Nos. 19-1257, 1258

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR STATE PETITIONERS

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QUESTIONS PRESENTED

Arizona, like every other State, has adopted rules to promote the order and integrity of its elections. At issue here are two such provisions: an "out-of-precinct policy," which does not count provisional ballots cast in person on Election Day outside of the voter's designated precinct, and a "ballot-collection law," known as H.B. 2023, which permits only certain persons (*i.e.,* family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot. A majority of States require in-precinct voting, and about twenty States limit ballot collection.

After a ten-day trial, the district court upheld these provisions against claims under Section 2 of the Voting Rights Act and the Fifteenth Amendment. A Ninth Circuit panel affirmed. At the en banc stage, however, the Ninth Circuit reversed—against the urging of the United States and over two vigorous dissents joined by four judges.

The questions presented are:

1. Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act?

2. Does Arizona's ballot-collection law violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners in No. 19-1257 are Mark Brnovich, in his official capacity as Arizona Attorney General, and the State of Arizona. Petitioners in No. 19-1258 are The Arizona Republican Party; Bill Gates; Suzanne Klapp; Debbie Lesko; and Tony Rivero.

Respondents in No. 19-1257 and No. 19-1258 are The Democratic National Committee; DSCC, aka Democratic Senatorial Campaign Committee; The Arizona Democratic Party; and Katie Hobbs, in her official capacity as Secretary of State of Arizona.

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INTRODUCTION

This case implicates two points that the Constitution puts beyond debate. First, every American must be free from intentional state discrimination based on race, U.S. Const. amend. XIV, §1, particularly when voting, *id.* amend. XV, §1. State acts that violate those constitutional guarantees deserve the harshest condemnation. Anything less dishonors the untold strivings of countless people for more than a century "to banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

Second, States bear the constitutional "power to regulate elections," *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)—both for state offices, *see id.* (citing U.S. Const. amend. X), and for federal ones, U.S. Const. art. I, §4. To ensure "fair and honest" elections marked by "order, rather than chaos," "there must be a *substantial* regulation of elections." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (emphasis added). "[E]xperience shows" those "necessary" regulations include not just voting "procedure[s]" but also "safeguards" for the "prevention of fraud and corrupt practices." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Each of those "laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

The questions presented here spring from the intersection of those two bedrock principles. Congress passed the Voting Rights Act of 1965 to "address entrenched racial discrimination in voting, 'an insidious and pervasive evil.'" *Shelby Cty. v. Holder*, 570 U.S. 529, 535 (2013). Section 2 of that Act prohibits any voting "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). Congress further specified that a law results in vote denial or abridgment under §2 when, "based on the totality of circumstances," racial minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." §10301(b).

Never before has this Court applied that language to a §2 *vote-denial* claim. Yet employing the same textual guardrails here that govern other interpretive questions yields clear answers about what §2 requires (equal opportunity for all voters to participate in a State's political processes) and what §2 prohibits (laws that cause substantial disparities in minority voters' opportunities to participate in those processes).

That reading of §2 respects Congress's choice to outlaw state voting practices "result[ing] in" less opportunity for minority voters to participate in the political process, §10301(a), while recognizing that §2 must "enforce" the Reconstruction Amendments, not "chang[e] … the right[s]" those Amendments provide, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). It also lets States discharge their constitutional duty to preserve fair and honest elections without injecting racial considerations into every aspect of voting legislation or worrying that every change to a voting law will produce a lawsuit.

This Court should accordingly adopt the State Petitioners' reading of §2, reverse the judgment of the court of appeals, and reinstate the district court's judgment in favor of Defendants.

OPINIONS BELOW

The en banc opinion (JA 576-830) is reported at 948 F.3d 989. The vacated panel opinion (JA 360-492) is reported at 904 F.3d 686. The district court opinion (JA 242-359) is reported at 329 F. Supp. 3d 824.

JURISDICTION

The court of appeals' judgment was entered on January 27, 2020. The petitions for certiorari were timely filed on April 27, 2020, which this Court granted on October 2, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions (U.S. Const. amend. XV; 52 U.S.C. §10301 (2018); and Ariz. Rev. Stat. Ann. (A.R.S.) §§16-122, 16-135, 16-452, 16-584, and 16-1005(H), (I) (West 2015 & Supp. 2019)) are reproduced in the appendix to this brief. App. 1-9.[1]

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[1] All statutes quoted in the appendix are current versions. A.R.S. §§16-584 and 16-452 are the only statutes that have changed since this lawsuit started, and the changes are not material to the questions presented.

STATEMENT

A. Arizona's voter-friendly electoral system

Arizona ensures that all citizens have an equal and easy-to-exercise opportunity to vote by offering online voter registration and "a flexible mixture of early in-person voting, early voting by mail, and traditional, in-person voting at polling places on Election Day." JA 259.

Early voting is "the most popular method of voting" in Arizona, "accounting for approximately 80 percent of all ballots cast in the 2016 election." JA 259. Arizona allows all voters to vote an early ballot for any reason. JA 259. And voters may request early ballots on an election-by-election basis or by signing up for the Permanent Early Voter List. JA 259. For the 27 days before Election Day, Arizona voters can vote an in-person early ballot at any early voting center, or may return a completed early ballot in three ways: by postage-free mail; by hand-delivery to any early voting center or other authorized election official's office; and, in some counties, by depositing them in special drop boxes. JA 259-260. Arizonans also can vote in-person on Election Day or hand-deliver a completed early ballot on Election Day to any polling place. JA 259-260.

B. Section 2 of the Voting Rights Act

Congress passed the Voting Rights Act of 1965 "to attack the blight of voting discrimination across the Nation." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 476 (1997) (cleaned up). The Act's goals were—and remain—indisputably proper. But some of the means Congress adopted to achieve them proved controversial—and ultimately unconstitutional. *See, e.g.*, *Katzenbach*, 383 U.S. 301; *Nw. Austin Mun.*

Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009); *Shelby Cty.*, 570 U.S. 529.

Unlike those provisions, §2 of the Voting Rights Act initially provoked no pushback. It originally prohibited "any State or political subdivision" from "deny[ing] or abridg[ing] the right of any citizen of the United States to vote on account of race or color." Pub. L. 89–110, 79 Stat. 437 (1965). So framed, §2 "simply restated the prohibitions" against racial discrimination in voting "already contained in the Fifteenth Amendment." *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality opinion). And that meant that a claim under §2—like a claim under the Fifteenth Amendment—failed absent proof that the challenged law was "motivated by a discriminatory purpose." *Id.* at 62.

Congress responded to *Bolden* by revising §2(a). It now prohibits the States from adopting voting qualifications, standards, or practices that "result[]" in "denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. §10301(a). That new text demonstrates Congress's intent to make "clear that a violation of §2 could be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 403-404 (1991).

Section 2(b), in turn, states what a plaintiff must "show[]" to "establish[]" a violation of amended §2(a). §10301(b). A plaintiff must prove, "based on the totality of circumstances," that the State's "political processes" are "not equally open to participation by members" of a protected class, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." §10301(b).

That is the "result" that amended §2 prohibits: "less *opportunity* than other members of the electorate," viewing the State's "political processes" as a whole. *Id.* (emphasis added). Congress crafted that new language as a compromise to eliminate the need for direct evidence of discriminatory intent, which is often difficult to obtain, but without embracing an unqualified "disparate impact" test that would invalidate many legitimate voting procedures. S. Rep. No. 97–417, at 28-29, 31-32, 99 (1982).

This Court has "never directly address[ed]" whether amended §2 is constitutional. *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *see also Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting).

C. The DNC's challenge to Arizona's third-party ballot collection and out-of-precinct voting rules

Several arms of the Democratic Party (together, the "DNC") filed suit in 2016 to challenge Arizona's out-of-precinct policy and ballot-collection law. They alleged that those laws violate §2 "by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American Arizonans," and violate the First and Fourteenth Amendments "by severely and unjustifiably burdening voting and associational rights." JA 243. The DNC further alleged that the ballot-collection law violates §2 and the Fifteenth Amendment "because it was enacted with the intent to suppress voting by Hispanic and Native American voters." JA 243.

1. Arizona's out-of-precinct policy

Arizona's longstanding out-of-precinct policy is part of the State's precinct-based voting system. JA 261-

262. "Since at least 1970," as in most other States, Arizona voters in counties with precinct-based polling locations "who choose to vote in person on Election Day" must "cast their ballots in their assigned precinct," as part of a precinct-based system that "count[s] only those ballots cast in the correct precinct." JA 261-262. In those counties, a voter who "arrives at a precinct but does not appear on the precinct register" is directed to the correct precinct but also may "cast a provisional ballot." JA 262, 305. If that voter's "address is [later] determined to be within the precinct, the provisional ballot is counted." JA 262. If not, the ballot is not counted. JA 262. The out-of-precinct policy is based on several Arizona statutes, A.R.S. §§16-122, 16-135, 16-584, and the Arizona Election Procedures Manual, which has the force of law, *see* JA 37-41; A.R.S. §16-452.

