

Nos. 19-1257 and 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA,
ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

ARIZONA REPUBLICAN PARTY, ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

JEFFREY B. WALL
*Acting Solicitor General
Counsel of Record*

HASHIM M. MOOPAN
*Counselor to the Solicitor
General*

JOHN B. DAUKAS
*Principal Deputy Assistant
Attorney General*

JONATHAN C. BOND
*Assistant to the Solicitor
General*

THOMAS E. CHANDLER
Attorney

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTIONS PRESENTED

Arizona allows all eligible voters to vote in a variety of ways, including traditional in-person voting on election day as well as voting early—either in person, by mail, or by delivering a completed ballot to a polling place or other designated location. This case concerns two measures that Arizona enacted to promote the orderly administration and integrity of its elections. First, under its out-of-precinct policy, Arizona declines to count the ballots of voters who choose to vote in person on election day but vote in an incorrect precinct. Second, Arizona’s ballot-collection restriction makes it unlawful for a third party to collect a voter’s completed early ballot if the third party is not an election official, a postal worker, a member of the voter’s family or household, or a caregiver of the voter.

The district court found that neither the out-of-precinct policy nor the ballot-collection restriction caused a racially discriminatory result in violation of Section 2 of the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (52 U.S.C. 10301), and that the ballot-collection restriction did not violate Section 2 or the Fifteenth Amendment on the ground that it was intentionally discriminatory. The en banc court of appeals reversed, holding that both measures violated Section 2’s results test and that the ballot-collection restriction was intentionally discriminatory. The questions presented are as follows:

1. Whether Arizona’s out-of-precinct policy or ballot-collection restriction violates the results test of Section 2 of the VRA.

2. Whether the court of appeals erred in overturning the district court’s finding that the ballot-collection restriction is not intentionally discriminatory.

TABLE OF CONTENTS

	Page
Interest of the United States.....	1
Constitutional and statutory provisions involved.....	2
Statement	2
Summary of argument	11
Argument:	
I. Neither Arizona’s out-of-precinct policy nor its ballot-collection restriction violates Section 2’s results test.....	13
A. Section 2’s results test prohibits voting practices that are responsible for members of one race having less ability to vote in the totality of circumstances.....	14
B. The challenged practices do not cause the result prohibited by Section 2.....	25
II. The court of appeals erred in rejecting the district court’s factual finding that H.B. 2023 was not motivated by discriminatory intent.....	32
Conclusion	35
Appendix — Constitutional and statutory provisions	1a

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. City of Bessemer City</i> , 470 U.S. 564 (1985).....	32, 33
<i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009)	13, 17, 23, 25
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	2, 3, 14, 15, 19, 29
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	16
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980)	2, 15
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980).....	16
<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017)	24, 32

IV

Cases—Continued:	Page
<i>Frank v. Walker</i> , 768 F.3d 744 (7th Cir. 2014), cert. denied, 575 U.S. 913 (2015)	23
<i>Holder v. Hall</i> , 512 U.S. 874 (1994)	20, 21
<i>Holmes v. Securities Investor Prot. Corp.</i> , 503 U.S. 258 (1992).....	22
<i>Houston Lawyers’ Ass’n v. Attorney Gen.</i> , 501 U.S. 419 (1991).....	24
<i>Husted v. A. Philip Randolph Inst.</i> , 138 S. Ct. 1833 (2018)	21
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	20
<i>Johnson v. De Grandy</i> , 512 U.S. 997 (1994)	17, 23
<i>League of United Latin Am. Citizens v. Perry</i> , 548 U.S. 399 (2006).....	31
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	19, 21
<i>Mississippi Republican Exec. Comm. v. Brooks</i> , 469 U.S. 1002 (1984).....	19, 20
<i>Obduskey v. McCarthy & Holthus LLP</i> , 139 S. Ct. 1029 (2019)	20
<i>Reno v. Bossier Parish Sch. Bd.</i> , 520 U.S. 471 (1997).....	2, 14, 32
<i>Ricci v. DeStefano</i> , 557 U.S. 557 (2009).....	16, 17, 25
<i>Sandusky Cnty. Democratic Party v. Blackwell</i> , 387 F.3d 565 (6th Cir. 2004)	4
<i>Smith v. Salt River Project Agric. Improvement & Power Dist.</i> , 109 F.3d 586 (9th Cir. 1997)	31
<i>Staub v. Proctor Hosp.</i> , 562 U.S. 411 (2011)	33, 34
<i>Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.</i> , 576 U.S. 519 (2015).....	16, 17, 22, 24
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	9, 12, 23, 18, 30, 31
<i>United States v. O’Brien</i> , 391 U.S. 367 (1968)	34

