

BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE: EXAMINING SECTION 2 OF THE VOTING RIGHTS ACT

ARTURO NAVA*

INTRODUCTION

The Supreme Court faces a critical juncture in shaping the future of voting rights in the United States. The Court’s consequential holding in *Shelby County v. Holder*,¹ effectively striking down Section 5 of the Voting Rights Act (VRA), opened the floodgates for new election laws restricting the right to vote.² Almost a decade later, Section 2,³ another core pillar of the VRA—the current safeguard against most racially discriminatory voting laws—is in jeopardy. In *Brnovich v. Democratic National Committee*,⁴ consolidated with *Arizona Republican Party v. Democratic National Committee*,⁵ the Court will not only rule on the legality of two Arizona statutes, but will likely weigh in on the appropriate test for assessing a wide array of vote-denial claims.⁶ The Court’s decision will have implications for voting rights for generations to come.⁷

In *Brnovich*, the Court will determine whether Arizona’s out-of-

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* J.D. Candidate, Duke University School of Law, Class of 2022. The author would like to thank the editors on the journal for their guidance and feedback on this piece.

1 See generally *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (holding Section 4(b) of the Voting Rights Act unconstitutional and effectively dismantling the Section 5 federal preclearance requirement).

2 Wendy Weiser and Max Feldman, *The State of Voting 2018*, BRENNAN CTR. FOR JUSTICE, 5 (June 5, 2018) https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf.

3 52 U.S.C. § 10301 (prohibiting voting policies that result in voter disenfranchisement based on race).

4 141 S. Ct. 222 (2020) (granting certiorari).

5 141 S. Ct. 221 (2020) (granting certiorari).

6 Amy Howe, *Justices to Consider Whether Arizona’s Coting Rules Discriminate Against Minorities*, SCOTUSBLOG (Feb. 16, 2021, 9:00 AM) <https://www.scotusblog.com/2021/02/justices-to-consider-whether-arizonas-voting-rules-discriminate-against-minorities/>.

7 *Id.*

precinct (OOP) policy and its ballot-collection law violate Section 2 of the VRA.⁸ The Ninth Circuit held that both voting provisions violate Section 2.⁹ The Supreme Court should affirm the Ninth Circuit’s decision, invoking the Section 2 Results Test adopted by multiple circuits, and find that a fact-specific inquiry should be preserved in assessing vote-denial claims.¹⁰ At a minimum, the Court should avoid establishing a bright-line rule as proposed by critics of the Section 2 Results Test.¹¹ Such a rigid rule runs the risk of masking the nuances that the courts must consider when assessing a vote-denial claim for potential racial discrimination.

I. FACTS

Arizonans have two methods of voting in elections: either in-person or by mail.¹² For in-person voting, counties can choose to either designate a specific precinct to each voter or operate county-wide “vote centers” that provide voters with flexibility in voting.¹³ Alternatively, voters can vote by mail as part of the State’s early voting process.¹⁴ Using this method, voters receive a ballot in their mailbox and can choose to either return the ballot back by mail or submit the ballot at a specified drop-off location.¹⁵

Arizona’s out-of-precinct policy requires that voters appear on the register of their designated voting precinct.¹⁶ If a voter is not listed on a precinct’s register, she can cast a provisional ballot.¹⁷ To determine whether the voter cast their ballot in the wrong precinct, the voter’s

8 Amy Howe, *February Argument Calendar Includes Immigration, Coting-rights Cases*, SCOTUSBLOG (Dec. 31, 2020, 1:30 PM) <https://www.scotusblog.com/2020/12/february-argument-calendar-includes-immigration-voting-rights-cases/>.

9 *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir. 2020).

10 *See* 52 U.S.C. § 10301 (invalidating voting policies or procedures that result in the “the denial or abridgment” of the right to vote based on race).

11 *See* Brief for the Cato Institute as Amicus Curiae Supporting Neither Side at 21, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (granting certiorari), *Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (granting certiorari) (filed Dec. 4, 2020) (Nos. 19-1257 and 19-1258) [hereinafter *Cato Amicus Brief*] (suggesting the Court should articulate a jurisprudential framework “free of balancing tests and other subjective standards”).

12 Brief of Arizona Secretary of State Katie Hobbs in Opposition to Certiorari at 4, *Brnovich*, 141 S. Ct. 222 (mem.), *Arizona Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (granting certiorari) (filed July 1, 2020) (Nos. 19-1257 and 19-1258) [hereinafter *Hobbs Brief*].

13 *Id.*

14 *Hobbs*, 948 F.3d at 999.

15 *Id.*

16 *Hobbs Brief*, *supra* note 12, at 6.