2. Arizona's ballot-collection law

Arizona law has long provided that "[o]nly the elector may be in possession of that elector's unvoted early ballot," A.R.S. §16-542(D), so as "to prevent undue influence, fraud, ballot tampering, and voter intimidation," *Miller v. Picacho Elementary Sch. Dist. No. 33*, 877 P.2d 277, 279 (Ariz. 1994). In 2016, the legislature passed the ballot-collection law, known as H.B. 2023, which amended A.R.S. §16-1005 to state who may knowingly collect another person's *voted* early ballot. Under it, only election officials, mail carriers, family or household members, or caregivers may do so. A.R.S. §16-1005(H)–(I). "Family member" includes those "related to the voter by blood, marriage, adoption or legal guardianship"; "[h]ousehold member" includes anyone "who resides at the same residence"; and "[c]aregiver" includes a "person who provides medical or health care assis-

tance to the voter in a residence, nursing care institution," or related assisted-living settings. A.R.S. §16-1005(I)(2).

Prohibiting unlimited third-party ballot collection is a commonsense means of protecting the secret ballot and preventing undue influence, voter fraud, ballot tampering, and voter intimidation. In fact, the bipartisan Carter-Baker Commission recommended that States "prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform 47 (2005) ("Carter-Baker Report"). As the Carter-Baker Commission found, "[a]bsentee ballots remain the largest source of potential voter fraud," and "[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* at 46. It thus recommended that "[t]he practice … of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated." *Id.* at 47.

D. Ninth Circuit en banc preliminary injunction and this Court's stay

In 2016, the DNC sought preliminary injunctions, which the district court denied. Appeals proceeded quickly, reaching en banc review in days, with an en banc injunction against the ballot-collection law just four days before the 2016 general election. *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016). The next day, this Court stayed the in-

junction without noted dissent. *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016).

E. The district court's ten-day trial

The district court thereafter held a ten-day trial on the merits. It heard live testimony from seven experts and 33 lay witnesses. JA 246-258. The court ultimately rejected the DNC's claims in a careful 83-page opinion containing extensive factual findings.

In the first part of its analysis, the court held that the DNC failed to show that the provisions "impose[d] meaningfully disparate burdens on minority voters as compared to non-minority voters." JA 337. Alternatively, even assuming cognizable burdens, the court reviewed the record and concluded that the DNC nonetheless failed to meet their overall burden for proving a §2 claim. JA 337-348.

As to the out-of-precinct policy, the court found that "the overall number of provisional ballots in Arizona, both as a percentage of the registered voters and as a percentage of the number of ballots cast, has consistently declined"; in the 2016 general election, only 3,970 ballots were cast in the wrong precinct—0.15% of 2,661,497 total votes. JA 297-298. The court also found that roughly 99 percent of minorities and 99.5 percent of non-minorities who voted in person voted in the correct precinct. *See* JA 333; *see also* JA 435 n.31.

The district court further found that having "to locate and travel to" one's precinct are "ordinary burdens" of voting. JA 302. Survey results showed that, unlike those in "several other states," "none of the survey respondents for Arizona reported that it was 'very difficult' to find their polling places"; and that

"approximately 94 percent of the Arizona respondents thought [doing so] was very easy or somewhat easy[.]" JA 303. The DNC presented "no evidence" that "precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters," and did not "challenge the manner in which Arizona counties allocate and assign polling places[.]" JA 336.

Citing the DNC's failure to show that the out-of-precinct policy "causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts," the court held the "observed disparities" of 0.5%—which involved "a small fraction of votes cast statewide"—did not create "a meaningful inequality in the opportunities of minority voters as compared to non-minority voters to participate in the political process and elect their preferred representatives." JA 336-337.

As to the ballot-collection law, the court noted that, although the law took effect before the 2016 elections, the DNC offered "no records of the numbers of people who, in past elections, have relied on" third-party ballot collectors, and "no quantitative or statistical evidence comparing the proportion [of such voters] that is minority versus nonminority." JA 321. As the court put it: "This evidentiary hole presents a practical problem," as "[d]isparate impact analysis is a comparative exercise," and it knew "of no vote denial case in which a § 2 violation has been found without quantitative evidence measuring the alleged disparate impact[.]" JA 321-322.

The court also found that, "even under a generous interpretation of the [nonstatistical] evidence, the vast majority of voters who choose to vote early by

mail do not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions." JA 272. Citing the DNC's "anecdotal estimates from individual ballot collectors," the court found that "even among socioeconomically disadvantaged voters, most do not use ballot collection services to vote." JA 331.

The court ultimately upheld the ballot-collection law, explaining that it applies equally to all voters, does "not impose burdens beyond those traditionally associated with voting," and "does not deny minority voters meaningful access to the political process simply because [it] makes [returning early ballots] slightly more difficult or inconvenient for a small, yet unquantified subset of voters[.]" JA 331. "In fact, no individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." JA 331.

Finally, the district court "f[ound] that H.B. 2023 was not enacted with a racially discriminatory purpose" or out of "a desire to suppress minority voters." JA 350, 357. Although some proponents may have acted out of "partisan motives" or "a misinformed belief that ballot collection fraud was occurring," "the majority … were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." JA 350, 357.

F. Ninth Circuit merits proceedings

A divided Ninth Circuit panel affirmed. Judge Ikuta's majority opinion noted that precinct-based voting is a "common electoral practice" that imposes only "'the usual burdens of voting,'" JA 437, and that

the DNC lacked evidence that many voters use ballot-collection services, JA 407. As to discriminatory intent, the majority stressed that the law requires "that the legislature acted with racial motives, not merely partisan motives," concluding that "the record does not contain the sort of evidence that has led other courts to infer the legislature was acting with discriminatory intent[.]" JA 416, 420-421. Chief Judge Thomas dissented. JA 441.

The Ninth Circuit again granted en banc review, and the United States filed a brief (and participated in argument), explaining that the challenged provisions do not violate §2. JA 495-525. The en banc court reversed. In an opinion by Judge Fletcher, the majority held (7-4) that the challenged provisions violated §2's results test, and (6-5) that the ballot-collection law was enacted with discriminatory intent, in violation of both §2 and the Fifteenth Amendment. JA 584, 691.

In so holding, the majority concluded that §2 is implicated where "more than a de minimis number of minority voters" "are disparately affected" by a voting policy. JA 619, 621.

In finding that the ballot-collection law was enacted with discriminatory intent, the majority acknowledged that many proponents of the law "had a sincere, though [in its view] mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed." JA 677. Nevertheless, the majority imputed racial motives to the legislature as a whole, citing its perception of the lack of proof of past fraud, one member's statements five years before the bill passed, and a partisan video used in advertising; it

concluded "that well meaning legislators were used as 'cat's paws.'" JA 678. While acknowledging that "[f]orbidding third-party ballot collection protects against potential voter fraud," the majority reasoned that "such protection is not necessary, or even appropriate, when there is a long history of third-party ballot collection with no evidence, ever, of any fraud and such fraud is already illegal under existing Arizona law." JA 689.

The decision prompted two dissents, each joined by four judges. Judge O'Scannlain rejected the majority's implicit suggestion "that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory[.]" JA 709. He also noted that "[a]necdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in other ways or would be burdened by having to do so." JA 711. And he criticized the majority's reliance on one legislator's motives, noting that "each legislator is an independent actor," that most "sincere[ly] belie[ved] that voter fraud needed to be addressed," and that "the underlying allegations of voter fraud did not need to be true" to defeat any "inference of pretext[.]" JA 719-720.

Judge Bybee stressed that the challenged rules are ordinary "[t]ime, place, and manner restrictions" designed "'to maintain the integrity of the democratic system.'" JA 722-723. Arizona's out-of-precinct policy, he explained, is "a traditional rule, common to the majority of American states." JA 731. Arizona's ballot collection law not only is "substantially similar" to provisions "in many other states," but "follows precisely the recommendation of the bi-partisan Carter-Baker Commission[.]" JA 739, 742.

SUMMARY OF THE ARGUMENT

I. State voting laws violate §2 when, under "the totality of circumstances," "the political processes leading to nomination or election in the State … are not equally open to participation by members of" a protected class "in that" those voters "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). In terms of application, §2 establishes this two-part, totality-of-circumstances test for vote-denial claims: (1) Have plaintiffs identified a substantial disparate impact on minority voters' ability to participate in the electoral process and to elect representatives of their choice? (2) If so, is that substantial disparate impact caused by the challenged law?