V

Cases—Continued: Page

<i>Village of Arlington Heights v. Metropolitan Hous.</i> <i>Dev. Corp.</i> , 429 U.S. 252 (1977)	32
<i>White v. Regester</i> , 412 U.S. 755 (1973)	20

Constitution and statutes:

U.S. Const.:

Amend. XIV	14
Amend. XV	<i>passim</i>
§ 1	2, 14
§ 2	2, 16

Voting Rights Act of 1965, Pub. L. No. 89-110,

79 Stat. 437 (52 U.S.C. 10301).....	1, 1a
Pmbl., 79 Stat. 437.....	2, 1a
52 U.S.C. 10301 (§ 2, 79 Stat. 437)	<i>passim</i> , 2a
52 U.S.C. 10301(a) (§ 2(a))	3, 13, 15, 18, 19, 21, 2a
52 U.S.C. 10301(b) (§ 2(b)).....	<i>passim</i> , 2a
52 U.S.C. 10308(d)	1
52 U.S.C. 10310(c)(1)	13

Miscellaneous:

Paul Gronke & Eva Galanes-Rosenbaum, <i>The Growth of Early and Nonprecinct Place</i> <i>Balloting: When, Why, and Prospects for the</i> <i>Future, in America Votes! A Guide to Modern</i> <i>Election Law and Voting Rights</i> (Benjamin E. Griffith ed. 2008).....	22
H.B. 2023, 52d Leg., 2d Sess. (Ariz. 2016).....	<i>passim</i>
10 <i>The Oxford English Dictionary</i> (2d ed. 1989).....	19
<i>Webster's New International Dictionary</i> (2d ed. 1949).....	19

In the Supreme Court of the United States

No. 19-1257

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA,
ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

No. 19-1258

ARIZONA REPUBLICAN PARTY, ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF THE UNITED STATES

This case presents important questions regarding Section 2 of the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (52 U.S.C. 10301), and the Fifteenth Amendment, which the VRA implements. The Department of Justice is charged with enforcing the VRA. *E.g.*, 52 U.S.C. 10308(d). The United States thus has a substantial interest in the proper interpretation of Section 2 and the Fifteenth Amendment.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. The Fifteenth Amendment provides that “[t]he 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,” U.S. Const. Amend. XV, § 1, and authorizes Congress “to enforce” that prohibition “by appropriate legislation,” Amend. XV, § 2. A Fifteenth Amendment violation requires proof of “discriminatory purpose.” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997).

In 1965, Congress enacted the VRA “to enforce the fifteenth amendment.” *Chisom v. Roemer*, 501 U.S. 380, 383 (1991) (quoting VRA Pmbl., 79 Stat. 437) (brackets omitted). Section 2 of the VRA originally provided that “[n]o 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.” 79 Stat. 437. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the plurality concluded that Section 2 “simply restated” the Fifteenth Amendment and thus required proof of “purposeful discrimination.” *Id.* at 61, 63.

In 1982, Congress amended Section 2 to provide that no state or local government may “impose[] or appl[y]” any “voting qualification or prerequisite to voting or standard, practice, or procedure * * * 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 language-minority status], as provided in subsection (b).” 52 U.S.C. 10301(a) (emphasis added). Subsection (b) states in relevant part:

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.

52 U.S.C. 10301(b). Thus, “proof of intent is no longer required to prove a § 2 violation.” *Chisom*, 501 U.S. at 394. Instead, Section 2(a) “adopts a results test,” and Section 2(b) “provides guidance about how the results test is to be applied.” *Id.* at 395.

2. a. Arizona provides registered voters with multiple ways to vote. In addition to voting in person on election day, qualified voters also may vote up to 27 days early—either in person, by mail, or by delivering a completed ballot to any polling place or other designated location by 7 p.m. on election day. J.A. 259-260, 279-280. Voters who cannot travel to a polling place due to illness or disability may request that a ballot be delivered to them in person. J.A. 279-280.