17 *Id.*

registration information is then reviewed, in which case the out-of-precinct ballot is tossed out “in its entirety.”¹⁸

For over twenty-five years, Arizona has offered voting by mail.¹⁹ Since its implementation in the 1990s, Arizona has closely regulated the practice of voting by mail by “prohibit[ing] anyone from possessing another voter’s unmarked early ballot” and “criminaliz[ing] fraudulent ballot-collection practices, including ‘knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to fix an election.’”²⁰ Nonetheless, in 2016, the Arizona legislature passed H.B. 2023, which criminalized “non-fraudulent third-party ballot collection.”²¹ Exceptions were made for a “family member, household member or caregiver of the voter.”²² Violations would be classified as a class six felony.²³

II. LEGAL BACKGROUND

Congress enacted the Voting Rights Act in 1965 to address racial discrimination in voting.²⁴ The Supreme Court substantially weakened the Voting Rights Act in its 2013 decision in *Shelby County v. Holder*.²⁵ In *Shelby County*, the Court found that the original formula used to determine which states and counties need to seek federal clearance before modifying their voting laws was outdated.²⁶ The Court reasoned that there was “no longer such a [racial] disparity” in voter registration and turnout, which had originally prompted the establishment of clearance measures that states had to abide by before modifying their voting procedures.²⁷ In doing so, the Supreme Court invalidated “the heart of

18 *Hobbs*, 948 F.3d at 999; *see also id.* (noting that the ballot invalidation includes races for which the OOP voter was eligible to vote for, including statewide officers, U.S. President, U.S. Senate, and many times Members of the U.S. House of Representatives).

19 *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 839 (D. Ariz. 2018).

20 *Hobbs* Brief, *supra* note 12, at 11 (citing ARIZ. REV. STAT. § 16-542(D) 2019 and ARIZ. REV. STAT. § 16-1005(A) 2016).

21 *Id.*

22 *Id.* at 11–12 (citing ARIZ. STAT. § 16-1005(H), (I)(2) 2016).

23 *Id.* at 12 (citing ARIZ. STAT. § 16-1005(H), (I)(2) 2016).

24 *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (The Act intended to establish remedies for voting discrimination “where it persists on a pervasive scale, and . . . strengthen[ed] existing remedies for pockets of voting discrimination elsewhere in the country.”).

25 *See generally* 570 U.S. 529 (2013) (invalidating the Section 5 federal preclearance requirement of the VRA).

26 *See id.* at 551 (“Coverage today is based on decades-old data and eradicated practices.”).

27 *See id.* at 537 (“Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities A jurisdiction could obtain such ‘preclearance’ only by proving that the change had neither ‘the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.’”).

the Voting Rights Act.”²⁸ Post-*Shelby County*, Section 2 has become the bedrock of challenges to racially discriminatory voting laws in the country.²⁹

In its original form, Section 2 was viewed largely as a restatement of the Fifteenth Amendment.³⁰ Congress amended the VRA in 1982, allowing parties to introduce Section 2 claims by either showing proof of discriminatory intent *or* discriminatory impact.³¹ Under modern election law jurisprudence, parties can show a violation of Section 2 through either the Results Test or the Intent Test.³² In its current amended form, Section 2 of the VRA reads:

No voting . . . standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political process . . . are not equally open to participation by members of a class . . . 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.³³

A. Results Test

The Ninth Circuit has adopted a two-step process when evaluating a vote-denial challenge under the Results Test of Section 2.³⁴ The court

28 Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>.

29 See *Election Law – Voting Rights – Ninth Circuit Holds Two Arizona Voting Laws are Unlawful Under Section 2 of the Voting Rights Act*, 134 HARV. L. REV. 862, 862 (2020) (discussing the recent shift to Section 2 jurisprudence in challenging discriminatory voting laws).

30 *Chisom v. Roemer*, 501 U.S. 380, 392 (1991). Compare Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”) (emphasis added), with U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

31 *Chisom*, 501 U.S. at 394 (emphasis added); see also *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (“Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the ‘results test’ . . .”).

32 *Democratic Nat’l Comm.v. Hobbs*, 948 F.3d 989, 1011 (9th Cir. 2020).

33 52 U.S.C. § 10301.

34 *Hobbs*, 948 F.3d at 1012.

first determines “whether the challenged standard, practice or procedure results in a *disparate burden* on members of the protected class.”³⁵ Second, the court examines whether, in considering the “totality of circumstances,” a relationship exists between the challenged practice and sociohistorical conditions.³⁶ Section 2’s totality of circumstances analysis is fact-specific.³⁷ The court weighs several factors when determining whether “a legally significant relationship” exists between the disparate burden on minority voters and the “social and historical conditions affecting them.”³⁸ There is no threshold of factors that must be met to establish a valid Section 2 claim.³⁹

B. Intent Test

Under the Intent Test, the initial burden rests on the plaintiff to show “proof of racially discriminatory intent or purpose.”⁴⁰ Discriminatory intent may be inferred “from the totality of the relevant facts.”⁴¹ Plaintiffs may rely on evidence that looks at the broader context pertaining to the legislation’s enactment.⁴² A broad review of the evidence is permissible because of the subtle nature of discrimination today, like the selective placement and relocation of voting precincts in lieu of literacy tests.⁴³ Once plaintiffs meet their burden of proof, defendants

35 *Id.* (recognizing that “a mere statistical disparity” is insufficient).

36 *Id.*

37 *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

38 *Hobbs*, 948 F.3d at 1012–13. (outlining the Senate Report that supplemented the 1982 VRA amendments). The list of factors includes, but is not limited to history of official discrimination in the state affecting minority groups right to vote, extent of racially polarized elections in the state, pattern of discriminatory practices, extent to which minority groups bear effects of discrimination in areas such as education, employment and health, overt or subtle racial appeals in political campaigns, extent to which minority groups have held elected office. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp.3d 824, 863 (D. Ariz. 2018).