At step one, §2 commands that state voting laws provide equal treatment (rather than guarantee equal outcomes). So evidence of a racially disparate impact, by itself, does not establish a violation. Instead, the disparity must be substantial—a magnitude of impact suggesting the challenged law in fact "deni[es] or abridg[es]" minority voters' right to vote, §10301(a), rather than reflects a burden attendant to every voting law.

And courts assess the alleged disparity's substantiality in the context of a State's voting system as a whole. Isolating one provision's alleged impact from the opportunities provided by the State's entire system flouts §2's command to consider "the totality of circumstances." §10301(b). If (for example) a law closed the polls 30 minutes earlier than in prior years, courts could not accurately assess that law's impact on voters' opportunity to vote without consid-

ering whether voters could also vote in person before Election Day, or vote by mail (on or before Election Day).

Beyond that, §2 makes vote-denial claims contingent on proof of diminished minority-group opportunity "to participate in the political process *and* to elect representatives of their choice." *Id.* (emphasis added). *Chisom v. Roemer* confirms that §2's conjunctive construction makes evidence of diminished opportunities in *both* areas necessary for a successful vote-denial claim.

At step two, a plaintiff must prove that the challenged law caused the substantial disparate impact. That much follows from §2's requirements that the challenged law "*results* in" diminished opportunities to vote "*on account of* race or color." §10301(a) (emphasis added). This causation requirement holds States to account for their own discrimination but not for private acts or the acts of non-parties.

Reading §2 to require those showings avoids serious constitutional concerns inherent in other interpretations. Congress enacted §2 as an exercise of its powers to enforce the Reconstruction Amendments. Those Amendments guarantee citizens of all races the right to be free from intentional state discrimination. Invalidating a state voting law under §2 without proof of a substantial disparate impact—that is, without evidence that could serve as a proxy for intentional discrimination—raises serious questions about whether, in passing §2, Congress impermissibly altered (rather than enforced) that constitutional guarantee. Similarly, if §2 invalidates state voting laws with any disparate racial impact, race will predominate in every legislative choice about those

laws. That would violate the Fourteenth Amendment's central mandate of racial neutrality in governmental decisionmaking. Finally, this Court's First and Fourteenth Amendment cases recognize that States must enact a host of laws to ensure elections are fair and honest. So nondiscriminatory election laws generally pass muster under the First and Fourteenth Amendments if they further important state interests. Reading §2 to impose liability for those same nondiscriminatory laws (without a substantial disparate impact) will hamper election administration and invalidate States' laws that merely regulate elections and result in no more than the usual burdens of voting.

The Ninth Circuit's standard falls short of these requirements in two main ways. First, instead of demanding a substantial disparate impact, it invalidated Arizona's laws upon finding they had only "more than a de minimis impact" on racial minorities. Second, rather than demand proof of causation, the Ninth Circuit held that Plaintiffs could prevail by showing only that the de minimis impact was "linked to social and historical conditions." Both thresholds depart from §2's text and raise the constitutional concerns noted above. And the Ninth Circuit's principal proposed work-around was to apply the *Gingles* factors. But those factors are designed for vote-dilution cases, and cannot supply the legal standard for vote-denial claims.

II. Had it applied the correct test, the Ninth Circuit would have affirmed the district court's judgment upholding Arizona's out-of-precinct policy and ballot-collection law. The out-of-precinct policy is race-neutral; it gives all voters an equal opportunity to vote in their correct precinct on Election Day or oth-

erwise choose from the robust set of early voting options, and it requires discarding the votes of all out-of-precinct voters, irrespective of race. In any event, its impact is minimal—in 2016, for example, it affected only about 0.15% of all Arizona voters. Plaintiffs also failed at step two because they did not prove that the out-of-precinct policy caused voters of any race to vote in the wrong precinct.

Plaintiffs' ballot-collection challenge falls even shorter of the mark. Plaintiffs proved *no* disparate impact—offering neither statistical nor expert evidence of any racial disparity. Instead they relied only on anecdotal evidence that the district court rightly found wanting. And this challenge also failed at step two; as the district court noted, the Arizona ballot-collection law did not cause "meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." JA 331. That is particularly true as Plaintiffs offered no numerical evidence by which such alleged impacts could be assessed.

III. Finally, the Ninth Circuit's holding that the ballot-collection law was motivated by discriminatory intent is plainly flawed. Rather than cite actual evidence of discriminatory intent, the court of appeals employed the "cat's paw" theory to impute unlawful intent to each co-equal member of a legislative body. Doing so was error because that theory works only when decisionmakers have supervisory control over other actors. The court of appeals also contravened this Court's decision in *Crawford v. Marion County Election Board* by (1) faulting the Arizona Legislature for passing laws to proactively prevent, rather than respond to, electoral fraud in Arizona and (2) precluding consideration of evidence of fraud in other

States. And the court of appeals badly misapplied the limited scope of review for pure factual findings.

ARGUMENT

I. A law "results in" vote "denial or abridgment" under §2 only when it causes a substantial disparity in opportunities for members of a protected class to participate in the political process and affect electoral outcomes.

"[R]id[ding] the country of racial discrimination in voting" is a constitutional and moral imperative. *Katzenbach*, 383 U.S. at 315. Congress passed §2 of the Voting Rights Act to that end. It forbids "any State or political subdivision" to "impose[] or appl[y]" any voting practice in "a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color … as provided in subsection (b)." 52 U.S.C. §10301(a).

Section 2(b), in turn, sets forth what a plaintiff must "show[]" to "establish[]" a "violation of subsection (a)." §10301(b); *see also Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020) (Easterbrook, J.) ("Section 2(b) provides the standard for interpreting §2(a)'s 'denial or abridgment' result."). It requires a plaintiff to show, "based on the totality of circumstances," that

> the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the elec-

> torate to participate in the political process and to elect representatives of their choice.

§10301(b).

Properly understood, those provisions create this two-part test for a §2 vote-denial claim: (1) Have plaintiffs identified a substantial disparate impact on minority voters' ability to participate in the electoral process and to elect representatives of their choice? (2) If so, is that substantial disparate impact caused by the challenged law? *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1235 (11th Cir. 2020); *Frank v. Walker*, 768 F.3d 744, 753-755 (7th Cir. 2014) (Easterbrook, J.); *see also Veasey v. Abbott*, 830 F.3d 216, 310-312 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part). Both parts must be analyzed "based on the totality of circumstances." §10301(b). Those two required showings not only follow from §2's text but also are necessary to avoid serious constitutional concerns.

A. Section 2's text requires a vote-denial plaintiff to establish that a challenged law causes a substantial disparity in minority voters' opportunity to vote and to elect their preferred candidates.

1. Section 2(b) "provides guidance about how the results test is to be applied." *Chisom*, 501 U.S. at 395. It prohibits state voting practices that, "based on the totality of circumstances," result in members of protected classes having "*less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." §10301(b) (emphasis added). That text in-

forms the contours of a vote-denial claim's first element in three ways.

First, it makes clear what §2 guarantees: Equality of *opportunity* for all voters—regardless of race—to participate in the political process and to elect representatives of their choice. In other words, it imposes on States an "equal-treatment requirement," *not* "an equal-outcome command." *Frank*, 768 F.3d at 754. Section 2's proviso buttresses the point: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." §10301(b).

Congress's choice to cabin §2's mandate to equal *opportunity* means that §2 does not invalidate neutral, generally applicable voting laws whenever a protected class contends that those laws will "reduce the likelihood that they will use the opportunities they possess." *Luft*, 963 F.3d at 672-673. State laws that "do[] not draw any line by race," *Frank*, 768 F.3d at 753, but give "every registered voter" the "full ability" to "participate in the political process," "do[] not violate §2," *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016) (rejecting §2 challenge to voter ID law).

Second, a state law's "outcomes" can inform the inquiry into whether "the state has provided an equal opportunity." *Frank*, 768 F.3d at 753. But in this vein, "Section 2(b) tells us that §2(a) does not condemn a voting practice just because it has a disparate effect on minorities." *Id.* "A showing of disproportionate racial impact alone does not establish a per se violation of Section 2." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016) (internal quotation marks omitted).

Rather, a disparate impact establishes "less opportunity … to participate in the political process," §10301(b), only when the disparity between "minority group members" and other members of the electorate is "substantial," *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986). After all, "[a] law cannot disparately impact minority voters if its impact is insignificant to begin with." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628 (6th Cir. 2016). And insubstantial impacts may suggest that voters face "*disparate inconveniences* … when voting," but §2 does not outlaw voting inconveniences—it forbids the "*denial or abridgement of the right to vote*." *Lee*, 843 F.3d at 600-601. Equating an inconvenience with vote denial or abridgment is "an unjustified leap." *Id.*

Consider why: "Every decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others." *Id*. at 601. "For example, every polling place will, by necessity, be located closer to some voters than to others." *Id*. Reading §2 to impose liability for an insubstantial disparate impact would "mean that every polling place would need to be precisely located such that no group had to spend more time traveling to vote than did any other." *Id.* In short, imposing liability for insubstantial disparate impacts transforms §2's equal-*opportunity* requirement into an equal-*outcome* command that "sweep[s] away all election rules that result in a disparity in the convenience of voting," *id.*, thereby "dismantl[ing] every state's voting apparatus," *Frank*, 768 F.3d at 754.

