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Appellate Court

Case Materials

2023

J. McCreary in his official capacity as Attorney General of the State of Nevada;
Steven Rudder in his official capacity as Secretary of State of Nevada
Plaintiffs-Petitioners,

v.

Nevada Civil Action Fund, et al.
Defendant-Respondent

22-GE01

St. Paul, Minnesota – July 24-27th, 2023

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Case Summary

Across the nation, state legislatures have been enacting new requirements to vote following a wave of election doubt from the last few election cycles. As a result, voting rights have become a point of contention and a frequent presence on federal court dockets.

This year's case centers around a *fictional voting law* (A.B. 24) enacted by the Nevada Legislature. Borrowing from controversial new laws from around the country, the law in question seeks to enact two changes to current Nevada voting law:

1. Mandate the presentation of a valid form of identification when voting in person
2. Place restrictions on wo can submit absentee ballots

These policies are commonly referred to as "Voter ID" laws and "ballot harvesting" restrictions.

In reaction to the new requirements, civil rights groups have joined a lawsuit by the Nevada Civil Action Fund (NCAF) to permanently halt the implementation of the legislation. NCAF alleges that the law has both discriminatory intent and result, intending to and succeeding in disenfranchising minority voters in their state. They argue that this law violates Section 2 of the Voting Rights Act (VRA). They assert that the ban on ballot harvesting also disenfranchises lower income and minority voters, again standing in violation of Section 2. These are the two issues that will be addressed in this case:

1. Do the voter ID requirements of A.B. 24 violate Section 2 of the Voting Rights Act?
2. Does the restriction on ballot drop off assistance violate Section 2 of the Voting Rights Act?

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Voting Rights Act of 1965 Background

via U.S. Department of Justice
https://www.justice.gov/crt/section-2-voting-rights-act

In order to assess whether or not A.B. 24 violates Section 2 of the VRA, it is important to understand what Section 2 covers and how it has historically been implemented. The following section is excerpted from the U.S. Department of Justice's summary of Section 2 implementation.

" SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the Voting Rights Act of 1965 prohibits voting practices or procedures that discriminate **on the basis of race, color, or membership in one of the language minority groups** identified in Section 4(f)(2) of the Act. Most of the cases arising under Section 2 since its enactment involved challenges to at-large election schemes, but the section's prohibition against discrimination in voting applies nationwide to any voting standard, practice, or procedure that results in the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group. Section 2 is permanent and has no expiration date as do certain other provisions of the Voting Rights Act.

In 1980, the Supreme Court held that the section, as originally enacted by Congress in 1964, was a restatement of the protections afforded by the 15th amendment. *Mobile v. Bolden*, 446 U.S. 55 (1980). Under that standard, a plaintiff had to prove that the standard, practice, or procedure was enacted or maintained, at least in part, by an invidious purpose.

In 1982, Congress extended certain provisions of the Act such as Section 5 that were set to expire, and added protections for voters who required assistance in voting. At the same time, it examined the history of litigation under Section 2 since 1965 and concluded that Section 2 should be amended to provide that a plaintiff could establish a violation of the section if the evidence established that, in the context of the "totality of the circumstance of the local electoral process," the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process.

OPERATION OF THE AMENDED SECTION 2

The Senate Committee on the Judiciary issued a report to accompany the 1982 legislation. In that report, it suggested several factors for courts to consider when determining if, within the totality of the circumstances in a jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2. These factors include:

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

The Judiciary Committee also noted that the court could consider additional factors, such as whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members or where the policy underlying the state or political subdivision's use of the challenged standard, practice, or procedure is tenuous. **However, the Judiciary Committee report describes this list of factors as neither exclusive nor comprehensive**. Moreoever, a plaintiff need not prove any particular number or a majority of these factors in order to succeed in a vote dilution claim.

In its first review of a case brought under the 1982 amendment, the Supreme Court explained that the ***"essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."*** *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). *See also, Johnson v. DeGrandy*, 512 U.S. 997 (1994).”

Voting Rights Act of 1965 §2 (Amended 1982)

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52 U.S. Code § 10301 - Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(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.

Justice Alito’s Guideposts

There are several measures that have been used to assess whether a law violates Section 2. In *Brnovich v. DNC*, 594 US _ (2021), Justice Alito authored the opinion of the court in which he established five “guideposts” to consider when hearing a potential Section 2 violation:

Guideposts as Established in *Brnovich v. DNC, 594 US _ (2021)*

1. **The size of the burden imposed** by a challenged voting rule is highly relevant. Voting necessarily requires some effort and compliance with some rules; thus, the concept of a voting system that is "equally open" and that furnishes equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting." Mere inconvenience is insufficient.

2. **The degree to which a voting rule departs from what was standard practice when §2 was amended in 1982** is a relevant consideration. Widespread current use is also relevant.

3. **The size of any disparities** in a rule's impact on members of different racial or ethnic groups is an important factor to consider. Even neutral regulations may well result in disparities in rates of voting and noncompliance with voting rules. The mere fact that there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. And small disparities should not be artificially magnified.

4. Consistent with §2(b)'s reference to a States' "political processes," **courts must consider the opportunities provided by a State's entire system of voting** when assessing the burden imposed by a challenged provision. Thus, where a State provides multiple ways to vote, any burden associated with one option cannot be evaluated without also taking into account the other available means.

5. **The strength of the state interests**—such as the strong and entirely legitimate state interest in preventing election fraud— served by a challenged voting rule is an important factor. Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. In determining whether a rule goes too far "based on the totality of circumstances," rules that are supported by strong state interests are less likely to violate §2.

It is also important to note that Justice Alito, in his opinion, rejected at least 10 other standards of evaluation for Section 2 violations, including the disparate impact test, which would focus primarily on the disparities produced by the proposed law and has long served as an applicable standard for evaluation. He argued that this would disallow almost any voting rule from being enacted without considering the strength of state interest in preventing voter fraud or the "totality of circumstances" surrounding voting in each state.

Thus, for the purposes of this case, we will be utilizing Justice Alito's Five Guideposts as the standard for reviewing potential Section 2 violations.

With these guideposts in mind, here are questions to ask yourself when evaluating how the facts apply to the guideposts:

- Are there enough facts to prove that the guideposts have been met?
- Is there proof that there *is* disparate impact?
- Do the facts show that there is legitimate state interest in preventing fraud?
- How do the other opportunities for voting affect the impacts of A.B. 24?
- Not every guidepost needs to support your position. In other words, it is unlikely that every guidepost will be fulfilled by the facts from one side.

Other Considerations of Note

This case is contingent upon the "private right of action" under Section 2 of the VRA. In short, this is the ability of private individuals or organizations other than the U.S. Department of Justice to challenge voting laws that are thought to infringe upon minority rights under Section 2. There is a substantial history of utilizing the private right of action in this way and it has often been perceived as a hallmark of the VRA. However, there are several cases challenging the validity of the private right of action that have yet to be decided. In the event that the Supreme Court of the United States revokes private right of action before the National Judicial Competition, **this is to be ignored**. Regardless of impending decisions in the "real world", assume private right of action is still applicable and this case may be brought before the Court.

Furthermore, some "facts" presented in this case may not reflect reality. For example, NCAF asserts that there have only been 13 cases of mail ballot fraud in Nevada since 2012. This is a made-up statistic for the purpose of this fictional appellate case. However, when constructing your arguments, these facts should be assumed to be true.

In addition, please note that both NCAF and the names of the Secretary of State and Attorney General are also fictional. Any materials contained in this case are not representative of the thoughts of the Secretary of State, Attorney General, or the Nevada Legislature. In addition, the fictional organization NCAF is not intended to mimic any other "real" organization and their arguments, though these thoughts are modeled after real challenges to voting laws.

Finally, in preparing your oral argument, you may only utilize and reference the materials listed below. There are excerpts of opinions which do not contain the full discussions of the Court-- please only use the excerpts that have been provided to you. You may not conduct any other outside research.

ASSEMBLY BILL NO. 1–COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

NOVEMBER 27, 2022

Referred to Committee on Legislative Operations and Elections

AN ACT relating to elections; to require valid identification to be shown upon casting a ballot; to impose additional requirements for those assisting voters with mail ballots.

Section 1. NRS 293.277 is hereby amended to read as follows:

1. Except as otherwise provided in NRS 293.283, 293.541 and 293.5772 to 293.5887, inclusive, if a person's name appears in the roster or if the person provides an affirmation pursuant to NRS 293.525, the person is entitled to vote and must sign his or her name in the roster or on a signature card when he or she applies to vote. The signature must be compared by an election board officer with the signature or a facsimile thereof on the person's application to register to vote or one of the forms of identification listed in subsection 2.

2. In addition to verifying a signature match or a facsimile thereof, voters must provide one of the following documents to verify their identity:

(a) The voter registration card issued to the voter;
(b) A driver's license;
(c) An identification card issued by the Department of Motor Vehicles;
(d) A military identification card; or
(e) Any other form of identification issued by a governmental agency which contains the voter's signature and physical description or picture.

3. The county clerk shall prescribe a procedure, approved by the Secretary of State, to verify that the voter has not already voted in that county in the current election.

4. If a voter is not able to provide identification, they may cast a provisional ballot under the conditions specified in NRS 293.3081.

Section 2. NRS 293.3081 is hereby amended to read as follows:

A person at a polling place may cast a provisional ballot in an election pursuant to NRS 293.3078 to 293.3086, inclusive, if the person complies with the applicable provisions of NRS 293.3082 and:

1. Declares that he or she has registered to vote and is eligible to vote at that election in that jurisdiction, but his or her name does not appear on a voter registration list as a voter eligible to vote in that election in that jurisdiction or an election official asserts that the person is not eligible to vote in that election in that jurisdiction;

2. Applies by mail or computer, on or after January 1, 2003, to register to vote and has not previously voted in an election for federal office in this State and fails to provide the identification required pursuant to paragraph (a) of subsection 1 of NRS 293.2725 or NRS 293.277 to the election board officer at the polling place; or

3. Declares that he or she is entitled to vote after the polling place would normally close as a result of a court order or other order extending the time established for the closing of polls pursuant to a law of this State in effect 10 days before the date of the election.