39 *See Gingles*, 478 U.S. at 45 (“[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.”).

40 *Hobbs*, 948 F.3d at 1038 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). *Arlington Heights* established a set of factors to be considered when examining a provision, including (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. *See* 429 U.S. at 266–68.

41 *Washington v. Davis*, 426 U.S. 229, 242 (1976).

42 *Arlington Heights*, 429 U.S. at 266.

43 *See* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 221 (4th Cir. 2016) (“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.’” (quoting H.R. REP. NO. 109-478, at 6 (2006))).

must prove that the law would have been enacted without racial discrimination serving as the motivating factor.⁴⁴ Courts must look to the actual non-racial motivations to determine if these motives alone can justify the passage of the law.⁴⁵

III. PROCEDURAL HISTORY

In 2016, the Democratic National Committee and several affiliates (DNC) sued the state of Arizona to challenge its out-of-precinct policy and its ballot-collection law.⁴⁶ Plaintiffs argued that the out-of-precinct policy and H.B. 2023 violate Section 2 “by adversely and disparately *impacting* the electoral opportunities of Hispanic, African American, and Native American Arizonans.”⁴⁷ Plaintiffs also argued that H.B. 2023 violates Section 2 “because it was enacted with the *intent* to suppress voting by Hispanic and Native American voters.”⁴⁸

After a ten-day bench trial, the district court rejected the DNC’s claims.⁴⁹ First, the court held that, under the Results Test, the DNC failed to show that both the OOP policy and H.B. 2023 “impose[d] meaningfully disparate burdens on minority voters as compared to non-minority voters”.⁵⁰ The court found that Arizona’s OOP policy affected only a de minimis number of total voters and presented typical burdens associated with voting.⁵¹ As to H.B. 2023, the court pointed to the lack of quantifiable data and the relatively small number of voters that utilize ballot-collection practices to show that no substantial burden existed.⁵² Second, applying the Intent Test to H.B. 2023, the district court found that the law “was not enacted with a racially discriminatory

44 *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

45 *McCrary*, 831 F.3d at 221.

46 Brief for State Petitioners at 6, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (granting certiorari) (filed Nov. 30, 2020) (Nos. 19-1257 and 19-1258) [hereinafter Brief for State Petitioners]. The Arizona Republican Party, along with several elected officials, intervened as defendants. Brief for Private Petitioners at 11, *Ariz. Republican Party v. 831 F.3d 204*, 141 S. Ct. 221 (granting certiorari) (filed Nov. 30, 2020) (Nos. 19-1257 and 19-1258) [hereinafter Brief for Private Petitioners].

47 Brief for State Petitioners, *supra* note 46, at 6 (emphasis added). Plaintiffs also made First and Fourteenth Amendment Claims, which the district court rejected. *Democratic Nat’l Comm.*, 329 F. Supp.3d 824, 856, 862 (D. Ariz. 2018).

48 Brief for State Petitioners, *supra* note 46, at 6 (emphasis added).

49 *Id.* at 9.

50 *Id.*

51 *Id.* at 9–10.

52 *Id.* at 10–11.

purpose,” but rather, was introduced as an election security measure.⁵³ In a divided decision, the Ninth Circuit panel affirmed.⁵⁴

Plaintiffs appealed the decision, and the Ninth Circuit granted an en banc hearing.⁵⁵ Upon en banc review, the Ninth Circuit reversed.⁵⁶ First, the Ninth Circuit applied the two-step Results Test to review the OOP policy and H.B. 2023, assessing (1) whether each policy created a disparate burden on minority voters (beyond a mere statistical disparity) and (2) whether the totality of circumstances revealed a relationship between the policy in question and sociohistorical conditions.⁵⁷ The Ninth Circuit found that Arizona’s OOP policy had a disparate burden on minority voters in the state.⁵⁸ Under the totality of circumstances, the court concluded that Arizona’s OOP policy led to inequities in minority participation in the political process. The court followed a similar approach in assessing H.B. 2023’s validity under the Results Test of Section 2 of the VRA. Noting that minority voters disproportionately relied on ballot collection practices outlawed by H.B. 2023 relative to whites, the court found a disparate burden existed among minority communities as a result of the ballot-collection law.⁵⁹ The court then turned to step two—determining whether minorities had access to political processes under the totality of circumstances, finding that the ballot collection law inhibited such access.⁶⁰

Second, applying the Intent Test, the Ninth Circuit held that Arizona legislators passed H.B. 2023 with a discriminatory purpose.⁶¹ The court highlighted the initial attempts at passing similar legislation in 2011, relying on statements made by Arizona State Senator Don

⁵³ *Id.* at 11.

⁵⁴ *Id.* Judge Ikuta was joined by Judge Bea, with Judge Thomas dissenting. *See generally* Democratic Nat’l Comm. v. Reagan 904 F.3d 686 (9th Cir. 2018).

⁵⁵ Brief for State Petitioners, *supra* note 46, at 12.