What's more, §2 forbids courts to assess the law alleged to create the substantial disparate impact "in

isolation." *Id.* at 753. Instead, they must consider it in the context of "the entire voting and registration system." *Id.* "[I]t is essential to look at everything (the 'totality of circumstances,' §2(b) says) to determine whether there has been" a cognizable "impact." *Id.* at 754. So if, for example, a plaintiff challenges one aspect of a State's voter-registration laws, courts must consider the State's voter-registration "system as a whole" to see whether it is "accommodating." *Luft*, 963 F.3d at 674. "So long as a state treats all voters equally, §2 does not limit the state's control of details" in its election systems. *Id.*

Third, §2(b) specifies where those substantial disparities must be manifest: in opportunities "to participate in the political process *and* to elect representatives of their choice." §10301(b) (emphasis added). Because §2's "results test" applies "to *all* claims arising under §2," a vote-denial claim also "must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice." *Chisom*, 501 U.S. at 398 (emphasis added). Given the conjunctive construction, allowing a §2 claim to proceed with proof of only one of those requirements would improperly "substitute the word 'or' for the word 'and.'" *Id.* at 397. So no vote-denial claim arises under §2 unless a voting practice affects minority groups' opportunity to participate in the electoral process *and* to "influence the outcome of an election." *Id.* at 397 n.24; *see Greater Birmingham Ministries*, 966 F.3d at 1233. And, by definition, an insubstantial impact is unlikely to affect minority groups' opportunity "to elect representatives of their choice." §10301(b).

Combined, those three textual requirements establish the first step of a §2 vote-denial claim: A plaintiff

must first prove that, under the totality of circumstances, the challenged state law results in a substantial disparate impact on minority voters' "opportunity … to participate in the political process *and* to elect representatives of their choice." §10301(b) (emphasis added). If a plaintiff does not allege facts establishing all of those showings, the §2 claim fails.

2. Only plaintiffs who make those showings reach the second step of a vote-denial claim: They must establish "a causal connection between the challenged regulation" and the substantial disparate impact. *Greater Birmingham Ministries*, 966 F.3d at 1234 (citation omitted). After all, §2 prohibits only voting practices that "result[] in a denial or abridgement of the right … to vote." §10301(a). And statutory text imposing liability when one thing "'[r]esults from'" another has long indicated "a requirement of actual causality." *Burrage v. United States*, 571 U.S. 204, 211 (2014). Similarly, the requirement that the substantial disparate impact arise "*on account* of race or color" underscores that §2 demands proof of causation. §10301(a) (emphasis added). Section 2 thus explicitly demands proof of causation—twice.

Virtually every court of appeals has therefore recognized a causation requirement for §2 claims. *See Greater Birmingham Ministries*, 966 F.3d at 1233 ("the challenged law must have *caused* the denial or abridgement of the right to vote on account of race"); *id.* at 1233-1234 (collecting cases); *Ohio Democratic Party*, 834 F.3d at 638-639 (requiring proof that challenged law "*causally contributes* to the alleged discriminatory impact") (emphasis added); *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) ("proof of 'causal connection'" is "crucial"); *see also Veasey*, 830 F.3d at 312 (Jones, J., concurring in part and dis-

senting in part) ("A tailored causation analysis is imperative under Section 2 case law."). Section 2 thus mirrors other statutory anti-discrimination laws that require proof of causation. *See, e.g.*, *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1013 (2020).

Like the inquiry at step one, step two's causation inquiry considers the "totality of circumstances." §10301(b). Critically, that includes confirming that the substantial disparate impact arises from "the state's actions rather than those of other persons," *Luft*, 963 F.3d at 672—an express textual limit, since §2 applies only to actions by "any State or political subdivision," §10301(a). Enforcing that limit is "important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753 (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)); *see Ohio Democratic Party*, 834 F.3d at 638 (§2 cannot "punish a state for the effects of private discrimination"). Section 2's "robust causality requirement … thus protects defendants from being held liable for racial disparities they did not create." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015).

B. Construing §2 to invalidate state laws that do not cause a substantial disparity in minority voters' opportunity to vote and to achieve their preferred electoral outcomes raises serious constitutional concerns.

1. Some courts—including the en banc majority—apply a less-demanding standard to §2 vote-denial claims. Rather than require a substantial disparate

impact, they entertain claims when a law affects "more than a de minimis number of minority voters." JA 619-620, 661-662. And rather than demand proof that the challenged law caused that substantial disparity, they deem it sufficient if the disparity is merely "linked to 'social or historical conditions.'" JA 659, 671.

For the reasons discussed above, those relaxed standards are not plausible interpretations of §2's text. But if the Court thought they were plausible—and thus harbored "doubt [about] whether §2 calls for" State Petitioners' interpretation—it must "resolve that doubt by avoiding serious constitutional concerns." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion); *United States v. Coombs*, 37 U.S. 72, 76 (1838). And the Ninth Circuit's anything-more-than-de-minimis-impact-suffices standard raises at least two of them.

First, invalidating state voting laws under §2 purely based on insubstantial disparate *impact* would make §2 exceed Congress's powers to enforce the Reconstruction Amendments. Recall that Congress passed the Voting Rights Act as an exercise of its powers under §5 of the Fourteenth Amendment and §2 of the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 327-328. The "central purpose" of the Fourteenth Amendment's Equal Protection Clause "is to prevent the States from *purposefully* discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (emphasis added). And the Fifteenth Amendment prohibits only laws that explicitly draw racial classifications or are "motivated by a discriminatory purpose." *Bolden*, 446 U.S. at 62.

When deciding whether Congress has permissibly exercised its powers to enforce those provisions, this Court assesses the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520; *see Shelby Cty.*, 570 U.S. at 542 n.1; *Nw. Austin*, 557 U.S. at 204. Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519. And "Congress does not enforce a constitutional right by changing what the right is." *Id.*

But §2 does just that if the en banc majority is correct. If §2 invalidates facially neutral laws like Arizona's without evidence of a substantial disparate impact—that is, without evidence from which a "significant danger" of discriminatory intent could be reasonably inferred, *Katzenbach*, 383 U.S. at 329—it would effect "a substantive change in" the Reconstruction Amendments' protections. *City of Boerne*, 521 U.S. at 532; *see Shelby Cty.*, 570 U.S. at 542 n.1; *Nw. Austin*, 557 U.S. at 204. That's because the Ninth Circuit's reading allows anything more than a de minimis disparity to invalidate state electoral laws—a threshold wholly indifferent to congruence and proportionality concerns. In those circumstances, §2 would be unconstitutional for substantially the same reason this Court invalidated the legislation at issue in *City of Boerne*. *See* 521 U.S. at 535 ("In most cases, the state laws to which [the legislation] applies are not ones which will have been motivated by … bigotry.").

Second, if every disparate racial impact—substantial or not—gives rise to a §2 vote-denial claim, state voting legislation necessarily would be-

come overwhelmingly race conscious. And making race the "predominant factor" in fashioning election laws would violate the Equal Protection Clause's "central mandate" of "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904, 916 (1995); *see also Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J. concurring) ("Race cannot be the predominant factor in redistricting."); *Ricci v. DeStefano*, 557 U.S. 557, 594-595 (2009) (Scalia, J., concurring). The Ninth Circuit's approach upends that principle by "inject[ing] racial considerations" into every aspect of voting legislation. *Inclusive Communities Project*, 576 U.S. at 543. That would inevitably—and impermissibly—compel legislators to persist in the "sordid business" of "divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring).

This Court has "never directly address[ed]" those two constitutional concerns in §2. *Vera*, 517 U.S. at 990 (O'Connor, J., concurring); *see also Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting). And it need not resolve them here if it construes §2 as discussed in §I.A above. For that construction ameliorates (if not eliminates) those concerns and brings §2 more in line with *City of Boerne*'s congruence and proportionality analysis.

Consider the requirement that a plaintiff prove a *substantial* racial disparity. That type of showing may give rise to an inference of "invidious discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 242 (1976). And deploying §2 to squelch intentional state discrimination poses no constitutional problem, since the Reconstruction Amendments themselves command an end to that repugnant practice.