Section 3. NRS 293.269923 is hereby amended to read as follows:

1. Except as otherwise provided in subsection 2, at the request of a voter whose mail ballot has been prepared by or on behalf of the voter, an authorized messenger may return the mail ballot on behalf of the voter by mail or personal delivery to the county clerk, or any ballot drop box established in the county, pursuant to NRS 293.269921. Those individuals who may serve as an authorized messenger are as follows:

(a) A family member of the voter
(b) A household member of the voter
(c) A caregiver of the voter

A caregiver, for the purposes of this law, shall be defined as, "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."

2. Except for an election board officer in the course of the election board officer's official duties, a person shall not willfully:

(a) Impede, obstruct, prevent or interfere with the return of a voter's mail ballot;

(b) Deny a voter the right to return the voter's mail ballot; or

(c) If the person receives the voter's mail ballot and authorization to return the mail ballot on behalf of the voter by mail or personal delivery, fail to return the mail ballot, unless otherwise authorized by the voter, by mail or personal delivery:

(1) Before the end of the third day after the day of receipt, if the person receives the mail ballot from the voter four or more days before the day of the election; or

(2) Before the deadline established by the United States Postal Service for the mail ballot to be postmarked on the day of the election or before the polls close on the day of the election, as applicable to the type of delivery, if the person receives the mail ballot from the voter three or fewer days before the day of the election.

3. A person who violates any provision of subsection 2 is guilty of a category E felony and shall be punished as provided in NRS 193.130.

(Added to NRS by 2021, 1220)

Facts Submitted by Respondents to the District Court

McCreary et al submitted the following facts to the U.S. District Court District of Nevada.

Other Nevada Voting Policies

In person registration is available during the early voting period. Online registration is always accessible and offered by every county.

Nevada also offers same-day voter registration both in-person and online.

All registered voters receive a ballot by mail. Voters can opt out of this system using a form available in three languages.

Nevada offers an emergency absentee program. If a voter is suddenly unable to cast a ballot because they have been admitted to a medical institution on an emergency basis, a ballot can be delivered to the hospital on Election Day upon request.

Nevada maintains a specific program for voters with disabilities so they may register, request, mark, and return ballots from their home.

Provisional ballots are available if there is an issue with a voter's registration. These ballots must be "cured" by presenting an ID within six days of Election Day.

Nevada in Comparison

Voting rights groups rated Nevada's voting laws as one of the most expansive and accessible prior to the enaction of A.B. 24.

Prior to A.B. 24, Nevada was among the most accessible states for mail in voting and ease of voter registration.

Nevada received high marks by watchdog groups for election security efforts.

Facts Submitted by Petitioners to the District Court

The Nevada Civil Action Fund submitted the following facts in support of their complaint to the U.S. District Court District of Nevada.

Mail Ballot Participation

Every registered voter in Nevada is mailed a ballot as an effort to increase voter participation.

In 2020, 48% of voters cast a ballot by mail in Nevada.

Since 2012, there have been only 13 instances of attempted mail ballot fraud across the state. None of these instances involved "ballot harvesting".

Black and Latino voters are more likely than white voters to cast a mail ballot. While only 32% of white voters returned a mail ballot, 52% of Black voters and 49% of Latino voters returned a mail ballot in the 2022 election.

Voter ID

13% of voting-age Black Americans do not have a government issued ID, compared to 5% of white Americans.

12% of Americans making less than $25,000 per year lack a valid photo ID, compared to 2% of households making over $150,000 annually.

According to a Harvard Law study, "free" voter registration cards cost on average between $75-$175 when factoring time off work, travel, and costs to obtain valid documentation required for voter ID approval.

History of Voter Suppression in Nevada

Prior to the enactment of the Civil Rights Act of 1964, the Nevada legislature failed at least four attempts at passing legislation that would mandate racial equality in the state.

From the years of 1990 to 2011, only 281 people's voting rights were restored after a felony conviction, despite nearly 100,000 U.S. citizens being disenfranchised in Nevada.

- Black Nevadans make up only 8% of the general population, yet make up 29% of the state's prison population.

Prior to 2019, the process of restoring voting rights after a felony conviction in Nevada was among the most complicated in the country.

In September 2022, prior to introducing A.B. 24, several members of the Committee on Legislative Operations and Elections requested demographic data on who returns mail ballots and the accessibility of voter identification by race and geographic area.

There was no voter ID requirements or absentee ballot restrictions prior to the enactment of A.B. 24 in the state of Nevada.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MCCREARY; RUDDER Plaintiffs, v. NEVADA CIVIL ACTION FUND Defendant.	February 12, 2023

OPINION

Rozman, A., Judge

I. Introduction

On December 20, 2022, the Governor of Nevada signed A.B. 24 into law, mandating the presentation of voter identification at the polls in order to cast a ballot. In addition, A.B. 24 placed restrictions on who may deliver a mail ballot on behalf of a voter.

The Nevada Civil Action Fund (NCAF) claimed in the United States District Court in the District of Nevada that the introduction of these two requirements unfairly burdened minority voters in the state of Nevada and constituted a violation of §2 of the Voting Rights Act of 1965. In doing so, they presented information about the impact of voter ID laws and mail ballot restrictions on Black and Latino voters in Nevada to the lower court.

McCreary et al. has argued that there is not sufficient evidence to prove a violation of Section 2 when considering the totality of circumstances

presented to Nevadans while voting. McCreary contends that the state provides free voter registration cards and allows voter registration at the DMV. Furthermore, the state of Nevada sends a mail ballot to every eligible voter. Those without the physical means to obtain a voter ID required for in-person voting may submit their ballot via mail. McCreary also argued that the interest of election security permits them to take action on voter ID and mail-in voting. While McCreary acknowledged that any minor inconvenience from the policies in A.B. 24 would be regrettable, the erosion of public trust in the electoral system disenfranchises many more voters. Finally, McCreary argued that the presence of 13 instances of mail ballot fraud in their state since 2012 proves the state's motivation to prevent fraud was legitimate and neutral.

The District Court accepted NCAF's argument that disenfranchisement of minority voters was substantial enough to render A.B. 24 in violation of Section 2 of the Voting Rights Act of 1965. McCreary et al. now ask that the District Court's opinion be reversed and this court find that neither the voter ID requirements or the mail ballot restrictions stand in violation of Section 2 of the VRA. McCreary argues that the standard of review by the District Court entirely neglected the most recent guideposts issued in *Brnovich v. DNC*, 594 US _ (2021) and ignored the totality of Nevada's voting system in considering whether A.B. 24 violated Section 2.

II. Facts

Nevada has made the process of voting exceedingly easy for most voters. Each registered voter is mailed a ballot without needing to request one. Early voting is also permitted at one of their several early voting cites around the state. Mail ballots may also be returned prior to the election. In addition, A.B. 24 does not affect the existing provisional ballot system in place in Nevada. If you are unable to provide a valid ID at the polls, you may cast a provisional ballot and bring a valid ID to the county clerk by the Friday following election day. Nevada also offers same-day voter registration. By all measures, there are few policies in place in Nevada that prevent any group from casting a valid ballot in an election.

The state has also maintained pace with national progress surrounding the rights of minority voters. There were few challenges to racial equality in voting following the implementation of the Civil Rights Act of 1964. There is not a substantial history of racialized gerrymandering in the state. In fact, in 2021, the Nevada State Assembly even amended newly-drawn maps after being alerted of potential disenfranchisement of tribal communities. There has been little evidence provided by NCAF to show a pattern of disenfranchisement of minority voters in Nevada other than a request for data by the Committee on Legislative Operations and Elections.

What NCAF provides as evidence of disparate impact is that minority and low income voters are much less likely to have a government issued ID. The

narrow ID requirements set forth in A.B. 24 thus disproportionately impact Black and Latino voters. In addition, more Black and Latino voters cast mail ballots than white voters in 2022. They also point to the fact that, of the 13 mail ballot fraud instances since 2012, none of these have been due to the process of ballot return assistance or "ballot harvesting."

III. Standard of Review

In evaluating whether a Section 2 violation has occurred, the opinion of the court in *Brnovich v. DNC* (2021), provides the court with five guideposts to consider. These guideposts will be utilized by this court and are as follows:

1. The size of the burden imposed by the implementation of these policies. The burden must be greater than an inconvenience consistent with those normally incurred by voting. One is expected to endure any "usual burdens" of voting.
2. The degree to which a voting rule departs from that which were in place when Section 2 was last amended (1982). Legislation with a neutral, long-standing history of nondiscriminatory effect should not be considered in violation of Section 2 on its face.
3. The size of any disparities created by the rule. Simply the presence of a minute racial disparity does not prove a violation of Section 2.

Rather, one should consider that even neutral laws may have disparate impact that does not substantially affect equality of opportunity.

4. The totality of opportunities provided by the entire voting system in the state. Increased restriction when voting by one means does not unfairly burden the voter when another means remains readily accessible.
5. The strength of state interests. If the state holds legitimate and neutral interest in preventing election fraud in the state, Section 2 violations are less likely.

This guideposts will serve as the primary evaluation tool when considering whether A.B. 24 violates Section 2 of the Voting Rights Act.

IV. Discussion

The District Court erred in its judgment when deciding that both the voter ID requirement and mail ballot assistance restrictions violated Section 2. Both issues will be addressed in turn.

1. Voter Identification Requirement

This court holds that the voter ID requirement does not violate Section 2 of the VRA. First, the defendants have shown little substantial proof that this

causes a burden outside of those typical for voters. While the District Court agreed that obtaining a valid ID was costly and therefore placed an outsized burden on voters, this was a mistake. It may be true that certain forms of identification come at a cost to the voter, but the availability of a free identification card in the state of Nevada provides a reasonable and cost-effective alternative to obtaining a more costly form of ID.

Second, it is true that this voting rule was not in place in Nevada in 1982 as argued by the defendants and acknowledged by the District Court. However, many other voter ID laws in other states are long-held. Justice Alito, in *Brnovich v. DNC* (2021), contends that, "widespread current use is also relevant." Thirty-five states currently maintain voter ID laws with similar requirements.

Third, the District Court assessed that the disparity created would be substantial. This was done in error and lack of consideration for compounding factors in the Nevadan electoral system. Though the defendants have pointed out that 13% of Black Americans lack a government issued ID compared to 5% of white Americans, they have not accounted for unique factors of the Nevadan electoral system that will decrease those disparities. The ease of mail in voting decreases the need for all voters to have government issued IDs to present at the polls.