⁵⁶ *Id.* A majority (7-4) held that the provisions in question violated the Results Test of § 2, and (6-5) that the ballot collection law was passed with an intent to discriminate, violating both § 2 and the Fifteenth Amendment.

⁵⁷ *See* Respondents’ Brief in Opposition to Petitioners for Writ of Certiorari at 6, Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 222 (mem.), *Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (mem.) (filed Jul. 1, 2020) (Nos. 19-1257 and 19-1258) [hereinafter Brief for Respondents].

⁵⁸ *Id.* at 9.

⁵⁹ *See id.* at 13–14 (highlighting “a variety of socioeconomic-related reasons” that make in-person voting disproportionately “difficult or impossible” for communities of color, such as community sprawl and lack of adequate transportation in American Indian lands).

⁶⁰ Brief for Respondents, *supra* note 57, at 14–15.

⁶¹ *Id.* at 16.

Shooter.⁶² Senator Shooter’s proposal failed to meet the federal pre-clearance requirements in place at the time.⁶³ Additionally, a “racially tinged” video produced by Maricopa County Republican Chair, A.J. LaFaro, added to the racial animus that the court noted influenced the passage of H.B. 2023.⁶⁴ Ultimately, the court found that, but-for these legislators’ actions, H.B. 2023 would not have been enacted.⁶⁵

The contested decision resulted in two dissents.⁶⁶ The first dissent, penned by Judge O’Scannlain, rejected the “implicit” suggestion in the majority’s opinion that any facially neutral law with a statistical racial disparity is discriminatory.⁶⁷ Judge O’Scannlain noted how designated voting precincts impose only “burdens traditionally associated with voting.”⁶⁸ With regards to ballot collections, Judge O’Scannlain highlighted the trial court’s finding that plaintiffs presented no evidence to conclude that minority voters were disparately burdened in their ability to elect candidates of their choice.⁶⁹ As to H.B. 2023’s discriminatory intent claims, Judge O’Scannlain criticized the majority for extrapolating racial animus on behalf of the entire legislature from the actions of one senator.⁷⁰ The second dissent, penned by Judge Bybee, categorized the practices at issue as “[t]ime, place, and manner restrictions,”⁷¹ distinguishing them from “status-based restraints.”⁷² He cautioned that such conflation jeopardizes the legality of “countless ordinary election rules.”⁷³ Both dissents scrutinize the en banc purportedly overbroad interpretation of Section 2 in its challenges to the vote denial claims in question.

62 *Id.* at 17.

63 *Id.* (“According to DOJ records, Arizona’s Elections Director, who had helped draft the provision, had admitted to DOJ that the provision was ‘targeted at voting practices in predominantly Hispanic areas.’” (quoting *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp.3d 824, 881 (D. Ariz. 2018))). See *supra* text accompanying note 27.

64 See *id.* at 18 (“The [LaFaro] video showed ‘a man of apparent Hispanic heritage’ purportedly dropping off ballots at a polling place. LaFaro’s voice-over narration included unfounded and racist statements, ‘that the man was acting to stuff the ballot box’ and that LaFaro ‘did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug.’”)

65 *Id.* at 19.

66 Brief for State Petitioners, *supra* note 46, at 13.

67 Brief for Private Petitioners, *supra* note 46, at 14.

68 *Id.*

69 *Id.*

70 *Id.* at 15.

71 *Id.*

72 *Id.*

73 Brief for State Petitioners, *supra* note 46, at 18.

IV. ARGUMENTS

A. *Petitioners' Arguments*

Petitioners, Brnovich and the Arizona Republican Party, outline three core arguments for upholding Arizona's out-of-precinct policy and H.B. 2023. First, Petitioners argue that a law violates Section 2 only when it “causes a substantial disparity” for members of a protected class to *both* take part in the political process and in their ability to affect the outcomes of an election.⁷⁴ Second, Petitioners argue that had the Ninth Circuit properly applied the Results Test, it would have found that the OOP policy and H.B. 2023 do not violate Section 2.⁷⁵ Lastly, Petitioners argue that the Ninth Circuit erred in ruling that legislators enacted H.B. 2023 with discriminatory intent.⁷⁶

1. Substantial Disparity Requirement

Petitioners deviate from the Ninth Circuit's interpretation of Section 2 by noting that a law “results in” a vote denial only when it generates a substantial disparity in opportunity for minority voters to engage in the electoral process.⁷⁷ Articulating their own two-part test in challenging voting laws under Section 2, Petitioners argue that Section 2 requires laws to provide equal *treatment*, rather than to guarantee equal *outcomes*, to the general population.⁷⁸

The first step is to assess whether “plaintiffs have identified a substantial disparate impact on minority voters' ability to participate in the electoral process *and* to elect representatives of their choice[.]”⁷⁹ The racial disparity must be so substantial as to demonstrate that the burden extends beyond the typical burdens associated with voting, and in fact “deni[es] or abridg[es]” minority voters' right to vote.⁸⁰ The court must assess the voting system *as a whole* to determine whether the disparate burden is substantial.⁸¹ If the first step is met, the court must then determine whether “[the] substantial disparate impact is *caused*

⁷⁴ *Id.*

⁷⁵ *Id.* at 33.

⁷⁶ *Id.* at 45.