Beyond that, imposing §2 liability only when disproportionate impacts on minority voters have been caused by *the state law at issue*—and *not* by "'socio-economic conditions'" or a "'history of discrimination'" in the distant past—ties §2 more closely to the Reconstruction Amendments' remedial purposes. *Veasey*, 830 F.3d at 311 (Jones, J., concurring in part and dissenting in part). Rates of participation in the political process might vary across racial groups, and "it cannot be the case that pointing to a … disparity related to a challenged voting practice is sufficient to 'dismantle' that practice." JA 702-703 (O'Scannlain, J., dissenting) (citing *Frank*, 768 F.3d at 754). In other words, just because a disparity exists does not necessarily mean that the challenged regulation *caused* that disparity. For that reason, a "tailored causation analysis is imperative"; without one, a State could be held liable for "racial disparities it did not create." *Veasey*, 830 F.3d at 312-313 (Jones, J., concurring in part and dissenting in part) (cleaned up).

2. One related constitutional principle further militates in favor of State Petitioners' reading of §2. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Sugarman*, 413 U.S. at 647 (internal quotation marks omitted). The power to regulate state elections "inheres in the State[s] by virtue of [their] obligation … 'to preserve the basic conception of a political community.'" *Id.* (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). And state power to regulate federal elections derives from the express vesting in "each State … Legislature" the authority to "prescribe[]" the "Times, Places and Manner of hold-

ing Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1.

States have vast powers—and responsibilities—under those provisions. To ensure that elections are "fair and honest," and that "some sort of order, rather than chaos, is to accompany the democratic processes," *Storer*, 415 U.S. at 730, "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). That encompasses "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," including practices such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. Each of those necessary "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. And no citizen has a constitutional right to be free from those "usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008).

Given that reality, this Court has refused to subject all election laws to searching judicial scrutiny under the First and Fourteenth Amendments. Doing so would improperly "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Instead, courts apply strict scrutiny and assess whether an election law is "'narrowly drawn to advance a state interest of compelling importance'" only when it "subject[s]" voting rights "to 'severe' restrictions." *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). In

contrast, mine-run election laws that "impose[] only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters" are "'generally'" justified by "'the State's important regulatory interests.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Adopting a reading of §2 less demanding than State Petitioners' would welcome into vote-denial cases the very judicial hand-tying that *Anderson-Burdick* rejects in the First and Fourteenth Amendment context. The same de minimis burden from a neutral, nondiscriminatory law that generally would warrant no relief under the First or Fourteenth Amendments could compel extensive (and expensive) review under §2. Given those options, rational plaintiffs with identical limited evidence will press the latter claim every time.

No text in §2 requires that outcome. As a result, interpretive principles counsel against it; this Court "hesitate[s] before interpreting [a] statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002). Just as the Court has refused to let plaintiffs wield the First and Fourteenth Amendments to "compel federal courts to rewrite state electoral codes," *Clingman v. Beaver*, 544 U.S. 581, 593 (2005), so too should it refuse to make §2 an alternative and sharper blue pencil.

C. The Ninth Circuit's standard misreads §2's text, invites constitutional concerns, and improperly elevates the *Gingles* factors.

The en banc majority's §2 vote-denial analysis errs on several fronts. Most prominently, its relaxed standard diverges from §2's textual requirements. It does not require a *substantial* disparate impact on minority voters' opportunity to participate and to elect their desired candidates. Instead, it invalidated Arizona's out-of-precinct policy and ballot-collection law after finding only that "more than a de minimis number of minority voters" were affected. JA 619-620, 661-662. And it does not require plaintiffs to prove that Arizona's out-of-precinct policy and ballot-collection law *caused* a significant disparate impact. Rather, the panel majority relegated causation to merely one part of an either/or test that allows plaintiffs to succeed on a vote-denial claim when a de minimis disparate impact is either "*caused by* ***or*** linked to 'social and historical conditions.'" JA 659, 671 (emphasis added) (citation omitted).

Those two parts of the en banc majority's standard are not a "plausible interpretation" of §2's text. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). They do not account for what §2(b) "tells us" about §2(a)—that it "does not condemn a voting practice just because it has a disparate effect on minorities," *Frank*, 768 F.3d at 753, and "does not sweep away all election rules that result in a disparity in the convenience of voting," *Lee*, 843 F.3d at 601. Nor does it require the proof of causation mandated by §2's text imposing liability only for a voting practice that "results in" the denial of minority voters' equal oppor-

tunity to participate in the political process and to elect their preferred representatives. §10301(a).

The Ninth Circuit's relaxed standards also raise the serious constitutional concerns described above. Minor disparities—those deemed merely "more than [] de minimis," JA 619-621—do not support an inference of intentional discrimination. Yet "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank*, 768 F.3d at 754. And even differences in those rates could fluctuate yearly for innumerable and innocuous reasons unrelated to race. So the standard applied below improperly allows courts to invalidate neutral, nondiscriminatory state laws that merely "affect a greater proportion of one race than of another," *Davis*, 426 U.S. at 242—perhaps even for an anomalous statistical blip. So too the en banc majority's eschewing a causation showing for a mere link between a de minimis impact and "'social and historical conditions.'" JA 659, 671. Because the Fifteenth Amendment bars only "action by a State," *Bolden*, 446 U.S. at 62, "apply[ing] Section 2 to invalidate a State's innocuous voting regulation based solely on evidence that social and historical conditions resulted in a disparate impact would impermissibly punish a state for the effects of private discrimination," *Ohio Democratic Party*, 834 F.3d at 638.

Finally, the Ninth Circuit erred by relying almost entirely on the *Gingles* factors to analyze vote-denial claims. Taking those factors at face value, they arise from "a vote dilution case," not a "case involv[ing] vote denial, a fundamentally different claim." *Greater Birmingham Ministries*, 966 F.3d at 1235. Thus the "obvious answer" to the question of how courts can "apply the factors in" vote-denial cases "is that

[they] cannot." *Id.*; *see also Frank*, 768 F.3d at 754 (explaining that the *Gingles* factors are "unhelpful in voter-qualification cases"); *Veasey*, 830 F.3d at 306 (Jones, J., concurring in part and dissenting in part) ("Using the *Gingles* factors is error on several levels."); *id.* at 327 (Elrod, J., concurring in part and dissenting in part) ("the *Gingles* factors—an unranked list of nonexclusive considerations that lend themselves to manipulation—are unhelpful in this context").

Nor should the *Gingles* factors be taken at face value. They are a relic of a "bygone era of statutory construction"—a product of the *Gingles* Court's decision largely and "inappropriately [to] resort to legislative history before consulting the statute's text and structure." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). To be sure, no vote-dilution claims exist here, so this case provides no occasion to determine whether those claims should continue to be judged under the *Gingles* factors. But neither is there any basis to extend *Gingles*'s erroneous mode of statutory analysis—with its myopic focus on legislative history—into the vote-denial context. Doing so merely heightens the risk, manifested below, that federal judges might impose their policy preferences on States' voting practices under the guise of applying §2. *See* JA 623-658, 662-670.

II. Arizona's out-of-precinct and ballot-collection policies do not violate §2.

A. Arizona's out-of-precinct policy does not violate §2.

Plaintiffs' challenge to Arizona's out-of-precinct policy fails both parts of the proper §2 vote-denial test.

1. Plaintiffs failed to prove a substantial disparity in minority voters' opportunity to vote and to elect representatives of their choice.

On its face, Arizona's out-of-precinct policy complies with §2's "equal-treatment requirement," *Frank*, 768 F.3d at 754, because it does not accord minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," §10301(b). The out-of-precinct policy is facially race-neutral: All voters who live in precinct-based counties and who do not choose to vote early ballots must vote at their correct polling place on Election Day. And ballots cast in incorrect precincts are not counted—irrespective of the voter's race. *See* A.R.S. §§16-122, 16-135, 16-584; JA 37-41. Since the out-of-precinct policy "leave[s] all voters with equal opportunit[y] to participate," and "is but one aspect of [Arizona's] election system" that "as a whole is accommodating" of the right to cast a ballot, it does not violate §2. *See Luft*, 963 F.3d at 674.

As a result, Plaintiffs can prove that the out-of-precinct policy creates an unequal opportunity for minority voters only by establishing a substantial disparate impact. Even after a ten-day trial, they failed to do so. The record reflects that minority and non-minority voters voted in person at their correct precincts 99% and 99.5% of the time, respectively. JA 333; *see also* JA 435 n.31. But even that 0.5% disparity overstates the actual impact on minority voters because it measures the disparity only among the subset of voters who choose to vote in person on Election Day. That's a small group; in 2016, for example, nearly 80% of Arizonans cast an early ballot

(and thus faced no burden from the out-of-precinct policy). JA 297. When combining all voters—both early voters and in-person, Election Day voters—roughly 99.8% of minority voters and 99.9% of non-minority voters cast ballots whose validity is unaffected by the out-of-precinct policy. *See* JA 297, 298, 333 (providing numbers used to derive this result); *see also* JA 435 n.31.[2] So Plaintiffs have identified some numerical difference (99.9% vs. 99.8%) in the out-of-precinct policy's racial impact. But it is at best a "bare statistical showing" of a disparate impact that, as a matter of law, does not prove unequal treatment cognizable under §2. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997).