This leads into the evaluation of the fourth guidepost. Considering the ease of access of mail-in voting in Nevada, voter ID laws do not pose a

substantial burden to voters. The District Court erred in judging only the disparities created without assessing the totality of circumstances. Considering the numerous ways Nevada facilitates easy and open voting in the state, the implementation of one restriction does not constitute a consistent and overwhelming effort to suppress votes on the basis of race. Indeed, the totality of circumstances only reinforces the presence of equal openness– meaning that voting remains open to everyone, even if circumstances create marginally less opportunity. *Brnovich v. DNC.* 594 U.S. ___ (2021).

Finally, it is important to consider the presence of state interest in preventing fraud. While the plaintiffs have not provided evidence of in-person voter fraud in Nevada, they referenced in their argument the political polarization surrounding election security following a tumultuous 2020 election nationwide. In *Crawford v. Marion County Board of Elections* (2008), the Supreme Court noted that it was not necessary for there to be any direct evidence of voter fraud in Indiana for there to be genuine interest in restoring public trust in elections. It would be ignorant of this court to dismiss the wave of anti-electoral sentiment across the nation. The voter ID requirement in A.B. 24 may well prove to encourage turnout due to increased public trust more than the policy turns away voters. The defendant, while providing evidence of race-based data requested by the

Committee on Legislative Operations and Elections, has yet to provide direct evidence that this data influenced the lawmakers introducing A.B. 24.

In summary, it is not possible to determine that the disparate effects of voter ID under A.B. 24 are present, let alone substantial enough to outweigh the presence of similar laws nationwide and the strength of state interest in restoring public trust in electoral systems.

2. Mail-In Ballot Collection Restrictions

The District Court also erred in concluding that the restrictions on mail-in ballot delivery stood in violation of Section 2 of the VRA. There is little evidence to prove the restriction of voter assistance to family or household members substantially burdensome under Section 2.

While it has been shown that minority voters in Nevada are more likely to cast a mail ballot, the defendants have not shown that the delivery of the ballot themselves constitutes an undue burden on the voter. Under the first guidepost in *Brnovich*, incurring the usual burdens of voting does not amount to a Section 2 violation. It is reasonable to ask that those delivering ballots are trusted members of the voter's community network.

Under the third and fourth guideposts, the plaintiffs have correctly pointed out that there are numerous opportunities to cast a ballot that do not involve dropping off a ballot. Nevada law also provides protections for employees who must leave work to vote on Election Day to cast an in-person

ballot. In short, the totality of the voting opportunities ensure equal openness as necessitated by *Brnovich*.

Finally, the greatest error made by the District Court was undervaluing the merit of the 13 mail ballot fraud instances since 2012. It is true that even the presence of just one fraud case can compromise trust. Considering that the only meritorious instances of fraud in Nevada in the past ten years have been by mail-in voters, it is more than reasonable that the Nevada legislature would seek to secure these ballots wherever possible. The strength of this state interest proves the intent neutral and nondiscriminatory in nature and therefore must outweigh any minor, unintended, disparate impact.

For these reasons, this court holds that (1) the voter identification statute in A.B. 24 does not stand in violation of Section 2 of the Voting Rights Act of 1965 and (2) restricting mail-in ballot assistance as outlined in A.B. 24 also does not constitute a Section 2 violation.

Judge Rozman, A. *Rozman, A.*

Concurring, Judge Compton, R. joined the Court's opinion in its entirety.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MCCREARY; RUDDER Plaintiffs, v. NEVADA CIVIL ACTION FUND Defendant.	February 12, 2023

Fagerstrom, M., Judge, Dissenting

The opinion of the Court, in adhering rigidly to the guideposts set forth in *Brnovich v. DNC* (2021), has neglected long-standing assessments of Section 2 violations as well as facts put forth by the Nevada Civil Action Fund. I will also address my dissents in order of issue.

I. Voter Identification Requirement

I would first like to oppose the conception that "free" voter IDs eliminate the cost barrier associated with most accepted forms of identification. While it is true that these may come at a lower cost, there are compounding factors that may increase costs. In order to obtain a "free" voter ID, one must first provide existing documentation. If a voter does not have one of these accepted materials, they may have to spend additional money accessing these. As provided by the defendants, one study estimates that

"free" voter registration cards may cost anywhere from $75-$175 when considering time taken off work, travel, and other costs. The majority opinion entirely ignored this fact provided when assessing the size of the burden of voter identification.

Second, the long-standing presence of this law in other states does not sufficiently serve to fulfill the second guidepost. Though in *Brnovich* it is correct that widespread use is an applicable measure of neutrality, the opinion of the court failed to acknowledge that these two provisions in A.B. 24 were not in place in 1982 in Nevada. Thus, we are unable to establish long-standing facial neutrality in the state in regard to voter ID and ballot collection restrictions.

Third, it is incorrect to conclude that the variety of voting options diminishes the impacts of laws that create racial disparities in voting. I do not contest that the totality of the Nevadan voting system is easy to use and that the mailing of ballots to every voter certainly eliminates some barriers to voting. However, these two provisions being enacted in conjunction with one another do not just burden one aspect of the electoral system in Nevada. The same factors that may preclude a voter from obtaining a government ID—such as time or financial commitments—exacerbate the impact of eliminating third-party ballot collection. For example, a low-income voter whose work schedule makes it difficult to visit the DMV for an ID during business hours may also not have the time to drop off a ballot during

those same business hours. These two provisions only compound existing barriers to voting when enacted simultaneously.

Finally, I oppose the idea that the mere prospect of voter fraud without any evidence of this occurring in-person substantiates state interest when the result is clear racial disparities in voting access. Without evidence of in-person fraud, it is not a reasonable assumption that the voter ID requirement will have any substantive impact on voter security.

II. Ballot Collection Restrictions

First, the Court made a glaring error in omitting mention of the second guidepost in *Brnovich* in regard to ballot collection restrictions. Again, there is no evidence provided that suggests these restrictions were standard practice in 1982 upon amendment of Section 2, though it is true that mail voting was less commonplace during this time. Regardless, this provision does not benefit from a history of neutrality afforded to a long-standing law.

Indeed, when considering the issue of neutrality, the opinion of the Court also does not consider that the Nevada legislature specifically requested documentation about racial disparities in mail ballot submission and voter ID accessibility. In *North Carolina NAACP v. McCrory* (2016), the United States Court of Appeals for the Fourth Circuit acknowledged a similar request from the North Carolina legislature as a clear indication of discriminatory intent in

drafting restrictive voting laws. I contend that the court should have found the same conclusion here rather than assuming neutrality.

I also do not contest the presence of 13 mail ballot fraud cases are alarming. However, these 13 cases over the last decade have not involved ballot collection. In short, A.B. 24 would not have prevented any of the confirmed fraud cases since 2012. This weakens the strength of state interest in enacting election-securing policies and diminishes the validity of the law under the fifth guideposts.

As such, it is clear the Court has failed to consider many relevant facts and has erred in finding no Section 2 violations.

Excerpt from the Opinion of the Court
Fourth Circuit Court of Appeals
North Carolina NAACP v. McCrory

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1468

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; ROSANELL EATON; EMMANUEL BAPTIST CHURCH; BETHEL A. BAPTIST CHURCH; COVENANT PRESBYTERIAN CHURCH; BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC.; ARMENTA EATON; CAROLYN COLEMAN; JOCELYN FERGUSON-KELLY; FAITH JACKSON; MARY PERRY, MARIA TERESA UNGER PALMER,

Plaintiffs - Appellants,

and

JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JANE DOE 2; JOHN DOE 3; JANE DOE 3; NEW OXLEY HILL BAPTIST CHURCH; CLINTON TABERNACLE AME ZION CHURCH; BAHEEYAH MADANY,

Plaintiffs,

v.

PATRICK L. MCCRORY, in his official capacity as Governor of the State of North Carolina; KIM WESTBROOK STRACH, in her official capacity as a member of the State Board of Elections; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; JAMES BAKER, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants - Appellees.

DIANA GRIBBON MOTZ, Circuit Judge, writing for the court except as to Part V.B.:

These consolidated cases challenge provisions of a recently enacted North Carolina election law. The district court rejected contentions that the challenged provisions violate the Voting Rights Act and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments of the Constitution. In evaluating the massive record in this case, the court issued extensive factual findings. We appreciate and commend the court on its thoroughness. The record evidence provides substantial support for many of its findings; indeed, many rest on uncontested facts. But, for some of its findings, we must conclude that the district court fundamentally erred. In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees. This failure of perspective led the court to ignore critical facts bearing on legislative intent, including the inextricable link between race and politics in North Carolina.

Voting in many areas of North Carolina is racially polarized. That is, "the race of voters correlates with the selection of a certain candidate or candidates." *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986) (discussing North Carolina). In *Gingles* and other cases brought under the Voting Rights Act, the Supreme Court has explained that polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them. In North Carolina, restriction of voting mechanisms and procedures that most heavily affect African Americans will predictably redound to the benefit of one political party and to the disadvantage of the other. As the evidence in the record makes clear, that is what happened here.

After years of preclearance and expansion of voting access, by 2013 African American registration and turnout rates had finally reached near-parity with white registration and turnout rates. African Americans were poised to act as a major electoral force. But, on the day after the Supreme Court issued *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an "omnibus" election law. Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.

In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State's true motivation. "In essence," as in *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 440 (2006), "the State took away [minority voters'] opportunity because [they] were about to exercise it." As in *LULAC*, "[t]his bears the mark of intentional discrimination." Id.

Faced with this record, we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent. Accordingly, we reverse the judgment of the district court to the contrary and remand with instructions to enjoin the challenged provisions of the law.

Excerpt from the Opinion of the Court
Supreme Court of the United States
Crawford v. Marion County Board of Elections

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CRAWFORD ET AL. *v.* MARION COUNTY ELECTION BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07–21. Argued January 9, 2008—Decided April 28, 2008*

After Indiana enacted an election law (SEA 483) requiring citizens voting in person to present government-issued photo identification, petitioners filed separate suits challenging the law's constitutionality. Following discovery, the District Court granted respondents summary judgment, finding the evidence in the record insufficient to support a facial attack on the statute's validity. In affirming, the Seventh Circuit declined to judge the law by the strict standard set for poll taxes in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, finding the burden on voters offset by the benefit of reducing the risk of fraud.

Held: The judgment is affirmed.

472 F. 3d 949, affirmed.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that the evidence in the record does not support a facial attack on SEA 483's validity. Pp. 5–20.