⁷⁷ *Id.* at 18.

⁷⁸ *Id.* at 14.

⁷⁹ Brief for State Petitioners, *supra* note 46, at 15.

⁸⁰ *Id.* at 14.

⁸¹ *Id.* (“Isolating one provision's alleged impact from the opportunities provided by the State's entire system flouts Section 2's command to consider ‘the totality of circumstances.’”).

by the challenged law[.]”⁸² Here, Plaintiff’s must establish a “causal connection” between the law in question and the substantial disparate impact.⁸³ Both parts are analyzed under the “totality of circumstances.”⁸⁴

Petitioners argue that the Ninth Circuit applied a less demanding standard for providing a Section 2 vote-denial claim than what the text requires.⁸⁵ They allege the Ninth Circuit has established an “any-thing-more-than-de-minimis-impact-suffices” standard.⁸⁶ Petitioners further argue that the Ninth Circuit steered away from requiring a causal connection between the challenged law and the substantial disparity.⁸⁷

2. Plaintiffs Fail to Meet the Substantial Disparity Threshold

According to Petitioners, Plaintiffs failed to prove that Arizona’s OOP policy and H.B. 2023 created a substantial disparity in electoral opportunities for minority voters in the state.⁸⁸ With regards to the State’s OOP policy, Petitioners note that the “race-neutral” OOP policy gives all voters the “equal opportunity” to vote in their designated precinct, or to choose from the various voting options available.⁸⁹ Further, Petitioners find the Ninth Circuit’s “totality of circumstances” review insufficient.⁹⁰ They then argue that Plaintiffs failed to show the OOP policy *caused* voters to disproportionately vote at the wrong precinct.⁹¹ Lastly, Petitioners argue that the Ninth Circuit erred in applying the *Gingles* factors in this context, a vote denial case.⁹²

Petitioners raise a similar argument for the ballot-collection law. First, Petitioners note that Plaintiffs failed to show a substantial disparity in minority voters’ engagement in the electoral process.⁹³ Noting that the DNC provided no quantitative data about the impact of ballot-collection laws on minority voters, Plaintiffs allegedly relied solely on

⁸² *Id.* at 19 (emphasis added).

⁸³ *Id.* at 23.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.* at 24.

⁸⁶ *Id.* at 25.

⁸⁷ *Id.* at 24.

⁸⁸ *Id.* at 33.

⁸⁹ *Id.* at 16–17.

⁹⁰ *Id.* at 36.

⁹¹ See Brief for State Petitioners, *supra* note 46, at 17.

⁹² *Id.* at 39 (noting that making a state liable for non-parties’ actions through historical conditions of discrimination is an overextension of Section 2 beyond its textual limits).

⁹³ *Id.* at 40.

“select anecdotes.”⁹⁴ Petitioners argue that, even taking anecdotes at face value, no substantial disparity exists because only a small portion of Arizona voters make use of the ballot-collection practice.⁹⁵ As such, it is impossible to find a causal relationship between H.B. 2023’s passage and its role in establishing a substantial disparity in minority voter engagement because there is no evidence that a disparity exists to begin with.⁹⁶

3. Ninth Circuit’s Legal Error in Finding Intentional Discrimination

Additionally, Petitioners argue that the Ninth Circuit erred in finding that legislators enacted H.B. 2023 with discriminatory intent. They first contend the Ninth Circuit erred in applying the cat’s paw theory in “imput[ing] unlawful intent” to members of the Arizona Legislature.⁹⁷ They then challenge the Ninth Circuit’s suggestion that election-integrity measures must be implemented only in response to election issues within the state.⁹⁸ Instead, states can take “proactive efforts” to combat voter fraud, and insisting otherwise, according to Petitioners, breaks with the Court’s precedent.⁹⁹

B. Respondents’ Arguments

Respondents, the Democratic National Committee and Secretary Hobbs, outline two primary arguments in favor of upholding the Ninth Circuit’s en banc decision. First, the Ninth Circuit properly applied the Section 2 Results Test.¹⁰⁰ Second, the Ninth Circuit properly applied the Intent Test in holding that legislators enacted H.B. 2023 with a discriminatory purpose.¹⁰¹

1. The Ninth Circuit Properly Applied the Section 2 Results Test

Respondents argue that the Ninth Circuit correctly applied the Results Test under Section 2 for assessing vote-denial claims.¹⁰² They argue

⁹⁴ *Id.* at 41.

⁹⁵ *Id.* at 41–42.

⁹⁶ *Id.* at 43.

⁹⁷ See Brief for State Petitioners, *supra* note 46, at 46 (distinguishing the Congressional setting, where legislators are viewed as co-equals, from an employment setting, where there are hierarchical employment relationships).

⁹⁸ *Id.* at 47.

⁹⁹ *Id.* at 47–48.

¹⁰⁰ *Id.* at 20.

¹⁰¹ *Id.* at 33.

¹⁰² *Id.* at 20.