And Plaintiffs did not even try to prove that the out-of-precinct policy reduced their opportunity "to elect representatives of their choice." §10301(b). In fact, Plaintiffs produced no evidence that the out-of-precinct policy had a disparate effect on minority groups' ability to elect their preferred representatives. Nor did the Ninth Circuit ever hold Plaintiffs to proving anything of the sort. Because *Chisom* makes that kind of diminished-opportunity evidence a necessary part of all §2 claims, *see* 501 U.S. at 397-398, this deficiency alone warrants rejecting Plaintiffs' challenge.

The en banc majority's finding that those minimal differences still established a cognizable disparate

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[2] The absolute numbers underlying those percentages confirm that the total number of votes affected is too small to establish §2 liability. In the 2016 election, less than 4,000 votes out of 2,661,497 total ballots cast (only 0.15%) were in the wrong precinct. JA 298.

impact flowed from three errors in how it viewed the "totality of circumstances." §10301(b). *First*, it focused myopically on in-person Election Day voting. JA 619. But that ignores Arizona's "system as a whole," which the evidence shows is more than "accommodating." *See Luft*, 963 F.3d at 674. Arizonans *overwhelmingly* prefer mail-in voting; 80% of ballots cast in Arizona in 2016 were early ballots not subject to the out-of-precinct policy. JA 297. Assessing the out-of-precinct policy's legality based on how it affects only one-fifth of Arizona's total voting population necessarily overstates its impact on minority voters; they can (and do) vote by mail as well, and when they do, the out-of-precinct policy affects them not at all.

Second, the en banc majority failed to consider how many other jurisdictions do not count out-of-precinct ballots. The record shows that Arizona's approach accords with the practice in "twenty-six states, the District of Columbia, and three U.S. territories." JA 730 (Bybee, J., dissenting). Because "[e]xperience from other states would help to understand the full effect" of out-of-precinct policies, *Frank*, 768 F.3d at 753, it cannot be true that an electoral practice employed by a majority of States for decades now constitutes a "denial or abridgement" of the right to vote within the meaning of §2.

Third, the en banc majority failed to recognize that Plaintiffs' challenge to the out-of-precinct policy is fundamentally miscast. Plaintiffs challenged "Arizona's policy, within" its precinct-based voting "system, of entirely discarding [out-of-precinct] ballots," when they should have instead challenged the precinct-system *itself*. JA 655. That's because any burden on voters arising from the out-of-precinct policy derives

from the precinct-based system's requirement that a voter appear at a particular polling station rather than at any station in the county. And because Plaintiffs do not challenge the precinct system, *that* actual burden—finding and showing up at the right precinct—will be unchanged regardless of whatever relief they obtain.

Plaintiffs thus wrongly conflate "the burden of *complying* with the precinct-based system" with "the *consequence* imposed should a voter fail to comply." JA 706 (O'Scannlain, J., dissenting). If accepted, that sort of misdirection would render vast swaths of election law invalid. For example, voters who go to the polls one day late will not have their votes counted. But that is not the sort of burden that makes the requirement of voting on or before Election Day challengeable under §2. So too with the unchallenged requirement of voting at the correct precinct. *See also Crawford*, 553 U.S. at 198 (plurality opinion) (analyzing the relevant burden as "making a trip to the BMV" rather than as the alleged disenfranchisement for lacking a photo identification).

2. Plaintiffs failed to show that the out-of-precinct policy caused any disparity.

Even if Plaintiffs had shown a substantial disparate impact at step one, their challenge to the out-of-precinct policy would still fail because they have not proved that the out-of-precinct policy—or indeed any state action—caused that disparity. As Judge O'Scannlain properly observed, there is no causal chain between the out-of-precinct policy and the alleged disparate impact: "the fact that a ballot cast by a voter outside of his or her assigned precinct is dis-

carded does not *cause* minorities to vote out-of-precinct disproportionately." JA 708.

The majority nevertheless imposed §2 liability based on the "[t]hree key" reasons it thought that voters cast out-of-precinct ballots: "frequent changes in polling locations; confusing placement of polling locations; and high rates of residential mobility." JA 589. None of those satisfies §2's causation requirement.

The first two factors—both relating to polling locations—are not attributable to the State Petitioners. Polling places are set by county officials who are not parties here (though Plaintiffs could have joined them as defendants). *See* A.R.S. §16-411. Petitioners are not the legal cause of decisions by non-party county officials in siting of polling locations.

The final "key" factor—greater residential mobility in Arizona—is also not caused by the State Petitioners, or indeed by any state action. True, the record reflects that "[b]etween 2000 and 2010, almost 70 percent of Arizonans changed their residential address, the second highest rate of any State." JA 593. But Plaintiffs introduced no evidence that the State Petitioners forced any Arizonan to move or otherwise caused high residential mobility rates. And the en banc majority's reliance on considerations like differential rates of poverty and educational attainment between racial groups (JA 647-650) fail for the same reason; Plaintiffs introduced no evidence that Arizona caused those economic or educational disparities.

3. The Ninth Circuit's analysis of the *Gingles* factors was erroneous.

The en banc majority invoked the *Gingles* factors to hold that the out-of-precinct policy violates §2. Its analysis only confirms "the fundamental misalignment between the *Gingles* factors" and vote-denial claims. *Greater Birmingham Ministries*, 966 F.3d at 1238. Consider just these few examples.

Past discrimination. This Court has held that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Bolden*, 446 U.S. at 74; *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (explaining that "the presumption of legislative good faith [is] not changed by a finding of past discrimination"). Yet the en banc majority fixated on Arizona's distant past—including its *territorial* history—to justify invalidating the out-of-precinct policy. *See, e.g.*, JA 625-628. But the Ninth Circuit never explained how whatever improper state discrimination that occurred more than 100 years ago motivated any legislator today.

As to recent history, the Ninth Circuit's examples are scant and equivocal. Both of its "examples" of discrimination "Continu[ing] to the Present Day" were actions by Maricopa County officials who are not named parties here. JA 642-643. Making the State Defendants liable for non-parties' actions they did not cause stretches §2 liability beyond what its text will bear.

Tenuousness of justification. The Ninth Circuit incorrectly reasoned that "[t]he only plausible justification for Arizona's [out-of-precinct] policy would be the delay and expense entailed in counting [out-of-

precinct] ballots[.]" JA 656. Not so. Avoiding potential vote disqualification creates incentives for voters to vote in the correct precinct, which is fundamental to a precinct-based voting system. By failing even to acknowledge—let alone analyze—that justification for the out-of-precinct policy, the Ninth Circuit's analysis is necessarily incomplete and thus erroneous.

* * *

Those examples confirm not only how little relevance the *Gingles* factors have for vote-denial claims but also how readily they "lend themselves to manipulation." *Veasey*, 830 F.3d at 327 (Elrod, J., concurring in part and dissenting in part). This Court should decline to import the *Gingles* factors into the §2 vote-denial inquiry.

B. The ballot-collection law does not violate §2.

1. Plaintiffs did not prove that the ballot-collection law disparately affected minority voters' opportunity to vote and to elect representatives of their choice.

Plaintiffs failed to carry their evidentiary burden at step one of their §2 challenge to H.B. 2023. After a ten-day trial, the record contains no quantitative data—*none*—about how the ballot-collection law affects minority voters (or the rest of Arizona's electorate). That's worth repeating: Plaintiffs did not present any statistical or expert data about the number or race of voters who in the past had relied on third parties to collect and return early ballots. Nor did they present data "comparing the proportion" of "minority versus non-minority" voters within that (unknown) number.

JA 321. Given that total failure of proof, the district court did not clearly err when it found that Plaintiffs had shown no "cognizable disparity." JA 324.

Rather than introducing quantitative evidence to prove a substantial disparate impact, Plaintiffs introduced only selective anecdotes. JA 325, 329. The district court ultimately concluded that Plaintiffs' anecdotal evidence could not support a §2 claim. It was "aware of no vote denial case in which a §2 violation ha[d] been found without quantitative evidence measuring the alleged disparate impact of a challenged law on minority voters." JA 322. That's correct, and it should suffice to reverse the en banc panel's judgment. Indeed, the district court's refusal to be the first court in the Nation to find a §2 vote-denial violation without any quantitative evidence is plainly correct.

To be sure, the district court still considered Plaintiffs' "anecdotal" and "circumstantial" evidence for what it was worth. JA 712 (O'Scannlain, J., dissenting). It simply was not worth enough to prove an actual disparity—let alone one substantial enough to be cognizable under §2. The district court inferred from Plaintiffs' anecdotes that before Arizona enacted the ballot-collection law "minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." JA 330. But it also found that only a "relatively small number of voters have used ballot collection services in past elections" and that "the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties" not within H.B. 2023's exceptions. JA 331. So even crediting the anecdotal evidence, the district court could find only that it was unlikely that the ballot-collection law

caused any "meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." JA 330-331.