Early voting by mail is by far “the most popular method of voting” in Arizona. J.A. 259. Voters may vote by mail in one election or request to do so in all elections (and may make that request online). *Ibid.*

b. This case concerns two measures that Arizona enacted to promote the orderly administration and integrity of its elections.

Out-of-precinct policy. Arizona has long required in-person election-day voters “to cast their ballots in [an] assigned precinct.” J.A. 261; see J.A. 262 & n.5, 307-308. “The advantages of the precinct system are significant and numerous.” *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (per curiam). Precinct voting “caps the number of voters attempting to vote in the same place on election day”; “allows each precinct ballot to list all of the votes,” and “only those votes,” that a particular “citizen may cast, making ballots less confusing”; “makes it easier for election officials to monitor votes and prevent election fraud”; and enables “put[ting] polling places in closer proximity to voter residences.” *Ibid.* Arizona enforces the precinct requirement (in counties using it) through an out-of-precinct policy. J.A. 261-262; see J.A. 729-730, 750-767 (Bybee, J., dissenting).¹ For votes cast in-person on election day, election officials “count[] only those ballots cast in the correct precinct.” J.A. 261-262. If a voter appears at a polling place and is not listed in the precinct register, he may cast a provisional ballot, which will be counted if he is registered and resides in that precinct. J.A. 262. If the voter voted in an incorrect precinct, no portion of the ballot is counted. *Ibid.*

Ballot-collection restriction. Since 1997, Arizona has prohibited anyone besides a voter to possess the voter’s not-yet-completed early ballot. J.A. 260-261. In 2016, the Arizona legislature enacted H.B. 2023, 52d

¹ Since 2011, Arizona has allowed counties to opt out of the precinct system and instead to use a “vote center system,” under which “voters may cast their ballots at any vote center in the county in which they reside.” J.A. 263. The out-of-precinct policy “ha[s] no impact” in counties using the vote-center system. *Ibid.*

Leg., 2d Sess., which forbids a third party to possess a completed early ballot unless the third party is a member of the voter’s family or household, a voter’s caregiver, or a postal-service worker or election official engaged in official duties. J.A. 260-261. That prohibition “follows precisely the recommendation of the bi-partisan Carter-Baker Commission on Federal Election Reform” as a means of “reduc[ing] the risks of fraud and abuse in absentee voting.” J.A. 742-743 (Bybee, J., dissenting) (citation omitted).

3. The Democratic National Committee and certain affiliates (respondents) brought this suit challenging Arizona’s out-of-precinct policy and ballot-collection restriction. J.A. 242-244. They alleged (as relevant) that both measures “adversely and disparately affect Arizona’s American Indian, Hispanic, and African American citizens,” in violation of Section 2’s results test, and that H.B. 2023 “was enacted with discriminatory intent,” in violation of Section 2 and the Fifteenth Amendment. J.A. 583. The district court denied respondents’ motion to preliminarily enjoin both measures. J.A. 372. The en banc court of appeals enjoined the ballot-collection restriction pending appeal, J.A. 372-373, but this Court stayed the injunction, 137 S. Ct. 446.

4. Following a ten-day bench trial, J.A. 244, 246-258, the district court made extensive factual findings and rejected respondents’ claims, J.A. 242-359.

a. The district court found that Arizona’s out-of-precinct policy does not impose a discriminatory burden. J.A. 331-337. Although the court noted that “minorities are over-represented among the small number of voters casting [out-of-precinct] ballots,” J.A. 332, it found that out-of-precinct in-person ballots constitute “such a small and ever-decreasing fraction of the overall

votes cast in any given election” that Arizona’s policy “has no meaningfully disparate impact on the opportunities of minority voters” to vote, J.A. 334. It also found that respondents failed to prove that Arizona’s enforcement of its precinct rule “causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts.” J.A. 336.

The district court additionally found that Arizona’s ballot-collection restriction does not impose a discriminatory burden. J.A. 321-331. The court first emphasized that respondents had “provided no quantitative or statistical evidence” showing how many voters “relied on now-prohibited third parties to collect and return their early mail ballots” or “the proportion that is minority versus non-minority.” J.A. 321. Instead, respondents relied on “circumstantial and anecdotal evidence,” including testimony of individual voters who had previously “used ballot collection services.” J.A. 280, 324.