Petitioners mischaracterized the Ninth Circuit’s en banc decision when concluding that the Ninth Circuit finds Section 2 violations *any time* there is more than a de minimis impact on minority voters.¹⁰³ Respondents stress that a bare statistical showing of a disparate impact is not enough to establish a Section 2 violation.¹⁰⁴ Rather, the Court properly applied a “fact-intensive, two-part test” derived from Section 2’s plain text, which was further established in *Gingles*.¹⁰⁵

Respondents argue that the Ninth Circuit’s analysis met both prongs of the Section 2 Results Test.¹⁰⁶ They note that the Ninth Circuit properly applied the first prong when the court determined that a significant number of minority voters were impacted by both the OOP policy and H.B. 2023 (far more than de minimis), leading to a disparate impact on minority voters.¹⁰⁷ Respondents then highlight the Ninth Circuit’s application of the second prong, the totality of circumstances analysis.¹⁰⁸ They argue that the second-prong’s “intensely local appraisal” of a given policy will lead to a Section 2 violation only in instances where a policy “operat[es] in a specific way in a specific context.”¹⁰⁹ Respondents contend that the two-prong approach would not undermine *any* facially neutral election law simply on the basis of its disparate impact on minority voters, as Petitioners allege.¹¹⁰ To lend support to the Ninth Circuit’s holding, Respondents point to unique local election practices in Arizona: including the State’s historic use of ballot collection practices, precinct assignments, and precinct relocations.¹¹¹

Respondents argue that Petitioners are “[f]undamentally misunderstanding Section 2.”¹¹² They take issue with the Petitioners interpretation of Section 2 requiring laws to provide equal treatment, rather than

103 Brief for Respondents, *supra* note 57, at 20.

104 *Id.* at 5.

105 *Id.* at 20; *see also* Thornburg v. Gingles, 478 U.S. 30, 78, 80 (1986) (articulating the need for an “intensely local appraisal” of North Carolina’s redistricting plan and holding that the contested policy prevented black voters from engaging in the electoral process).

106 *See id.*, at 20–21.

107 *Id.* at 20.

108 *Id.* at 21.

109 Brief for Respondents, *supra* note 57, at 21–22.

110 *Id.* Respondent cites to the Fifth Circuit as a sister court that reasoned similarly. *See* Veasey v. Abbott, 830 F.3d 216, 246 (5th Cir. 2016).

111 *Id.* at 22–23.

112 *Id.* at 24.

focusing on the outcomes of a challenged law—claiming this interpretation is at odds with Section 2’s text and the Court’s precedent established in *Gingles*. To bolster this claim, they highlight the fact that the Ninth Circuit’s Results Test parallels the application of the Section 2 test adopted by other circuits, including the Fourth, Fifth, Sixth, and Seventh Circuits.¹¹³ Respondents focus on the two distinct presentations of a circuit split provided by Private Petitioners and State Petitioners to argue that such a split has been fabricated.¹¹⁴

2. The Ninth Circuit’s Discriminatory Intent Holding Should Be Upheld

Respondents argue that the Ninth Circuit properly applied the Intent Test.¹¹⁵ Under the Intent Test, the plaintiff must show racially discriminatory intent or purpose as *a* motivating factor for the provision.¹¹⁶ Respondents argue that the Ninth Circuit properly applied *Arlington Heights* factors to the facts of the case, leading to a narrow, fact-specific outcome.¹¹⁷ They present two incidents of explicit discriminatory episodes that transpired in the lead up to the passage of the act.¹¹⁸ This includes a racially tinged video released by Maricopa County Republican Chair, A.J. LaFaro, to stoke fear surrounding minority ballot collection practices, in addition to false allegations from Arizona State Senator Don Shooter when proposing a bill to limit the practice.¹¹⁹ Respondents additionally note that Petitioners mischaracterized the “cat’s paw” doctrine, incorrectly implying that the Ninth Circuit

113 *Id.* at 26. *See also* *Veasey v. Abbott*, 830 F.3d 216, 244–45 (5th Cir. 2016) (upholding a district court’s finding that Texas’s requirement that a photo ID be presented at the time of voting violated the Results Test); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (holding that the district court clearly erred in finding that the Results Test had not been violated by North Carolina’s elimination of same-day registration, and by North Carolina’s practice of wholly discarding out-of-precinct ballots); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014) (upholding a district court’s finding that an Ohio law limiting early voting violated the Results Test of Section 2).

114 *See id.* at 26–27 (contrasting State Petitioner Brnovich’s claim that the Ninth Circuit’s decision clashes with *all* other Circuits and Private Petitioner Republicans’ assertion that the Ninth Circuit’s decision is at odds with a handful of Circuits and aligns with the Fifth Circuit).

115 Brief for Respondents, *supra* note 57, at 33.

116 *Hobbs*, 948 F.3d 989, 1038 (9th Cir. 2020).

117 Brief for Respondents, *supra* note 57, at 33.

118 *Id.*

119 *Id.* at 34–35.

adopted the doctrine to show that *all* legislatures acted with discriminatory intent.¹²⁰ Instead, Respondents point to the specific factual circumstances showing that many legislators were “heavily influenced by demonstrably false and racially motivated allegations.”¹²¹

V. ANALYSIS

The Supreme Court has recognized that racial discrimination in the electoral process is pervasive in American society.¹²² In *Bartlett v. Strickland*, the Court articulated the importance of Section 2 when addressing racial discrimination and the right to vote.¹²³ Since the *Bartlett* decision in 2009, twenty-eight states have passed measures that have made it more difficult to vote, and state officials have also spearheaded efforts to restrict the vote.¹²⁴ These restrictions yield disproportionate impacts on minority voters. These actions are a modern revival of the voter suppression efforts that inspired the passage of the Voting Rights Act over five decades ago.