On this record, the district court's conclusion is not clear error. The Ninth Circuit correctly acknowledged that a "'bare statistical showing' … is not sufficient" to establish a §2 claim, JA 613 (citation omitted), yet Plaintiffs' *non-existent* statistical evidence necessarily falls short of that bare minimum. As the dissent aptly put it, "[t]he majority offers no record-factual support for its conclusion that the anecdotal evidence presented demonstrates that compliance with the ballot-collection policy imposes a disparate burden on minority voters … let alone evidence that the district court's contrary finding was 'clearly erroneous.'" JA 711.

What little comparative, non-statistical analysis the majority pointed to does not answer those objections because it improperly conflated *partisan* motivations with *racial* ones. *See, e.g.*, JA 660 (noting that "'the Democratic Party … focused their ballot collection efforts on low-efficacy voters, who trend disproportionately minority … [while] the Republican Party has not significantly engaged in ballot collection as a GOTV strategy'"). Yet "legislators are *entitled* to consider politics when changing the rules about voting." *Luft*, 963 F.3d at 671; *see Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). So a record like this one—which shows that legislators "cared about voters' political preferences" instead of "about race," *Luft*, 963 F.3d at 671—raises no §2 concerns.

Not only did the en banc majority rely on (at best) a mere anecdotal disparity, but it also failed to "address the lack of evidence as to whether minority

voters have *less opportunity* than non-minority voters now that ballot collection is more limited." JA 711 (O'Scannlain, J., dissenting) (emphasis added). As the district court found, H.B. 2023's limitations are unlikely to cause "meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." JA 331. Indeed, "no individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." JA 331. No cognizable §2 claim exists without that type of evidence.

2. Plaintiffs did not prove that the ballot-collection law caused the (nonexistent) disparity.

Plaintiffs' total failure to produce statistical evidence of disparate impact also dooms their §2 claim at step two. Without proof that a prohibited disparity exists, searching for its cause makes no logical sense. In short, because Plaintiffs did not establish a disparate impact, it is logically impossible for a court to find that H.B. 2023 *caused* that (unproven) disparity. Plaintiffs' claim thus necessarily fails at step two.

The en banc majority skirted that difficulty by focusing entirely on the *Gingles* factors again. JA 662-670. Those factors cannot substitute for the causation analysis that §2 demands, so that analysis falls short of establishing liability on its own terms. Yet even if those factors were relevant, the en banc majority misapplied them.

The most significant flaw might be in the majority's analysis of the ninth *Gingles* factor (tenuousness). Applying that factor, the en banc majority found on clear-error review—with no citation, and against the

district court's post-trial factual findings—that the *only* possible reason that "some Arizonans today distrust third-party ballot collection [] is because of the fraudulent campaign mounted by proponents of H.B. 2023." JA 669.

That cannot be right. In fact, it disregards three well-known justifications for the ballot-collection law. First, Arizona's ballot-collection law implements the recommendation of the bipartisan Carter-Baker Commission that States "prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." Carter-Baker Report at 47; *see also* JA 742 (Bybee, J., dissenting). And H.B. 2023 is more generous than what the Carter-Baker Commission recommended, since it lists additional categories of third parties who are allowed to handle a voter's ballot. *See* A.R.S. §16-1005(I) (also exempting "household member[s]" and "caregiver[s]" from the prohibition on collecting ballots). Second, Arizona's ballot-collection law is not unique: A majority of States also restrict third-party ballot collection (without any suggestions that those other States' laws were motivated by racial discrimination). *See* JA 739-742 (Bybee, J. dissenting) (collecting statutes). The ubiquity of measures like Arizona's underscores that H.B. 2023 does not impose any burdens beyond those typical of voting throughout the Nation. Third, strong recent evidence from North Carolina confirms the propriety of those rules; ballot-collection fraud upended a congressional race in 2018. *See* JA 526-575. But the Ninth Circuit discounted that evidence simply because the fraud had not occurred in Arizona—thereby directly violating *Crawford*. JA 669.

III. The Ninth Circuit's holding that the Arizona Legislature intentionally discriminated against racial minorities is legal error.

The district court expressly found—after a ten-day trial—that plaintiffs had failed to show "that the legislature enacted H.B. 2023 with the intent to suppress minority votes." JA 356. The three-judge panel affirmed that ultimate finding, properly recognizing it as a "'pure question of fact.'" JA 411. Yet a bare majority of the en banc panel reversed, imputing discriminatory intent to the entire legislature and holding the district court's contrary finding to be clearly erroneous.

The en banc majority's conclusion suffers from at least three shortcomings, each sufficient by itself to warrant reversal. Most notably, it rests on the "cat's paw" theory of liability from employment law—a theory improperly (and never before) shoehorned into the legislative-intent context. Second, it conflicts with *Crawford*'s teaching that States can adopt prophylactic measures, and consider out-of-state evidence, to prevent voter fraud. Third, it misapplies the appropriate standard of review.

A. The cat's-paw theory cannot impute intent among co-equal, independent actors such as legislators.

The en banc majority did not actually find that a majority of the Arizona Legislature passed H.B. 2023 because of actual racial animus. Instead, it resorted to a legal fiction—the "cat's paw" theory—to supply the racial animus necessary for §2 liability but admittedly absent from the evidence here. That was reversible error.

"The term 'cat's paw' derives from a fable conceived by Aesop … and [was] injected into United States employment discrimination law by Judge Posner in 1990." *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011). Courts most often use the "cat's paw" theory "to hold [an] employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Id.* at 415. But principles of agency law are central to this theory's premise. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 791 (1998) (courts "look to traditional principles of the law of agency in devising standards of employer liability"). And inherent in agency law is the presumed "assumption of control," where the "master can exercise control over the physical activities of the servant." Restatement (Second) of Agency §219 (Am. Law Inst. 1958). In other words, the cat's-paw theory of liability is steeped in agency-law principles and dependent on hierarchical employment relationships.

By definition, then, the cat's-paw theory cannot inform an inquiry into the intent of a legislature—a body of independent, co-equal actors. As Judge O'Scannlain explained, reliance on this Aesopian theory "is misplaced because, unlike employers whose decision may be tainted by the discriminatory motives of a supervisor, each legislator is an independent actor, and bias of some cannot be attributed to all members." JA 719. That reasoning accords precisely with this Court's prior warning against invalidating a statute "on the basis of what fewer than a handful" of legislators said about it, since "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of

others to enact it[.]" *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

Worse yet, the Ninth Circuit imputed unlawful racial animus to the entire Arizona Legislature not based on statements from a "handful" of legislators, but on statements from just one: former Sen. Don Shooter. JA 677. But Shooter's lack of influence over the entire legislature is obvious: in 2018, when he was serving in the Arizona House of Representatives, that body expelled him by a 56-3 vote, thereby confirming just how little clout he possessed with his colleagues.[3] So even supposing a hypothetical super-legislator could hold such sway that his views could fairly be imputed to a majority of a legislature, recently expelled Shooter is not that man.

B. The Ninth Circuit's view that election-integrity measures betray racial animus unless they respond to in-state malfeasance conflicts with *Crawford*.

The en banc majority also erred by holding that H.B. 2023 was indicative of racial animus because the legislature passed it without direct evidence of ballot-collection fraud *in Arizona*. That reasoning directly contravenes *Crawford*.

States need not wait for evidence of in-state election fraud before enacting laws to prevent it. *See Crawford*, 553 U.S. at 194-196 (while "the record contains no evidence of any such fraud actually occurring in Indiana … flagrant examples of such fraud in other parts of the country have been documented," which provided "sufficient justification" for

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[3] *Bill History of HR2003*, AZ Leg. Website, https://apps.azleg.gov/BillStatus/BillOverview/70748.

the challenged state's law). Other courts have recognized *Crawford*'s import and credited States' proactive efforts to prevent mail-in ballot fraud. *See, e.g.*, *Veasey*, 830 F.3d at 239 ("potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting"); *id.* at 256 ("district court credited expert testimony showing mail-in ballot fraud is a significant threat—unlike in-person voter fraud").

On that score, *Crawford* and its follow-on circuit precedent accord with the recommendations of the bipartisan Carter-Baker Commission, which found that "[a]bsentee ballots remain the largest source of potential voter fraud." Carter-Baker Report at 46. Based on that finding, it recommended that "States … should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Crawford, related circuit precedent, and the Carter-Baker Commission's report fatally undermine the en banc majority's conclusion that H.B. 2023 *must* be the product of racial animus because the legislature cited no voter fraud in Arizona when passing it. Absentee-voter fraud still exists in this Country: the 2018 general election for North Carolina's 9th Congressional Seat was invalidated based on evidence of analogous absentee-ballot-collection voter fraud. *See* JA 526-575. And the cure for that fraud—redoing the election—left nearly 800,000 North Carolinians without representation in the House of Representatives for nearly a year.[4] Trying

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[4] Press Release, N.C. St. Board of Elections, State Board Sets Dates For New Election in 9th Congressional District (Mar. 8,

to prevent similar problems in Arizona constitutes a "sufficient justification" for enacting H.B. 2023. *Crawford*, 553 U.S. at 194-196. Because the en banc majority's reasoning contravenes *Crawford*, this Court should reverse.