The district court found such evidence unpersuasive for multiple reasons. J.A. 325-331. The court found that, although “minorities generically were more likely than non-minorities” before H.B. 2023 “to return their early ballots with the assistance of third parties,” respondents had not shown that H.B. 2023 “cause[s] a meaningful inequality in the electoral opportunities of minorities.” J.A. 330-331. It found that “the vast majority of voters who choose to vote early by mail d[id] not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023’s exceptions,” and the few “who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways.”

J.A. 272, 278. The court noted that none of the individual-voter witnesses testified that H.B. 2023 “would make it significantly more difficult to vote.” J.A. 331. The court concluded that “H.B. 2023 might have eliminated a preferred or convenient way of returning an early mail ballot,” but it neither “impose[s] burdens beyond those traditionally associated with voting” nor “den[ies] minority voters meaningful access to the political process.” J.A. 284, 331.

b. The district court also found that Arizona’s ballot-collection restriction was not enacted with a “racially discriminatory purpose.” J.A. 350; see J.A. 348-358. It found that, although “some individual legislators and proponents of limitations on ballot collection harbored partisan motives”—“perhaps implicitly informed by racial biases”—“the legislature as a whole enacted H.B. 2023 in spite of,” “not because of,” its “potential effect” on minority voters. J.A. 350.

The district court explained that “H.B. 2023 emerged in the context of racially polarized voting, increased use of ballot collection as a Democratic [get-out-the-vote] strategy in low-efficacy minority communities, and on the heels of several prior efforts to restrict ballot collection.” J.A. 350-351. Some of those efforts “were spearheaded by former Arizona State Senator Don Shooter,” whose district exhibited a “high degree of racial polarization.” J.A. 351. The court found that, although “Shooter’s efforts to limit ballot collection were marked by unfounded and often farfetched allegations of ballot collection fraud,” his allegations “spurred a larger debate in the legislature about the security of early mail voting as compared to in-person voting.” *Ibid.*

That debate was further fueled by a widely shared video created by Maricopa County Republican Party

chair, A.J. LaFaro, “show[ing] surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots.” J.A. 344. Although the man depicted was “not obviously violating any law,” the video included “racially tinged and inaccurate commentary” by LaFaro stating or implying that “the man was acting to stuff the ballot box,” “was a thug,” and might be an “illegal alien.” J.A. 344-345 (citation omitted).

The district court found that, “[a]lthough no direct evidence of ballot collection fraud was presented,” “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.” J.A. 352. The court found that H.B. 2023’s supporters “were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting.” J.A. 350; see J.A. 351-352. The court determined that “the legislature that enacted H.B. 2023 was not motivated by a desire to suppress minority voters,” but instead “by a misinformed belief that ballot collection fraud was occurring” and “a sincere belief that mail-in ballots lacked adequate prophylactic safeguards.” J.A. 357; see J.A. 350, 358.

5. A divided panel of the court of appeals affirmed. J.A. 360-440. Writing for the majority, Judge Ikuta concluded that neither challenged practice violates Section 2’s results test, J.A. 404-409, 434-439, and that the district court did not clearly err in finding that the ballot-collection restriction was not enacted with discriminatory intent, J.A. 409-423. Chief Judge Thomas dissented. J.A. 441-492.

6. The court of appeals granted rehearing en banc, and the en banc court reversed, J.A. 576-691, but stayed its mandate, J.A. 832.

a. i. The en banc majority held that the out-of-precinct policy and the ballot-collection restriction violate Section 2’s results test. J.A. 617-622. The majority applied a two-step test, asking (1) whether the challenged practice “results in a disparate burden on members of [a] protected class”; and (2) if so, “whether, under the ‘totality of the circumstances,’” a “legally significant relationship” exists between that burden “and the social and historical conditions affecting them,” including the “Senate factors”—a nonexhaustive list of nine factors this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), had derived from the Senate report that accompanied the 1982 amendments to the VRA. J.A. 612-613, 616.

At the first step, the en banc majority concluded that the out-of-precinct policy “result[s] in a disparate burden on minority voters” because such voters are more likely than white voters to vote out-of-precinct and have their ballots not counted. J.A. 622; see J.A. 618. It similarly held that the ballot-collection restriction “results in a disparate burden on minority voters” because, before H.B. 2023, “third parties collected a large and disproportionate number of early ballots from minority voters.” J.A. 659, 662; see J.A. 659-662. The majority held that the district court erred by comparing the small number of out-of-precinct ballots, and the small number of early ballots collected from minority voters by third parties, to the total ballots cast by all voting methods. J.A. 618-622, 661-662.