Section 2 of the Voting Rights Act serves as the modern-day safeguard to protect minority voters from racial discrimination in the electoral process post-*Shelby County v. Holder*. As such, it is essential that the Supreme Court affirm the Ninth Circuit’s decision. First, the Court should strike down Arizona’s OOP policy under the Results Test of Section 2. Under the totality of circumstances, the Court should find that the policy led to a disparate impact on minority voters’ ability to take part in the electoral process. Second, while a challenge to H.B. 2023 under the Results Test is likely premature, the Court should nonetheless strike down the law under the Intent Test—finding that racial discrimination served as a motivating factor in criminalizing certain third-party ballot-collection practices in the State.

The Supreme Court should affirm the Ninth Circuit’s holding that Arizona’s out-of-precinct policy violates Section 2 under the Results

¹²⁰ *Id.* at 36.

¹²¹ *Id.*

¹²² See 556 U.S. 1, 25 (2009) (“[R]acial discrimination and racially polarized voting are not ancient history.”).

¹²³ See *id.* (“Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic process and traditions; and § 2 must be interpreted to ensure that continued progress.”).

¹²⁴ LaShawn Warren, *Voting discrimination is getting worse, not better*, SCOTUSBLOG (Feb. 18, 2021, 11:41 AM) <https://www.scotusblog.com/2021/02/voting-discrimination-is-getting-worse-not-better/>.

Test. In doing so, the Court should formally validate the two-step Results Test adopted by the Ninth Circuit and sister circuits. Arizona's OOP policy indisputably had a disproportionate impact on minority voters.¹²⁵ With 3,709 out-of-precinct ballots cast in Arizona, the disparate impact extends beyond a de minimis number of voters.¹²⁶ Further, under the totality of circumstances, it is clear that the State's history of discrimination and the State's recent precinct reassignments have led to a heightened burden for communities of color. These negative consequences directly stem from the OOP policy.

The complexity of racial discrimination inherently calls for the balancing test invoked by the Ninth Circuit's application of the Section 2 Results Test. The history of racial discrimination in the United States is complex; social and historical conditions that have bred racial discrimination differ from one jurisdiction to the next. Petitioners, however, argue that the Ninth Circuit's two-part test will undermine any facially neutral law that has a disparate impact on minority voters.¹²⁷ Further, third-party critics, like the Cato Institute, which filed a neutral amicus brief, have proposed that the Court draw a bright-line rule "free of balancing tests and other subjective standards."¹²⁸ By adopting such a rigid approach, the Court would overlook the nuances of pervasive racial discrimination which continue to plague American democracy. Likewise, the approach undermines the original purpose that animated the VRA's passage over five decades ago.

Regarding H.B. 2023, the Respondents' challenge under the Results Test of Section 2 is likely premature. The district court's findings indicate that the ballot collection ban may likely have a disparate impact on minority communities.¹²⁹ Section 2, however, requires Respondents to show with certainty that a disparate impact exists.¹³⁰ Here, anecdotal evidence, by itself, is likely insufficient to show that the ballot collection ban would result in a disparate burden on minority voters.

Nonetheless, the Court should strike down H.B. 2023 under Section

125 See *Hobbs*, 948 F.3d at 1014 ("Uncontested evidence in the district court established that minority voters in Arizona cast OOP ballots at twice the rate of white voters.").

126 *Id.* at 1015.

127 See Brief for Private Petitioners, *supra* note 46, at 41 ("[Section] 2 cannot be a freestanding ban on ordinary voting laws that lead to racially disparate outcomes.").

128 Cato Amicus Brief, *supra* note 11, at 21.

129 *Hobbs*, 948 F.3d at 1032–33.

130 See *id.* at 1012 ("First, we ask whether the challenged standard, practice or procedure *results* in a disparate burden on members of the protected class.") (emphasis added).

2's Intent Test. Arizona's legacy of race-based discrimination in the electoral process persists to this day, at times in overt ways.¹³¹ Most recently, legislative efforts to unsuccessfully pass a less restrictive version of the same law were challenged through the preclearance process formerly in place through Section 5 of the VRA.¹³² Additionally, the legislative history of H.B. 2023 shows the use of a video with racial overtones to stoke fear surrounding minority ballot collection practices.¹³³ The district court found that "H.B. 2023 would not have been enacted without racial discrimination as a motivating factor"¹³⁴ and therefore violated the Intent Test. Thus, while the Court has reason to uphold H.B. 2023 under the Results Test of Section 2, it should strike down the law under the Intent Test.