(a) Under *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. However, "even handed restrictions" protecting the "integrity and reliability of the electoral process itself" satisfy *Harper*'s standard. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9. A state law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman* v. *Reed*, 502 U. S. 279,

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*Together with No. 07–25, *Indiana Democratic Party et al.* v. *Rokita, Secretary of State of Indiana, et al.,* also on certiorari to the same court.

288–289. Pp. 5–7.

(b) Each of Indiana's asserted interests is unquestionably relevant to its interest in protecting the integrity and reliability of the electoral process. The first is the interest in deterring and detecting voter fraud. Indiana has a valid interest in participating in a nationwide effort to improve and modernize election procedures criticized as antiquated and inefficient. Indiana also claims a particular interest in preventing voter fraud in response to the problem of voter registration rolls with a large number of names of persons who are either deceased or no longer live in Indiana. While the record contains no evidence that the fraud SEA 483 addresses—in-person voter impersonation at polling places—has actually occurred in Indiana, such fraud has occurred in other parts of the country, and Indiana's own experience with voter fraud in a 2003 mayoral primary demonstrates a real risk that voter fraud could affect a close election's outcome. There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes. Finally, Indiana's interest in protecting public confidence in elections, while closely related to its interest in preventing voter fraud, has independent significance, because such confidence encourages citizen participation in the democratic process. Pp. 7–13.

(c) The relevant burdens here are those imposed on eligible voters who lack photo identification cards that comply with SEA 483. Because Indiana's cards are free, the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters' right to vote, or represent a significant increase over the usual burdens of voting. The severity of the somewhat heavier burden that may be placed on a limited number of persons—*e.g.,* elderly persons born out-of-state, who may have difficulty obtaining a birth certificate—is mitigated by the fact that eligible voters without photo identification may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court clerk's office. Even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek. Pp. 13–16.

(d) Petitioners bear a heavy burden of persuasion in seeking to invalidate SEA 483 in all its applications. This Court's reasoning in *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. ___, applies with added force here. Petitioners argue that Indiana's interests do not justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office, but it is not possible to quantify, based on the evidence in the record, either that burden's magnitude

or the portion of the burden that is fully justified. A facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Id.*, at ___. When considering SEA 483's broad application to all Indiana voters, it "imposes only a limited burden on voters' rights." *Burdick* v. *Takushi*, 504 U. S. 428, 439. The "precise interests" advanced by Indiana are therefore sufficient to defeat petitioners' facial challenge. *Id.*, at 434. Pp. 16–20.

(e) Valid neutral justifications for a nondiscriminatory law, such as SEA 483, should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. P. 20.

JUSTICE SCALIA, joined by JUSTICE THOMAS and JUSTICE ALITO, was of the view that petitioners' premise that the voter-identification law might have imposed a special burden on some voters is irrelevant. The law should be upheld because its overall burden is minimal and justified. A law respecting the right to vote should be evaluated under the approach in *Burdick* v. *Takushi*, 504 U. S. 428, which calls for application of a deferential, "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote, *id.,* at 433–434. The different ways in which Indiana's law affects different voters are no more than different impacts of the single burden that the law uniformly imposes on all voters: To vote in person, everyone must have and present a photo identification that can be obtained for free. This is a generally applicable, nondiscriminatory voting regulation. The law's universally applicable requirements are eminently reasonable because the burden of acquiring, possessing, and showing a free photo identification is not a significant increase over the usual voting burdens, and the State's stated interests are sufficient to sustain that minimal burden. Pp. 1–6.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined. BREYER, J., filed a dissenting opinion.

Excerpt from the Opinion of the Court
Ninth Circuit Court of Appeals
DNC v. Hobbs

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC, AKA Democratic Senatorial Campaign Committee; THE ARIZONA DEMOCRATIC PARTY,
Plaintiffs-Appellants,

v.

KATIE HOBBS, in her official capacity as Secretary of State of Arizona; MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General,
Defendants-Appellees,

THE ARIZONA REPUBLICAN PARTY; BILL GATES, Councilman; SUZANNE KLAPP, Councilwoman; DEBBIE LESKO, Sen.; TONY RIVERO, Rep.,
Intervenor-Defendants-Appellees.

No. 18-15845

D.C. No. 2:16-cv-01065-DLR

OPINION

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted En Banc March 27, 2019
San Francisco, California

Filed January 27, 2020

Before: Sidney R. Thomas, Chief Judge, and Diarmuid F. O'Scannlain, William A. Fletcher, Marsha S. Berzon[*], Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Consuelo M. Callahan, Mary H. Murguia, Paul J. Watford, and John B. Owens, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Watford;
Dissent by Judge O'Scannlain;
Dissent by Judge Bybee

[*] Judge Berzon was drawn to replace Judge Graber. Judge Berzon has read the briefs, reviewed the record, and watched the recording of oral argument held on March 27, 2019.

SUMMARY[**]

Civil Rights

The en banc court reversed the district court's judgment following a bench trial in favor of defendants, the Arizona Secretary of State and Attorney General in their official capacities, in an action brought by the Democratic National Committee and others challenging, first, Arizona's policy of wholly discarding, rather than counting or partially counting, ballots cast in the wrong precinct; and, second, House Bill 2023, a 2016 statute criminalizing the collection and delivery of another person's ballot.

Plaintiffs asserted that the out-of-precinct policy (OOP) and House Bill (H.B.) 2023 violated Section 2 of the Voting Rights Act of 1965 as amended because they adversely and disparately affected Arizona's American Indian, Hispanic, and African American citizens. Plaintiffs also asserted that H.B. 2023 violated Section 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. Finally, plaintiffs asserted that the OOP policy and H.B. 2023 violated the First and Fourteenth Amendments because they unduly burden minorities' right to vote.

The en banc court held that Arizona's policy of wholly discarding, rather than counting or partially counting, OOP ballots, and H.B. 2023's criminalization of the collection of another person's ballot, have a discriminatory impact on

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

American Indian, Hispanic, and African American voters in Arizona, in violation of the "results test" of Section 2 of the Voting Rights Act. Specifically, the en banc court determined that plaintiffs had shown that Arizona's OOP policy and H.B. 2023 imposed a significant disparate burden on its American Indian, Hispanic, and African American citizens, resulting in the "denial or abridgement of the right of its citizens to vote on account of race or color." 52 U.S.C. § 10301(a). Second, plaintiffs had shown that, under the "totality of circumstances," the discriminatory burden imposed by the OOP policy and H.B. 2023 was in part caused by or linked to "social and historical conditions" that have or currently produce "an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" and to participate in the political process. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); 52 U.S.C. § 10301(b).

The en banc court held that H.B. 2023's criminalization of the collection of another person's ballot was enacted with discriminatory intent, in violation of the "intent test" of Section 2 of the Voting Rights Act and of the Fifteenth Amendment. The en banc court held that the totality of the circumstances—Arizona's long history of race-based voting discrimination; the Arizona legislature's unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat; the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023; the substantial increase in American Indian and Hispanic voting attributable to ballot collection that was targeted by H.B. 2023; and the degree of racially polarized voting in Arizona—cumulatively and unmistakably revealed that racial discrimination was a motivating factor in enacting H.B. 2023. The en banc court further held that Arizona had

not carried its burden of showing that H.B. 2023 would have been enacted without the motivating factor of racial discrimination. The panel declined to reach DNC's First and Fourteenth Amendment claims.

Concurring, Judge Watford joined the court's opinion to the extent it invalidated Arizona's out-of-precinct policy and H.B. 2023 under the results test. Judge Watford did not join the opinion's discussion of the intent test.

Dissenting, Judge O'Scannlain, joined by Judges Clifton, Bybee and Callahan, stated that the majority drew factual inferences that the evidence could not support and misread precedent along the way. In so doing, the majority impermissibly struck down Arizona's duly enacted policies designed to enforce its precinct-based election system and to regulate third-party collection of early ballots.

Dissenting, Judge Bybee, joined by Judges O'Scannlain, Clifton and Callahan, wrote separately to state that in considering the totality of the circumstances, which took into account long-held, widely adopted measures, Arizona's time, place, and manner rules were well within our American democratic-republican tradition.

Excerpt from the Opinion of the Court
(cont.)
Ninth Circuit Court of Appeals
DNC v. Hobbs

We therefore hold that Arizona's OOP policy violates the results test of Section 2 of the Voting Rights Act.

3. H.B. 2023 and the Results Test

Uncontested evidence in the district court established that, prior to the enactment of H.B. 2023, a large and disproportionate number of minority voters relied on third parties to collect and deliver their early ballots. Uncontested evidence also established that, beginning in 2011, Arizona Republicans made sustained efforts to limit or eliminate third-party ballot collection. The question is whether the district court clearly erred in holding that H.B. 2023 does not violate the "results test" of Section 2.

a. Step One: Disparate Burden

The question at step one is whether H.B. 2023 results in a disparate burden on a protected class. The district court held that Plaintiffs failed at step one. The district court clearly erred in so holding.

Extensive and uncontradicted evidence established that prior to the enactment of H.B. 2023, third parties collected a large and disproportionate number of early ballots from minority voters. Neither the quantity nor the disproportion was disputed. Numerous witnesses testified without contradiction to having personally collected, or to having personally witnessed the collection of, thousands of early ballots from minority voters. There is no evidence that white voters relied to any significant extent on ballot collection by third parties.

The district court recognized the disparity in third-party ballot collection between minority and white citizens. It wrote that "[t]he Democratic Party and community advocacy organizations . . . focused their ballot collection efforts on low-efficacy voters, who trend disproportionately minority." *Reagan*, 329 F. Supp. 3d at 870. "In contrast," the court wrote, "the Republican Party has not significantly engaged in ballot collection as a GOTV strategy." *Id.*

The district court nonetheless held that this evidence was insufficient to establish a violation at step one. To justify its holding, the court wrote, "[T]he Court finds that Plaintiffs' circumstantial and anecdotal evidence is insufficient to establish a cognizable disparity under § 2." *Id.* at 868. The court wrote further:

> Considering the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties who would not fall within H.B. 2023's exceptions, it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities.

Id. at 871.