At the second step, the en banc majority held that the burdens it attributed to both measures are “in part

caused by or linked to” the Senate factors. J.A. 659; see J.A. 623-659, 662-671. The majority cited (among other things) historical race-based discrimination in Arizona dating to its territorial period, current socioeconomic disparities and racially polarized voting patterns, and racial appeals in campaigns. See *ibid.*

ii. The en banc majority also held that the district court clearly erred in finding that the ballot-collection restriction was not enacted with discriminatory intent. J.A. 673-681. The majority purported to “accept” the district court’s finding that most of H.B. 2023’s proponents “had a sincere, though mistaken, non-race-based belief” that the measure was necessary to address potential fraud. J.A. 677. But it held that those “well meaning legislators were used as ‘cat’s paws’ * * * to serve the discriminatory purposes of” Shooter, LaFaro, “and their allies,” and that their “sincere belief” was “fraudulently created by Senator Shooter’s false allegations and the ‘racially-tinged’ LaFaro video.” J.A. 677-678.

b. Judge Watford concurred with respect to the Section 2 results test but not the en banc majority’s discussion of discriminatory intent. J.A. 692.

c. Judge O’Scannlain dissented, joined by Judges Clifton, Bybee, and Callahan. J.A. 692-721. He “reject[ed] the suggestion implicit in the majority opinion that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory” under Section 2. J.A. 709. He also disagreed with the majority’s conclusion that the district court clearly erred in finding no discriminatory intent, explaining that the majority improperly conflated “*racial* motives” with “*partisan* motives” and wrongly deemed H.B. 2023

“pretextual” merely because the legislature had “no direct evidence of voter fraud.” J.A. 717-718.

d. Judge Bybee also dissented, joined by Judges O’Scannlain, Clifton, and Callahan. J.A. 721-830. Among other things, he noted that Arizona’s ballot-collection restriction followed the recommendation of the Carter-Baker Commission. J.A. 742 & n.13; see also J.A. 739-744, 768-830 (noting that both measures resembled laws in numerous other jurisdictions).

SUMMARY OF ARGUMENT

I. Arizona’s out-of-precinct policy and its ballot-collection restriction do not violate Section 2’s results test.

A. Section 2 prohibits voting practices that “result[] in a denial or abridgment of the right * * * to vote on account of race or color [or language-minority status],” and it states that such a result “is established” if a jurisdiction’s “political processes * * * are not equally open” to members of such a group “in that [they] have less opportunity * * * to participate in the political process and to elect representatives of their choice.” 52 U.S.C. 10301. That text must be construed in light of Section 2’s constitutional context, as an exercise of Congress’s authority to enforce the Fifteenth Amendment’s ban on intentional discrimination.

So construed, Section 2’s results test imposes at least three requirements on vote-denial claims. First, members of a protected group must have less ability to vote than other voters in light of the burdens imposed by the challenged practice and readily available alternative voting methods. Second, the challenged practice must be responsible for that lesser ability, rather than other external factors not fairly attributed to the practice.

Third, courts must take account of the totality of circumstances, including the justifications for the practice.

B. Construed in that way, neither Arizona's out-of-precinct policy nor its ballot-collection restriction violates Section 2's results test. Respondents failed to prove that minority voters have less ability to vote under Arizona's out-of-precinct policy, especially taking account of other accessible voting methods, let alone that Arizona's enforcement of its precinct system is responsible for any such lesser ability. Similarly, respondents failed to prove that minority voters are less able to vote by means other than the restricted third-party ballot collectors, much less that Arizona's voting practices are responsible. The strong race-neutral justifications for both policies confirm that they do not violate Section 2.

The en banc majority erroneously held both practices invalid by asking the wrong question. It concluded that the practices violate Section 2's results test based on evidence of voters' behavior, but that evidence does not show either that minority voters have less ability to vote or that either practice is responsible for that lesser ability. The majority also gave short shrift to Arizona's race-neutral justifications for each policy. And it compounded its error by invoking the vote-dilution framework in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and Section 2's legislative history to justify considering a range of factors that shed no light on the proper inquiry under the results test in a vote-denial case.