C. The Ninth Circuit's analysis exceeds the scope of clear-error review.

More generally, this Court should reverse the en banc majority's discriminatory-intent finding because it results from a drastic misapplication of the clear-error standard of review.

Whether an actor had discriminatory intent is precisely the type of factual determination on which a district court, having conducted a bench trial and heard witnesses, receives immense deference. For whether a policy or enactment "reflect[s] an intent to discriminate on account of race" "is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard," not "a question of law and not a mixed question of law and fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288 (1982); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings.").

A reviewing appellate court cannot set aside a district court's factual findings as to discriminatory intent "simply because it is convinced that it would have decided the case differently." *Bessemer City*, 470 U.S. at 573. To the contrary, "[w]here there are two permissible views of the evidence, the factfind-

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2019), https://www.ncsbe.gov/news/press-releases/2019/03/08/state-board-sets-dates-new-election-9th-congressional-district.

er's choice between them cannot be clearly erroneous." *Id.* at 574.

But that did not stop the en banc majority. As the dissenting judges explained, "[t]he majority … fails to offer any basis—let alone a convincing one—for the conclusion that it must reach in order to reverse the decision of the district court: that the district court committed clear error in its factual findings." JA 717; *see also* JA 716 ("[T]he majority, once again, completely ignores our demanding standard of review[.]").

The en banc majority also frequently and erroneously conflated *partisan* motives with *racial* ones without explaining how the district court's findings were clearly erroneous. *Compare* JA 676-678 (concluding that Shooter was "'motivated by a desire to eliminate' the increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted") *with* JA 350-351, 356 (some members "harbored partisan motives—perhaps implicitly informed by racial biases"; "Due to the high degree of racial polarization in his district, Shooter was in part motivated by a desire to eliminate what had become an effective Democratic [get-out-the-vote] strategy."). Doing so also deviated from the Court's guidance against reinforcing "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*, 509 U.S. at 647.

Here the en banc majority should be reversed for making the same error corrected in *Bessemer City*: "When the record is examined in light of the appro-

priately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous." 470 U.S. at 577.

CONCLUSION

This Court should adopt the State Petitioners' reading of §2, reverse the judgment of the court of appeals, and reinstate the district court's judgment in favor of Defendants.

November 30, 2020

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STATUTORY APPENDIX

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U.S. Const. amend. XV

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

§2 The Congress shall have power to enforce this article by appropriate legislation.

52 U.S.C. § 10301

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political

subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Ariz. Rev. Stat. § 16-122. Registration and records prerequisite to voting

No person shall be permitted to vote unless such person's name appears as a qualified elector in both the general county register and in the precinct register or list of the precinct and election districts or proposed election districts in which such person resides, except as provided in §§ 16-125, 16-135 and 16-584.

Ariz. Rev. Stat. § 16-135. Change of residence from one address to another

A. An elector who is correcting the residence address shown on the elector's voter registration record shall reregister with the new residence address or correct the voter registration record as prescribed by this section.

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

is located within the precinct for the voter's new residence address. The voter shall affirm in writing the new residence address and shall be permitted to vote a provisional ballot.

C. When an elector completes voting a provisional ballot, the election official shall place the ballot in an envelope for provisional ballots and shall deposit the envelope in the ballot box designated for provisional ballots.

D. Within ten calendar days after a general election that includes an election for a federal office and within five business days after any other election, a provisional ballot shall be compared to the signature roster for the precinct in which the voter was listed and if the voter's signature does not appear on the signature roster for that election and if there is no record of that voter having voted early for that election, the provisional ballot shall be counted. If the signature roster or early ballot information indicates that the person did vote in that election, the provisional ballot for that person shall remain unopened and shall not be counted.

E. An elector may also correct the residence address on the elector's voter registration record by requesting the address change on a written request for an early ballot that is submitted pursuant to § 16-542 and that contains all of the following:

   1. A request to change the voter registration record.

2. The elector's new residence address.
3. An affirmation that the information is true and correct.
4. The elector's signature.

Ariz. Rev. Stat. § 16-452. Rules; instructions and procedures manual; approval of manual; field check and review of systems; violation; classification

A. After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots. The secretary of state shall also adopt rules regarding fax transmittal of unvoted ballots, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens and shall adopt rules regarding internet receipt of requests for federal postcard applications prescribed by section 16-543.

B. The rules shall be prescribed in an official instructions and procedures manual to be issued not later than December 31 of each odd-numbered year immediately preceding the general election. Before its issuance, the manual shall be approved by the governor and the attorney general. The secretary of state shall

submit the manual to the governor and the attorney general not later than October 1 of the year before each general election.

C. A person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor.

D. The secretary of state shall provide personnel who are experts in electronic voting systems and procedures and in electronic voting system security to field check and review electronic voting systems and recommend needed statutory and procedural changes.

Ariz. Rev. Stat. § 16-584. Qualified elector not on precinct register; recorder's certificate; verified ballot; procedure

A. A qualified elector whose name is not on the precinct register and who presents a certificate from the county recorder showing that the elector is entitled by law to vote in the precinct shall be entered on the signature roster on the blank following the last printed name and shall be given the next consecutive register number, and the qualified elector shall sign in the space provided.

B. A qualified elector whose name is not on the precinct register, on presentation of identification verifying the identity of the elector that includes the voter's given name and surname and the complete residence address that is verified by the election board to be in the precinct or on signing an affirmation that states

that the elector is a registered voter in that jurisdiction and is eligible to vote in that jurisdiction, shall be allowed to vote a provisional ballot.

C. If a voter has moved to a new address within the county and has not notified the county recorder of the change of address before the date of an election, the voter shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the voter's new address. The voter shall be permitted to vote a provisional ballot. The voter shall present a form of identification that includes the voter's given name and surname and the voter's complete residence address. The residence address must be within the precinct in which the voter is attempting to vote, and the voter shall affirm in writing that the voter is registered in that jurisdiction and is eligible to vote in that jurisdiction.

D. On completion of the ballot, the election official shall place the ballot in a provisional ballot envelope and shall deposit the envelope in the ballot box. Within ten calendar days after a general election that includes an election for a federal office and within five business days after any other election or no later than the time at which challenged early voting ballots are resolved, the signature shall be compared to the precinct signature roster of the former precinct where the voter was registered. If the voter's name is not signed on the roster and if there is

no indication that the voter voted an early ballot, the provisional ballot envelope shall be opened and the ballot shall be counted. If there is information showing the person did vote, the provisional ballot shall remain unopened and shall not be counted. When provisional ballots are confirmed for counting, the county recorder shall use the information supplied on the provisional ballot envelope to correct the address record of the voter.

E. When a voter is allowed to vote a provisional ballot, the elector's name shall be entered on a separate signature roster page at the end of the signature roster. Voters' names shall be numbered consecutively beginning with the number V-1. The elector shall sign in the space provided. The ballot shall be placed in a separate envelope, the outside of which shall contain the precinct name or number, a sworn or attested statement of the elector that the elector resides in the precinct, is eligible to vote in the election and has not previously voted in the election, the signature of the elector and the voter registration number of the elector, if available. The ballot shall be verified for proper registration of the elector by the county recorder before being counted. The verification shall be made by the county recorder within ten calendar days after a general election that includes an election for a federal office and within five business days following any other election. Verified ballots shall be counted by depositing the ballot in the ballot box and showing on the

records of the election that the elector has voted. If registration is not verified the ballot shall remain unopened and shall be retained in the same manner as voted ballots.

F. For any person who votes a provisional ballot, the county recorder or other officer in charge of elections shall provide for a method of notifying the provisional ballot voter at no cost to the voter whether the voter's ballot was verified and counted and, if not counted, the reason for not counting the ballot. The notification may be in the form of notice by mail to the voter, establishment of a toll free telephone number, internet access or other similar method to allow the voter to have access to this information. The method of notification shall provide reasonable restrictions that are designed to limit transmittal of the information only to the voter.

Ariz. Rev. Stat. § 16-1005 (H)-(I). Ballot abuse; violation; classification

H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.

I. Subsection H of this section does not apply to:

1. An election held by a special taxing district formed pursuant to title 48 for the purpose of

protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.

2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:

   a. "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.

   b. "Collects" means to gain possession or control of an early ballot.

   c. "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.

   d. "Household member" means a person who resides at the same residence as the voter.