First, the court clearly erred in discounting the evidence of third-party ballot collection as merely "circumstantial and anecdotal." The evidence of third-party ballot collection was not "circumstantial." Rather, as recounted above, it was direct evidence from witnesses who had themselves acted as third-party ballot collectors, had personally supervised third-party ballot collection, or had personally witnessed third-

party ballot collection by others. Nor was the evidence merely "anecdotal." As recounted above, numerous witnesses provided consistent and uncontradicted testimony about third-party ballot collection they had done, supervised, or witnessed. This evidence established that many thousands of early ballots were collected from minority voters by third parties. The court itself found that white voters did not significantly rely on third-party ballot collection. No better evidence was required to establish that large and disproportionate numbers of early ballots were collected from minority voters.

Second, the court clearly erred by comparing the number of early ballots collected from minority voters to the much greater number of all ballots cast "without the assistance of third parties," and then holding that the relatively smaller number of collected early ballots did not cause a "meaningful inequality." *Id.* at 871. In so holding, the court repeated the clear error it made in comparing the number of OOP ballots to the total number of all ballots cast. Just as for OOP ballots, the number of ballots collected by third parties from minority voters surpasses any de minimis number.

We hold that H.B. 2023 results in a disparate burden on minority voters, and that the district court clearly erred in holding otherwise. We accordingly hold that Plaintiffs have succeeded at step one of the results test.

b. Step Two: Senate Factors

The district court did not differentiate between Arizona's OOP policy and H.B. 2023 in its discussion of step two. Much of our analysis of the Senate factors for Arizona's OOP policy applies with equal force to the factors for H.B. 2023.

Again, we regard Senate factors five (the effects of discrimination in other areas on minorities access to voting) and nine (the tenuousness of the justification for the challenged voting practices) as particularly important, given the nature of Plaintiffs' challenge to H.B. 2023. We also regard factor one (history of official discrimination) as important, as it strongly supports our conclusion under factor five. Though "not essential," *Gingles*, 478 U.S. at 48 n.15, the other less important factors provide "helpful background context." *Husted*, 768 F.3d at 555.

We do not repeat here the entirety of our analysis of Arizona's OOP policy. Rather, we incorporate that analysis by reference and discuss only the manner in which the analysis is different for H.B. 2023.

i. Factor One: History of Official Discrimination Connected to Voting

We recounted above Arizona's long history of race-based discrimination in voting. H.B. 2023 grows directly out of that history. During the Republicans' 2011 attempt to limit ballot collection by third parties, Arizona was still subject to preclearance under Section 5. When DOJ asked for more information about whether the relatively innocuous ballot-collection provision of S.B. 1412 had the purpose or would have the effect of denying minorities the right to vote and requested more information, Arizona withdrew the preclearance request. It did so because there was evidence in the record that the provision intentionally targeted Hispanic voters. In 2013, public opposition threatened to repeal H.B. 2305 by referendum. If passed, the referendum would have required that any future bill on the same topic pass the legislature by a supermajority. Republicans repealed H.B.

2305 rather than face a referendum. Finally, after the Supreme Court's decision in *Shelby County* eliminated preclearance, Arizona enacted H.B. 2023, making third-party ballot collection a felony. The campaign was marked by race-based appeals, most prominently in the LaFaro Video described above.

As it did with respect to OOP voting, the district court clearly erred in minimizing the strength of this factor in Plaintiffs' favor.

ii. Factor Two: Racially Polarized Voting Patterns

H.B. 2023 connects directly to racially polarized voting patterns in Arizona. The district court found that "H.B. 2023 emerged in the context of racially polarized voting." *Reagan*, 329 F. Supp. 3d at 879. Senator Shooter, who introduced the bill that became S.B. 1412—the predecessor to H.B. 2023—was motivated by the "high degree of racial polarization in his district" and introduced the bill following a close, racially polarized election. *Id*.

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

iii. Factor Five: Effects of Discrimination

H.B. 2023 is closely linked to the effects of discrimination that "hinder" the ability of American Indian, Hispanic, and African American voters "to participate effectively in the political process." *Gingles*, 478 U.S. at 37. The district court found that American Indian, Hispanic, and African American Arizonans "are significantly less likely than non-minorities to own a vehicle, more likely to rely upon

public transportation, more likely to have inflexible work schedules, and more likely to rely on income from hourly wage jobs." *Reagan*, 329 F. Supp. 3d at 869. In addition, "[r]eady access to reliable and secure mail service is nonexistent in some minority communities." *Id.* Minority voters in rural communities disproportionately lack access to outgoing mail, while minority voters in urban communities frequently encounter unsecure mailboxes and mail theft. *Id.* These effects of discrimination hinder American Indian, Hispanic, and African American voters' ability to return early ballots without the assistance of third-party ballot collection.

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

iv. Factor Six: Racial Appeals in Political Campaigns

The enactment of H.B. 2023 was the direct result of racial appeals in a political campaign. The district court found that "racial appeals [were] made in the specific context of legislative efforts to limit ballot collection." *Id.* at 876. Proponents of H.B. 2023 relied on "overt or subtle racial appeals," *Gingles*, 478 U.S. at 37, in advocating for H.B. 2023, including the "racially tinged" LaFaro Video, *Reagan*, 329 F. Supp. 3d at 876–77 (characterizing the LaFaro Video as one of the primary motivators for H.B. 2023). The district court concluded, "[Senator] Shooter's allegations and the LaFaro video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting." *Reagan*, 329 F. Supp. 3d at 880.

The district court did not clearly err in assessing the strength of this factor in Plaintiff's favor.

v. Factor Seven: Number of Minorities in Public Office

Because Arizona's OOP policy had a particular connection to the election of minorities to statewide office and to the United States Senate, we concluded that the factor of minorities in public office favored Plaintiffs. That particular connection to statewide office does not exist between H.B. 2023 and election of minorities. However, H.B. 2023 is likely to have a pronounced effect in rural counties with significant American Indian and Hispanic populations who disproportionately lack reliable mail and transportation services, and where a smaller number of votes can have a significant impact on election outcomes. In those counties, there is likely to be a particular connection to election of American Indian and Hispanic candidates to public office.

As it did with respect to OOP voting, the district court clearly erred in minimizing the strength of this factor in Plaintiffs' favor.

vi. Factor Eight: Officials' Responsiveness to the Needs of Minority Groups

The district court found that "Plaintiffs' evidence . . . is insufficient to establish a lack of responsiveness on the part of elected officials to particularized needs of minority groups." *Id.* at 877. As discussed above, this finding ignores extensive evidence to the contrary and is contradicted by the court's statements elsewhere in its opinion.

The district court clearly erred in finding that this factor does not weigh in Plaintiffs' favor.

vii. Factor Nine: Tenuousness of Justification of the Policy Underlying the Challenged Restriction

The district court relied on two justifications for H.B. 2023: That H.B. 2023 is aimed at preventing ballot fraud "by creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction"; and that H.B. 2023 is aimed at improving and maintaining "public confidence in election integrity." *Id.* at 852. We address these justifications in turn.

First, third-party ballot collection was permitted for many years in Arizona before the passage of H.B. 2023. No one has ever found a case of voter fraud connected to third-party ballot collection in Arizona. This has not been for want of trying. The district court described the Republicans' unsuccessful attempts to find instances of fraud:

> The Republican National Lawyers Association ("RNLA") performed a study dedicated to uncovering cases of voter fraud between 2000 and 2011. The study found no evidence of ballot collection or delivery fraud, nor did a follow-up study through May 2015. Although the RNLA reported instances of absentee ballot fraud, none were tied to ballot collection and delivery. Likewise, the Arizona Republic conducted a study of voter fraud in Maricopa County and determined that, out of millions of ballots cast in Maricopa County from 2005 to 2013, a total of 34 cases of fraud were prosecuted. Of these, 18 involved a felon voting without her rights first being restored. Fourteen involved

> non-Arizona citizens voting. The study uncovered no cases of fraud perpetrated through ballot collection.

Id. at 853 (internal citations omitted).

The district court wrote, "[T]here has never been a case of voter fraud associated with ballot collection charged in Arizona." *Id.* at 852. "No specific, concrete example of voter fraud perpetrated through ballot collection was presented by or to the Arizona legislature during the debates on H.B. 2023 or its predecessor bills." *Id.* at 852–53. "No Arizona county produced evidence of confirmed ballot collection fraud in response to subpoenas issued in this case, nor has the Attorney General's Office produced such information." *Id.* at 853.

Ballot-collection-related fraud was already criminalized under Arizona law when H.B. 2023 was enacted. Collecting and failing to turn in someone else's ballot was already a class 5 felony. Ariz. Rev. Stat. § 16-1005(F). Marking someone else's ballot was already a class 5 felony. *Id.* § 16-1005(A). Selling one's own ballot, possessing someone else's ballot with the intent to sell it, knowingly soliciting the collection of ballots by misrepresenting one's self as an election official, and knowingly misrepresenting the location of a ballot drop-off site were already class 5 felonies. *Id.* § 16-1005(B)–(E). These criminal prohibitions are still in effect. Arizona also takes measures to ensure the security of early ballots, such as using "tamper evident envelopes and a rigorous voter signature verification procedure." *Reagan*, 329 F. Supp. 3d at 854.

The history of H.B. 2023 shows that its proponents had other aims in mind than combating fraud. H.B. 2023 does not forbid fraudulent third-party ballot collection. It forbids *non-fraudulent* third-party ballot collection. To borrow an understated phrase, the anti-fraud rationale advanced in support of H.B. 2023 "seems to have been contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

Second, we recognize the importance of public confidence in election integrity. We are aware that the federal bipartisan Commission on Federal Election Reform, charged with building public confidence, recommended *inter alia* that States "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Building Confidence in U.S. Elections* § 5.2 (Sept. 2005). We are aware of the recent case of voter fraud in North Carolina involving collection and forgery of absentee ballots by a political operative hired by a Republican candidate. And we are aware that supporters of H.B. 2023 and its predecessor bills sought to convince Arizona voters, using false allegations and racial innuendo, that third-party ballot collectors in Arizona have engaged in fraud.

Without in the least discounting either the common sense of the bipartisan commission's recommendation or the importance of public confidence in the integrity of elections, we emphasize, first, that the Supreme Court has instructed us in Section 2 cases to make an "intensely local appraisal." *Gingles*, 478 U.S. at 78. The third-party ballot collection fraud case in North Carolina has little bearing on the case before us. We are concerned with Arizona, where third-party ballot collection has had a long and honorable history, and where the acts alleged in the criminal indictment in North

Carolina were illegal under Arizona law before the passage of H.B. 2023, and would still be illegal if H.B. 2023 were no longer the law.