II. The en banc majority also erred by overturning the district court's factual finding that the ballot-collection restriction was not adopted with discriminatory intent. That finding was reviewable only for clear error, and the

en banc majority improperly second-guessed it. The majority mistakenly relied on an inapposite employment-law analogy to impute assertedly race-based motives of certain proponents of H.B. 2023 to the legislature. And it improperly conflated evidence of those proponents' permissible partisan motives with racial ones.

ARGUMENT

I. NEITHER ARIZONA'S OUT-OF-PRECINCT POLICY NOR ITS BALLOT-COLLECTION RESTRICTION VIOLATES SECTION 2'S RESULTS TEST

Section 2 of the VRA prohibits state and local governments from “impos[ing] or appl[y]ing” any “voting qualification or prerequisite to voting or standard, practice, or procedure * * * 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 language-minority status. 52 U.S.C. 10301(a); see 52 U.S.C. 10310(c)(1) (defining “vote” and “voting”). This “results” test, enacted in 1982, operates prophylactically to prohibit some voting practices absent a finding of intentional discrimination.

In prior cases, the Court has addressed the application of Section 2's results test to practices that were alleged to “dilut[e]” the efficacy of ballots cast by minority voters and thus to deny them an equal opportunity to elect representatives of their choice (known as vote-dilution cases). *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality opinion); see, e.g., *id.* at 10-26; *Thornburg v. Gingles*, 478 U.S. 30, 42-61, 77-80 (1986). This case is the first in which the Court is asked to apply Section 2's results test to practices that allegedly erect barriers to the ability to vote that disproportionately burden minority voters and thus deny or abridge their equal opportunity to participate in the political process

(often called vote-denial cases). This Court should adopt a vote-denial standard that focuses on Section 2’s statutory text and its constitutional context.

Properly construed, Section 2 prohibits a voting practice absent a showing of discriminatory intent only if the burdens it imposes are responsible for a protected group having less ability to vote than other voters, taking into account the totality of circumstances—including, among other factors, the specific justifications for the challenged practice. So interpreted, Section 2 does not prohibit either Arizona’s out-of-precinct policy or its ballot-collection restriction.²

A. Section 2’s Results Test Prohibits Voting Practices That Are Responsible For Members Of One Race Having Less Ability To Vote In The Totality Of Circumstances

1. Congress enacted the VRA “to enforce the fifteenth amendment.” *Chisom v. Roemer*, 501 U.S. 380, 383 (1991) (brackets and citation omitted). That Amendment states that “[t]he 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.” U.S. Const. Amend. XV, § 1. Like the Fourteenth Amendment, the Fifteenth Amendment bars only action taken “with a discriminatory purpose.” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997).

Section 2’s text originally tracked the Fifteenth Amendment, stating that “[n]o voting qualification or

² Although the government has previously filed briefs in lower courts, and in this Court at the certiorari stage, addressing the application of Section 2 in the vote-denial context, this brief represents this Office’s first comprehensive consideration of the question at the merits stage in this Court.

prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by” a state or local government “to deny or abridge the right of any citizen of the United States to vote on account of race or color.” 79 Stat. 437. A plurality of this Court concluded in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 “simply restated” the Fifteenth Amendment and accordingly barred only “purposeful discrimination.” *Id.* at 61, 63.

In 1982, Congress made two significant changes to Section 2 relevant here. First, Congress “str[uck] out ‘to deny or abridge’” and in its place “substitut[ed] ‘in a manner which *results* in a denial or abridgment of.’” *Chisom*, 501 U.S. at 393 (citation omitted). Second, Congress added subsection (b), which elaborates the kind of “result[.]” that subsection (a) covers. *Id.* at 394. Subsection (b) clarifies that “[a] violation of [Section 2(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” persons of a particular race, color, or language-minority group. 52 U.S.C. 10301(b). It defines “not equally open” to mean that persons of a particular race, color, or language-minority group “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Ibid.*

2. “Under the amended statute, proof of intent is no longer required to prove a § 2 violation.” *Chisom*, 501 U.S. at 394. Section 2’s text, though, still must be construed in its context of enforcing a constitutional prohibition limited to intentional discrimination. Section 2 does not reflexively invalidate any voting practice

with a racially disparate impact on minority voting; instead, the statute prohibits only the sorts of discriminatory results that are properly reached by prophylactic enforcement legislation under the Fifteenth Amendment.