VI. ORAL ARGUMENT

On March 2nd, the Court engaged in almost two hours of oral arguments for the two consolidated cases. During Private Petitioner Arizona Republican Party's oral argument, the Court primarily sought to clarify the equal opportunity framework proposed by Petitioner for assessing Section 2 claims. Chief Justice Roberts asked explicitly whether the test proposed by Respondents was an Intent Test rather than a Results Test.¹³⁵ Justice Breyer sought clarification on how the usual burdens of voting fit within the equal opportunity framework proposed by Petitioner.¹³⁶ Justice Sotomayor adopted a textualist approach to challenge Petitioner on its interpretation of the text of Section 2, noting that there is no mention of "equal opportunity" in the language of the statute.¹³⁷ Justice Kagan provided a set of hypotheticals describing instances of facially neutral laws that were likely to have a disparate im-

131 *See id.* at 1017–26 (documenting Arizona's history of race-based discrimination against minority groups in the State).

132 *See id.* at 1007-08 (describing the legislative history of the precursor to H.B. 2023 – S.B. 1412, which was withdrawn by the Arizona Attorney General after failing to complete the preclearance process).

133 *Id.* at 1009.

134 *Id.* at 1042–43.

135 Transcript of Oral Argument at 6, *Brnovich v. Democratic National Committee*, 141 S. Ct. 222 (mem.), *Arizona Republican Party v. Democratic National Committee*, 141 S. Ct. 221 (granting certiorari) (filed Dec. 4, 2020) (Nos. 19-1257 and 19-1258) [hereinafter Oral Argument].

136 *Id.* at 13–16.

137 *Id.* at 19.

fact on minority voters to challenge the justification for an equal opportunity framework.¹³⁸

In State Petitioner Brnovich's oral argument, the Court focused on the substantial disparate impact standard that Petitioner articulates in its brief. Chief Justice Roberts took a textualist approach similar to Justice Sotomayor, inquiring about where the word 'substantial' can be found in the text of Section 2.¹³⁹ Justice Gorsuch asked why the policies in question might not rise to the level of having a substantial burden on minority voters.¹⁴⁰

During Respondents Democratic National Committee and Secretary Hobbs's oral arguments, the Court focused on three core themes: the disparate impact in outcomes for minority voters as a result of a specific policy, the totality of circumstances analysis and the relationship between legislative context and discriminatory intent. First, several conservative justices—including Justice Thomas, Justice Alito and Justice Barrett—focused on statistical racial disparities arising from facially neutral laws, and the threat that Respondents' disparate impact framework could have on such laws.¹⁴¹ Justice Thomas pointed to the small number of minority voters impacted by Arizona's OOP policy.¹⁴² Justice Alito and Justice Barrett provided hypotheticals which presented facially neutral voting laws that resulted in statistical racial disparities in electoral participation.¹⁴³ Respondents tried to correct the Justices by emphasizing how the Results Test is designed to look beyond mere statistical disparities, diving into the disparate impact under the totality of circumstances.¹⁴⁴

Second, several justices—including Justice Roberts, Justice Gorsuch and Justice Kavanaugh—drew on an expansive interpretation of the totality of circumstances analysis. Rather than focusing on the social and historical conditions of Arizona, these justices examined the federal factors at play, including a federal administrative commission from 2005 which advised against ballot collection practices. The justices

138 *Id.* at 23–28.

139 *Id.* at 40.

140 *Id.* at 57.

141 *Id.* at 69–77.

142 *Id.* at 69–71.

143 *Id.* at 74–77, 90–93.

144 *Id.*

also noted the existence of out-of-precinct practices and ballot collection bans that exist in other states.¹⁴⁵

Lastly, the justices also focused on Respondent's approach toward showing discriminatory intent. Sotomayor questioned how Respondents could prove the Arizona legislature as a whole acted with discriminatory intent under the racially motivated actions of a handful of legislators.¹⁴⁶ Justice Roberts similarly requested clarification as to how discriminatory intent could be shown, and pressed Respondent on the limited evidence in the present case available to show such intent.¹⁴⁷

CONCLUSION

The Supreme Court has an opportunity to assess the Results Test derived from Section 2 of the Voting Rights Act. The Court should uphold the Ninth Circuit decision in challenging Arizona's out-of-precinct policy and ballot-collection ban on the grounds that the policy violates Section 2 of the VRA. While many circuit courts have adopted the Results Test, the test has yet to be validated by the Supreme Court. If the Court were to invalidate the Results Test as currently adopted by circuits around the country, the Section 2 safeguard, as we know it, runs the risk of becoming obsolete. This would parallel the collapse of Section 5 of the VRA.

Identifying and challenging racially discriminatory practices in this day and age requires a nuanced approach that necessitates a holistic balancing test to be effective. The Results Test derived from Section 2, currently adopted by circuit courts around the country, embraces this holistic approach. As such, the Supreme Court should lay to rest efforts to dismantle Section 2—recognizing that the currently adopted Section 2 Results Test serves as the proper form of challenging vote-denial claims. The Court's expansive view of the totality of circumstances analysis, expressed during oral arguments, lends itself to justifying Arizona's out-of-precinct policy. Likewise, the Court's skepticism towards a discriminatory enactment of H.B. 2023 signals that the Court is likely to uphold the ballot-collection ban. It remains less clear whether the Court will articulate any broader guidance as to Section 2's Results Test.

¹⁴⁵ *Id.* at 65–68, 82–89.

¹⁴⁶ *Id.* at 77–79.

¹⁴⁷ *Id.* at 99–101.