We emphasize, further, that if some Arizonans today distrust third-party ballot collection, it is because of the fraudulent campaign mounted by proponents of H.B. 2023. Those proponents made strenuous efforts to persuade Arizonans that third-party ballot collectors have engaged in election fraud. To the degree that there has been any fraud, it has been the false and race-based claims of the proponents of H.B. 2023. It would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation.

The district court clearly erred in finding that this factor does not weigh in Plaintiffs' favor. This factor either weighs in Plaintiffs' favor or is, at best, neutral.

viii. Assessment

The district court made the same overall assessment of the Senate factors in addressing H.B. 2023 as in addressing Arizona's policy of discarding OOP ballots. As it did with respect to OOP ballots, the court concluded that Plaintiffs had not carried their burden at step two. Here, too, the district court's conclusion was clearly erroneous. Contrary to the court's conclusion, Plaintiffs have successfully shown that six of the Senate factors weigh in their favor and that the remaining factor weighs in their favor or is neutral.

c. Summary

We hold that the district court clearly erred in holding that Plaintiffs' challenge to H.B. 2023 failed under the results test. We hold that Plaintiffs have carried their burden at both steps one and two. First, they have shown that H.B. 2023 imposes a disparate burden on American Indian, Hispanic, and African American citizens, resulting in the "denial or abridgement of the right" of its citizens to vote "on account of race or color." 52 U.S.C. § 10301(a). Second, they have shown that, under the "totality of circumstances," the discriminatory burden imposed by H.B. 2023 is in part caused by or linked to "social and historical conditions" that have or currently produce "an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" and to participate in the political process. *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b).

We therefore conclude that H.B. 2023 violates the results test of Section 2 of the Voting Rights Act.

B. Intent Test: H.B. 2023

As indicated above, uncontested evidence in the district court established that before enactment of H.B. 2023, a large and disproportionate number of minority voters relied on third parties to collect and deliver their early ballots. Uncontested evidence also established that, beginning in 2011, Arizona Republicans made sustained efforts to outlaw third-party ballot collection. After a racially charged campaign, they finally succeeded in passing H.B. 2023. The question is whether the district court clearly erred in holding that H.B. 2023 does not violate the "intent test" of Section 2.

1. The Intent Test

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), provides the framework for analyzing a claim of intentional discrimination under Section 2. *See, e.g.*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220–21 (4th Cir. 2016). Under *Arlington Heights*, Plaintiffs have an initial burden of providing "[p]roof of racially discriminatory intent or purpose." *Arlington Heights*, 429 U.S. at 265. Plaintiffs need not show that discriminatory purpose was the "sole[]" or even a "primary" motive for the legislation. *Id.* Rather, Plaintiffs need only show that discriminatory purpose was "*a* motivating factor." *Id.* at 265–66 (emphasis added).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266. "[D]iscriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Because "[o]utright admissions of impermissible racial motivation are infrequent[,] . . . plaintiffs often must rely upon other evidence," including the broader context surrounding passage of the legislation. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). "In a vote denial case such as the one here, where the plaintiffs allege that the legislature imposed barriers to minority voting, this holistic approach is particularly important, for '[d]iscrimination today is more subtle than the visible methods used in 1965.'" *N.C. State Conference of NAACP*, 831 F.3d at 221 (quoting H.R. Rep. No. 109–478, at 6 (2006)).

Arlington Heights provided a non-exhaustive list of factors that a court should consider. *Arlington Heights*, 429 U.S. at 266. The factors include (1) the historical background; (2) the sequence of events leading to enactment, including any substantive or procedural departures from the normal legislative process; (3) the relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group. *Id.* at 266–68.

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In determining whether a defendant's burden has been carried, "courts must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices." *N.C. State Conference of NAACP*, 831 F.3d at 221 (emphases in original) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982)). "In the context of a § 2 discriminatory intent analysis, one of the critical background facts of which a court must take notice is whether voting is racially polarized." *Id*. "[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *Id.* at 222.

2. H.B. 2023 and the Intent Test

a. *Arlington Heights* Factors and Initial Burden of Proof

The district court wrote, "Having considered [the *Arlington Heights*] factors, the Court finds that H.B. 2023 was not enacted with a racially discriminatory purpose." *Reagan*, 329 F. Supp. 3d at 879. The court then went on to discuss each of the four factors, but did not attach any particular weight to any of them. In holding that the Plaintiffs had not shown that discriminatory purpose was "a motivating factor," the district court clearly erred.

We address the *Arlington Heights* factors in turn.

i. Historical Background

"A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *N.C. State Conference of NAACP*, 831 F.3d at 223–24; *see Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."). As recounted above, the Arizona legislature has a long history of race-based discrimination, disenfranchisement, and voter suppression, dating back to Arizona's territorial days. Further, the history of H.B. 2023 itself reveals invidious purposes.

In addressing the "historical background" factor, the district court mentioned briefly the various legislative efforts to restrict third-party ballot collection that had been "spearheaded" by Senator Shooter, described briefly

Senator Shooter's allegations of third-party ballot fraud, and alluded to the "racially-tinged" LaFaro Video. *Reagan*, 329 F. Supp. 3d at 879–80. But the district court discounted their importance. We discuss the court's analysis below, under the third *Arlington Heights* factor.

ii. Sequence of Events Leading to Enactment

"The specific sequence of events leading up to the challenged decision . . . may shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267. We recounted above the sequence of events leading to the enactment of H.B. 2023. The district court acknowledged this history but again discounted its importance. We discuss the court's analysis below, under the third *Arlington Heights* factor.

iii. Relevant Legislative History

"The legislative . . . history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body[.]" *Id.* at 268. The district court found that legislators voted for H.B. 2023 in response to the "unfounded and often farfetched allegations of ballot collection fraud" made by former Senator Shooter, and the "racially-tinged LaFaro Video." *Reagan*, 329 F. Supp. 3d at 880. As Chief Judge Thomas wrote: "Because there was 'no direct evidence of ballot collection fraud . . . presented to the legislature or at trial,' the district court understood that Shooter's allegations and the LaFaro Video were *the* reasons the bill passed." *DNC*, 904 F.3d at 748 (Thomas, C.J., dissenting) (quoting *Reagan*, 329 F. Supp. 3d at 880) (emphasis in original).

Senator Shooter was one of the major proponents of the efforts to limit third-party ballot collection and was influential in the passage of H.B. 2023. *Reagan*, 329 F. Supp. 3d at 879. According to the district court, Senator Shooter made "demonstrably false" allegations of ballot collection fraud. *Id.* at 880. Senator Shooter's efforts to limit ballot collection were motivated in substantial part by the "high degree of racial polarization in his district." *Id.* at 879. He was "motivated by a desire to eliminate" the increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted. *Id.*

The LaFaro Video provides even stronger evidence of racial motivation. Maricopa County Republican Chair LaFaro produced a video showing "a man of apparent Hispanic heritage"—a volunteer with a get-out-the-vote organization—apparently dropping off ballots at a polling place. *Id.* at 876. LaFaro's voice-over narration included unfounded statements, *id.* at 877, "that the man was acting to stuff the ballot box" and that LaFaro "knew that he was a thug," *id.* at 876. The video was widely distributed. It was "shown at Republican district meetings," "posted on Facebook and YouTube," and "incorporated into a television advertisement." *Id.* at 877.

The district court used the same rationale to discount the importance of all of the first three *Arlington Heights* factors. It pointed to the "sincere belief," held by some legislators, that fraud in third-party ballot collection was a problem that needed to be addressed. The district court did so even though it recognized that the belief was based on the false and race-based allegations of fraud by Senator Shooter and other proponents of H.B. 2023. The court wrote: "Shooter's allegations and the LaFaro Video were successful in

convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting[.]" *Id.* at 880.

We accept the district court's conclusion that some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed. However, as the district court found, that sincere belief had been fraudulently created by Senator Shooter's false allegations and the "racially-tinged" LaFaro video. Even though some legislators did not themselves have a discriminatory purpose, that purpose may be attributable to their action under the familiar "cat's paw" doctrine. The doctrine is based on the fable, often attributed to Aesop, in which a clever monkey induces a cat to use its paws to take chestnuts off of hot coals for the benefit of the monkey.

For example, we wrote in *Mayes v. Winco Holdings, Inc.*, 846 F.3d 1274 (9th Cir. 2017):

> [T]he animus of a supervisor can affect an employment decision if the supervisor "influenced or participated in the decisionmaking process." *Dominguez-Curry* [*v. Nev. Transp. Dep't*], 424 F.3d [1027,] 1039–40 [(9th Cir. 2017)]. Even if the supervisor does not participate in the ultimate termination decision, a "supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's

> recommendation, entirely justified." *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011).

Id. at 1281; *see also Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) ("[I]f a subordinate . . . sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process.").

The good-faith belief of these sincere legislators does not show a lack of discriminatory intent behind H.B. 2023. Rather, it shows that well meaning legislators were used as "cat's paws." Convinced by the false and race-based allegations of fraud, they were used to serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies.

We hold that the district court clearly erred in discounting the importance of the first three *Arlington Heights* factors. We hold that all three factors weigh in favor of showing that discriminatory intent was a motivating factor in enacting H.B. 2023.

iv. Disparate Impact on a Particular Racial Group

"The impact of the official action[,] whether it 'bears more heavily on one race than another,' may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights*, 429 U.S.

at 266 (internal citation omitted). As described above, uncontested evidence shows that H.B. 2023 has an adverse and disparate impact on American Indian, Hispanic, and African American voters. The district court found that the legislature "was aware" of the impact of H.B. 2023 on what the court called "low-efficacy minority communities." *Reagan*, 329 F. Supp. 3d at 881.

It appears that the district court weighed this factor in favor of showing discriminatory intent as a motivating factor in enacting H.B. 2023. The court did not clearly err in so doing.

v. Assessment

We hold that the district court clearly erred in holding that Plaintiffs failed to carry their initial burden of proof of showing that racial discrimination was a motivating factor leading to the enactment of H.B. 2023. We hold that all four of the *Arlington Heights* factors weigh in favor of Plaintiffs. Our holding does not mean that the majority of the Arizona state legislature "harbored racial hatred or animosity toward any minority group." *N.C. State Conference of NAACP*, 831 F.3d at 233. "But the totality of the circumstances"—Arizona's long history of race-based voting discrimination; the Arizona legislature's unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat; the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023; the substantial increase in American Indian and Hispanic voting attributable to ballot collection that was targeted by H.B. 2023; and the degree of racially polarized voting in Arizona—"cumulatively and unmistakably reveal" that

racial discrimination was *a* motivating factor in enacting H.B. 2023. *Id*.

b. Would H.B. 2023 Otherwise Have Been Enacted

At the second step of the *Arlington Heights* analysis, Arizona has the burden of showing that H.B. 2023 would have been enacted without racial discrimination as a motivating factor. Because the district court held that Plaintiffs had not carried their initial burden, it did not reach the second step of the *Arlington Heights* analysis.

Although there is no holding of the district court directed to *Arlington Heights*' second step, the court made a factual finding that H.B. 2023 would not have been enacted without racial discrimination as a motivating factor. The court specifically found that H.B. 2023 would not have been enacted without Senator Shooter's and LaFaro's false and race-based allegations of voter fraud. The court wrote, "The legislature was motivated by a misinformed belief that ballot collection fraud was occurring, but a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." *Reagan*, 329 F. Supp. 3d at 882. That is, members of the legislature, based on the "misinformed belief" created by Shooter, LaFaro, and their allies and serving as their "cat's paws," voted to enact H.B. 2023. *See Poland*, 494 F.3d at 1182. Based on the court's finding, we hold that Arizona has not carried its burden of showing that H.B. 2023 would have been enacted without the motivating factor of racial discrimination.

c. Summary

We hold that the district court clearly erred in holding that Plaintiffs failed to establish that H.B. 2023 violates the intent test of Section 2 of the VRA. A holding that H.B. 2023 violates the intent test of Section 2 necessarily entails a holding that it also violates the Fifteenth Amendment.

III. Response to Dissents

We respectfully disagree with our dissenting colleagues. For the most part, our response to their contentions is contained in the body of our opinion and needs no elaboration. Several contentions, however, merit a specific response.

A. Response to the First Dissent

Our first dissenting colleague, Judge O'Scannlain, makes several mistakes.

First, our colleague contends that H.B. 2023 does not significantly change Arizona law. Our colleague writes:

> For years, Arizona has restricted who may handle early ballots. Since 1992, Arizona has prohibited anyone but the elector himself from possessing "that elector's *unvoted* absentee ballot." 1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B. 1390) (West). In 2016, Arizona enacted *a parallel regulation*, H.B.

Excerpt from the Opinion of the Court
Supreme Court of the United States
Brnovich v. DNC

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL. *v.* DEMOCRATIC NATIONAL COMMITTEE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–1257. Argued March 2, 2021—Decided July 1, 2021*

Arizona law generally makes it very easy to vote. Voters may cast their ballots on election day in person at a traditional precinct or a "voting center" in their county of residence. Ariz. Rev. Stat. §16–411(B)(4). Arizonans also may cast an "early ballot" by mail up to 27 days before an election, §§16–541, 16–542(C), and they also may vote in person at an early voting location in each county, §§16–542(A), (E). These cases involve challenges under §2 of the Voting Rights Act of 1965 (VRA) to aspects of the State's regulations governing precinct-based election-day voting and early mail-in voting. First, Arizonans who vote in person on election day in a county that uses the precinct system must vote in the precinct to which they are assigned based on their address. See §16–122; see also §16–135. If a voter votes in the wrong precinct, the vote is not counted. Second, for Arizonans who vote early by mail, Arizona House Bill 2023 (HB 2023) makes it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed. §§16–1005(H)–(I).

The Democratic National Committee and certain affiliates filed suit, alleging that both the State's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction had an adverse and disparate effect on the State's American Indian, Hispanic, and African-American citizens in violation of §2 of the VRA. Additionally, they alleged that the ballot-collection restriction was "enacted with discriminatory

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*Together with No. 19–1258, *Arizona Republican Party et al.* v. *Democratic National Committee et al.*, also on certiorari to the same court.

intent" and thus violated both §2 of the VRA and the Fifteenth Amendment. The District Court rejected all of the plaintiffs' claims. The court found that the out-of-precinct policy had no "meaningfully disparate impact" on minority voters' opportunities to elect representatives of their choice. Turning to the ballot-collection restriction, the court found that it was unlikely to cause "a meaningful inequality" in minority voters' electoral opportunities and that it had not been enacted with discriminatory intent. A divided panel of the Ninth Circuit affirmed, but the en banc court reversed. It first concluded that both the out-of-precinct policy and the ballot-collection restriction imposed a disparate burden on minority voters because they were more likely to be adversely affected by those rules. The en banc court also held that the District Court had committed clear error in finding that the ballot-collection law was not enacted with discriminatory intent.

Held: Arizona's out-of-precinct policy and HB 2023 do not violate §2 of the VRA, and HB 2023 was not enacted with a racially discriminatory purpose. Pp. 12–37.

(a) Two threshold matters require the Court's attention. First, the Court rejects the contention that no petitioner has Article III standing to appeal the decision below as to the out-of-precinct policy. All that is needed to entertain an appeal of that issue is one party with standing. *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___, ___, n. 6. Attorney General Brnovich, as an authorized representative of the State (which intervened below) in any action in federal court, fits the bill. See *Virginia House of Delegates* v. *Bethune-Hill*, 587 U. S. ___, ___. Second, the Court declines in these cases to announce a test to govern all VRA §2 challenges to rules that specify the time, place, or manner for casting ballots. It is sufficient for present purposes to identify certain guideposts that lead to the Court's decision in these cases. Pp. 12–13.

(b) The Court's statutory interpretation starts with a careful consideration of the text. Pp. 13–25.

(1) The Court first construed the current version of §2 in *Thornburg* v. *Gingles*, 478 U. S. 30, which was a vote-dilution case where the Court took its cue from §2's legislative history. The Court's many subsequent vote-dilution cases have followed the path *Gingles* charted. Because the Court here considers for the first time how §2 applies to generally applicable time, place, or manner voting rules, it is appropriate to take a fresh look at the statutory text. Pp. 13–14.

(2) In 1982, Congress amended the language in §2 that had been interpreted to require proof of discriminatory intent by a plurality of the Court in *Mobile* v. *Bolden*, 446 U. S. 55. In place of that language, §2(a) now uses the phrase "in a manner which results in a denial or

abridgement of the right . . . to vote on account of race or color." Section 2(b) in turn explains what must be shown to establish a §2 violation. Section 2(b) states that §2 is violated only where "the political processes leading to nomination or election" are not "*equally open* to participation" by members of the relevant protected group "*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." (Emphasis added.) In §2(b), the phrase "in that" is "used to specify the respect in which a statement is true." New Oxford American Dictionary 851. Thus, equal openness and equal opportunity are not separate requirements. Instead, it appears that the core of §2(b) is the requirement that voting be "equally open." The statute's reference to equal "opportunity" may stretch that concept to some degree to include consideration of a person's ability to use the means that are equally open. But equal openness remains the touchstone. Pp. 14–15.

(3) Another important feature of §2(b) is its "totality of circumstances" requirement. Any circumstance that has a logical bearing on whether voting is "equally open" and affords equal "opportunity" may be considered. Pp. 15–21.

(i) The Court mentions several important circumstances but does not attempt to compile an exhaustive list. Pp. 15–19.

(A) The size of the burden imposed by a challenged voting rule is highly relevant. Voting necessarily requires some effort and compliance with some rules; thus, the concept of a voting system that is "equally open" and that furnishes equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting." *Crawford* v. *Marion County Election Bd.*, 553 U. S. 181, 198. Mere inconvenience is insufficient. P. 16.

(B) The degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a relevant consideration. The burdens associated with the rules in effect at that time are useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally "open" or furnishing an equal "opportunity" to vote in the sense meant by §2. Widespread current use is also relevant. Pp. 17–18.

(C) The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider. Even neutral regulations may well result in disparities in rates of voting and noncompliance with voting rules. The mere fact that there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. And small disparities should not be artificially magnified. P. 18.

(D) Consistent with §2(b)'s reference to a States' "political

processes," courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision. Thus, where a State provides multiple ways to vote, any burden associated with one option cannot be evaluated without also taking into account the other available means. P. 18.

(E) The strength of the state interests—such as the strong and entirely legitimate state interest in preventing election fraud—served by a challenged voting rule is an important factor. Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. In determining whether a rule goes too far "based on the totality of circumstances," rules that are supported by strong state interests are less likely to violate §2. Pp. 18–19.

(ii) Some factors identified in *Thornburg* v. *Gingles,* 478 U. S. 30, were designed for use in vote-dilution cases and are plainly inapplicable in a case that involves a challenge to a facially neutral time, place, or manner voting rule. While §2(b)'s "totality of circumstances" language permits consideration of certain other *Gingles* factors, their only relevance in cases involving neutral time, place, and manner rules is to show that minority group members suffered discrimination in the past and that effects of that discrimination persist. The disparate-impact model employed in Title VII and Fair Housing Act cases is not useful here. Pp. 19–21.

(4) Section 2(b) directs courts to consider "the totality of circumstances," but the dissent would make §2 turn almost entirely on one circumstance: disparate impact. The dissent also would adopt a least-restrictive means requirement that would force a State to prove that the interest served by its voting rule could not be accomplished in any other less burdensome way. Such a requirement has no footing in the text of §2 or the Court's precedent construing it and would have the potential to invalidate just about any voting rule a State adopts. Section 2 of the VRA provides vital protection against discriminatory voting rules, and no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated. Even so, §2 does not transfer the States' authority to set non-discriminatory voting rules to the federal courts. Pp. 21–25.

(c) Neither Arizona's out-of-precinct policy nor its ballot-collection law violates §2 of the VRA. Pp. 25–34.

(1) Having to identify one's polling place and then travel there to vote does not exceed the "usual burdens of voting." *Crawford*, 553 U. S., at 198. In addition, the State made extensive efforts to reduce the impact of the out-of-precinct policy on the number of valid votes ultimately cast, *e.g.,* by sending a sample ballot to each household that includes a voter's proper polling location. The burdens of identifying

and traveling to one's assigned precinct are also modest when considering Arizona's "political processes" as a whole. The State offers other easy ways to vote, which likely explains why out-of-precinct votes on election day make up such a small and apparently diminishing portion of overall ballots cast.

Next, the racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms. Of the Arizona counties that reported out-of-precinct ballots in the 2016 general election, a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot. For non-minority voters, the rate was around 0.5%. A procedure that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open.

Appropriate weight must be given to the important state interests furthered by precinct-based voting. It helps to distribute voters more evenly among polling places; it can put polling places closer to voter residences; and it helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote. Precinct-based voting has a long pedigree in the United States, and the policy of not counting out-of-precinct ballots is widespread.

The Court of Appeals discounted the State's interests because it found no evidence that a less restrictive alternative would threaten the integrity of precinct-based voting. But §2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives. Considering the modest burdens allegedly imposed by Arizona's out-of-precinct policy, the small size of its disparate impact, and the State's justifications, the rule does not violate §2. Pp. 25–30.

(2) Arizona's HB 2023 also passes muster under §2. Arizonans can submit early ballots by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office. These options entail the "usual burdens of voting," and assistance from a statutorily authorized proxy is also available. The State also makes special provision for certain groups of voters who are unable to use the early voting system. See §16–549(C). And here, the plaintiffs were unable to show the extent to which HB 2023 disproportionately burdens minority voters.

Even if the plaintiffs were able to demonstrate a disparate burden caused by HB 2023, the State's "compelling interest in preserving the integrity of its election procedures" would suffice to avoid §2 liability. *Purcell* v. *Gonzalez*, 549 U. S. 1, 4. The Court of Appeals viewed the State's justifications for HB 2023 as tenuous largely because there was no evidence of early ballot fraud in Arizona. But prevention of fraud

is not the only legitimate interest served by restrictions on ballot collection. Third-party ballot collection can lead to pressure and intimidation. Further, a State may take action to prevent election fraud without waiting for it to occur within its own borders. Pp. 30–34.

(d) HB 2023 was not enacted with a discriminatory purpose, as the District Court found. Appellate review of that conclusion is for clear error. *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287–288. The District Court's finding on the question of discriminatory intent had ample support in the record. The court considered the historical background and the highly politicized sequence of events leading to HB 2023's enactment; it looked for any departures from the normal legislative process; it considered relevant legislative history; and it weighed the law's impact on different racial groups. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266–268. The court found HB 2023 to be the product of sincere legislative debate over the wisdom of early mail-in voting and the potential for fraud. And it took care to distinguish between racial motives and partisan motives. The District Court's interpretation of the evidence was plausible based on the record, so its permissible view is not clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–574. The Court of Appeals concluded that the District Court committed clear error by failing to apply a "cat's paw" theory—which analyzes whether an actor was a "dupe" who was "used by another to accomplish his purposes." That theory has its origin in employment discrimination cases and has no application to legislative bodies. Pp. 34–37.

948 F. 3d 989, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

Excerpt from the Opinion of the Court
(cont.)
Supreme Court of the United States
Brnovich v. DNC

Delivered by Justice Alito in which Justices Roberts, Thomas, Gorsuch, Kavanaugh, and Barrett joined.

elections to vote in whichever place is most convenient even if they know that it is not their assigned polling place. See *id.*, at 1065–1066 (opinion of Bybee, J.).

In light of the modest burdens allegedly imposed by Arizona's out-of-precinct policy, the small size of its disparate impact, and the State's justifications, we conclude the rule does not violate §2 of the VRA.[18]

B

HB 2023 likewise passes muster under the results test of §2. Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters waiting to vote in person. 329 F. Supp. 3d, at 839 (citing ECF Doc. 361, ¶57). Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the "usual burdens of voting." *Crawford*, 553 U. S., at 198 (opinion of Stevens, J.). And voters can also ask a statutorily authorized proxy—a family member, a household member, or a caregiver—to mail a ballot or drop

[18] In arguing that Arizona's out-of-precinct policy violates §2, the dissent focuses on the State's decisions about the siting of polling places and the frequency with which voting precincts are changed. See *post*, at 33 ("Much of the story has to do with the siting and shifting of polling places"). But the plaintiffs did not challenge those practices. See 329 F. Supp. 3d, at 873 ("Plaintiffs . . . do not challenge the manner in which Arizona counties allocate and assign polling places or Arizona's requirement that voters re-register to vote when they move"). The dissent is thus left with the unenviable task of explaining how something like a 0.5% disparity in discarded ballots between minority and non-minority groups suffices to render Arizona's political processes not equally open to participation. See *supra,* at 27–28. A voting rule with that effect would not be—to use the dissent's florid example—one that a "minority vote suppressor in Arizona" would want in his or her "bag of tricks." *Post*, at 33.

it off at any time within 27 days of an election.

Arizona also makes special provision for certain groups of voters who are unable to use the early voting system. Every county must establish a special election board to serve voters who are "confined as the result of a continuing illness or physical disability," are unable to go to the polls on election day, and do not wish to cast an early vote by mail. Ariz. Rev. Stat. Ann. §16–549(C) (Cum. Supp. 2020). At the request of a voter in this group, the board will deliver a ballot in person and return it on the voter's behalf. §§16–549(C), (E). Arizona law also requires employers to give employees time off to vote when they are otherwise scheduled to work certain shifts on election day. §16–402 (2015).

The plaintiffs were unable to provide statistical evidence showing that HB 2023 had a disparate impact on minority voters. Instead, they called witnesses who testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged. 329 F. Supp. 3d, at 868, 870. But from that evidence the District Court could conclude only that prior to HB 2023's enactment, "minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." *Id.*, at 870. How much more, the court could not say from the record. *Ibid.* Neither can we. And without more concrete evidence, we cannot conclude that HB 2023 results in less opportunity to participate in the political process.[19]

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[19] Not one to let the absence of a key finding get in the way, the dissent concludes from its own review of the evidence that HB 2023 "prevents many Native Americans from making effective use of one of the principal means of voting in Arizona," and that "[w]hat is an inconsequential burden for others is for these citizens a severe hardship." *Post*, at 38. What is missing from those statements is any evidence about the actual size of the disparity. (For that matter, by the time the dissent gets around to assessing HB 2023, it appears to have lost its zeal for statistical significance, which is nowhere to be seen. See *post*, at 35–40, and n. 13.) The

Even if the plaintiffs had shown a disparate burden caused by HB 2023, the State's justifications would suffice to avoid §2 liability. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell* v. *Gonzalez*, 549 U. S. 1, 4 (2006) (*per curiam*) (internal quotation marks omitted). Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that "[a]bsentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Report of the Comm'n on Fed. Election Reform, Building Confidence in U. S. Elections 46 (Sept. 2005).

The Commission warned that "[v]ote buying schemes are

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reader will search in vain to discover where the District Court "found" to what extent HB 2023 would make it "'significantly more difficult'" for Native Americans to vote. *Post,* at 39, n. 15 (citing 329 F. Supp. 3d, at 868, 870). Rather, "[b]ased on" the very same evidence the dissent cites, the District Court could find only that minorities were "generically" more likely than non-minorities to make use of third-party ballot-collection. *Id.,* at 870. The District Court's explanation as to why speaks for itself:

"Although there are significant socioeconomic disparities between minorities and non-minorities in Arizona, these disparities are an imprecise proxy for disparities in ballot collection use. Plaintiffs do not argue that all or even most socioeconomically disadvantaged voters use ballot collection services, nor does the evidence support such a finding. Rather, the anecdotal estimates from individual ballot collectors indicate that a relatively small number of voters have used ballot collection services in past elections." *Ibid.*; see also *id.,* at 881 ("[B]allot collection was used as a [get-out-the-vote] strategy in mostly low-efficacy minority communities, though the Court cannot say how often voters used ballot collection, *nor can it measure the degree or significance of any disparities in its usage*" (emphasis added)).

far more difficult to detect when citizens vote by mail," and it recommended that "States therefore 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." *Ibid.* The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to "the voter, an acknowledged family member, the U. S. Postal Service or other legitimate shipper, or election officials." *Id.*, at 47. HB 2023 is even more permissive in that it also authorizes ballot-handling by a voter's household member and caregiver. See Ariz. Rev. Stat. Ann. §16–1005(I)(2). Restrictions on ballot collection are also common in other States. See 948 F. 3d, at 1068–1069, 1088–1143 (Bybee, J., dissenting) (collecting state provisions).

The Court of Appeals thought that the State's justifications for HB 2023 were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. See *id.*, at 1045–1046. But prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. Section 2's command that the political processes remain equally open surely does not demand that "a State's political system sustain some level of damage before the legislature [can] take corrective action." *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 195 (1986). Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States. For example, the North Carolina Board of Elections invalidated the results of a 2018 race for a seat in the House of Representatives for

evidence of fraudulent mail-in ballots.[20] The Arizona Legislature was not obligated to wait for something similar to happen closer to home.[21]

As with the out-of-precinct policy, the modest evidence of racially disparate burdens caused by HB 2023, in light of the State's justifications, leads us to the conclusion that the law does not violate §2 of the VRA.

V

We also granted certiorari to review whether the Court of Appeals erred in concluding that HB 2023 was enacted with a discriminatory purpose. The District Court found that it

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[20] See Blinder, Election Fraud in North Carolina Leads to New Charges for Republican Operative, N. Y. Times, July 30, 2019, https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html; Graham, North Carolina Had No Choice, The Atlantic, Feb. 22, 2019, https://www.theatlantic.com/politics/archive/2019/02/north-carolina-9th-fraud-board-orders-new-election/583369/.

[21] The dissent's primary argument regarding HB 2023 concerns its effect on Native Americans who live on remote reservations. The dissent notes that many of these voters do not receive mail delivery at home, that the nearest post office may be some distance from their homes, and that they may not have automobiles. *Post,* at 36. We do not dismiss these problems, but for a number of reasons, they do not provide a basis for invalidating HB 2023. The burdens that fall on remote communities are mitigated by the long period of time prior to an election during which a vote may be cast either in person or by mail and by the legality of having a ballot picked up and mailed by family or household members. And in this suit, no individual voter testified that HB 2023 would make it significantly more difficult for him or her to vote. 329 F. Supp. 3d, at 871. Moreover, the Postal Service is required by law to "provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining." 39 U. S. C. §101(b); see also §403(b)(3). Small post offices may not be closed "solely for operating at a deficit," §101(b), and any decision to close or consolidate a post office may be appealed to the Postal Regulatory Commission, see §404(d)(5). An alleged failure by the Postal Service to comply with its statutory obligations in a particular location does not in itself provide a ground for overturning a voting rule that applies throughout an entire State.