First, because Section 2 is an exercise of Congress’s “power to enforce” the Fifteenth Amendment’s bar on purposeful discrimination “by appropriate legislation,” U.S. Const. Amend. XV, § 2, it must be construed so that it “appropriate[ly]” “enforce[s]” (*ibid.*) that bar. “[T]he power ‘to enforce’” is “not the power to determine what constitutes a constitutional violation.” *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). “[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern,” but “the distinction exists and must be observed.” *Id.* at 519-520.

A statute that bans discriminatory effects is an “appropriate method” to enforce the Fifteenth Amendment’s ban on intentional discrimination if it targets a “risk of purposeful discrimination,” *City of Rome v. United States*, 446 U.S. 156, 177 (1980)—“to ‘smoke out,’ as it were, disparate treatment,” *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). “Disparate-impact” rules can “play[] a role in uncovering discriminatory intent” by identifying subtle or implicit discrimination that “escape[s] easy classification as disparate treatment.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 540 (2015). But construing a disparate-impact rule to impose liability “based *solely* on a showing of a statistical disparity” would raise “serious constitutional questions.” *Ibid.* (emphasis added). Those

concerns can be “avoid[ed]” by giving defendants “leeway to state and explain the valid interest served by their policies.” *Id.* at 540-541. Considering such interests as part of the totality of the circumstances helps to focus liability on the types of “‘artificial, arbitrary, and unnecessary barriers’” imposed on minority voters, *id.* at 544 (citation omitted), that are most likely to reflect discriminatory intent despite their facial neutrality, see *Ricci*, 557 U.S. at 695 (Scalia, J., concurring).

Second, “interpreting disparate-impact liability * * * expansive[ly]” risks encouraging defendants to “use[] and consider[]” race “in a pervasive and explicit manner,” raising additional “serious constitutional questions.” *Inclusive Communities*, 576 U.S. at 543. If a “statistical disparity” alone established disparate-impact liability, defendants would be forced to subordinate legitimate governmental interests and to gerrymander practices to achieve racial proportionality, including by adopting measures to achieve “‘numerical quotas’” that “tend to perpetuate race-based considerations rather than move beyond them.” *Id.* at 542-543 (citation omitted). This Court’s Section 2 vote-dilution cases also have expressed concerns about construing the statute to require excessive consideration of race in ways that undermine its purpose. See, e.g., *Strickland*, 556 U.S. at 18, 21 (plurality opinion); *Johnson v. De Grandy*, 512 U.S. 997, 1016-1017 (1994). To “avoid” those questions in other contexts, the Court has imposed “[a] robust causality requirement.” *Inclusive Communities*, 576 U.S. at 542. A plaintiff cannot prevail simply by identifying a “statistical disparity” but must “point to a defendant’s policy or policies causing that disparity.” *Ibid.*

3. The text of Section 2’s results test should be read in light of its constitutional context. Section 2(a) bars voting practices that “result[] in a denial or abridgment of the right * * * to vote on account of” race, color, or language-minority status, which Section 2(b) defines to include practices that cause persons of one such group to have “less opportunity than other” voters “to participate in the political process and to elect representatives of their choice,” in light of “the totality of circumstances.” 52 U.S.C. 10301. Properly construed, Section 2’s results test imposes at least three requirements for vote-denial claims: first, members of a protected group must have less ability to vote than other voters in light of the burdens imposed by the challenged practice and readily available alternative voting methods; second, the challenged practice must be responsible for that lesser ability, rather than other external factors not fairly attributed to the practice; and third, courts must take account of the totality of circumstances, including, among other things, the specific justifications for the challenged practice. Applying those requirements calls for an “‘intensely local appraisal of the design and impact’ of the contested electoral mechanisms.” *Gingles*, 478 U.S. at 79.

a. Section 2 prohibits only practices that impose burdens causing a particular racial group to have “less opportunity”—*i.e.*, less *ability*—to vote, relative to other members of the electorate. 52 U.S.C. 10301(b). In the context of vote-denial (rather than vote-dilution) claims, the “opportunity * * * to participate in the political process” is synonymous with the opportunity to vote, and “[a]ny abridgment of the opportunity of members of a protected class to participate in the political process” by voting “inevitably impairs their ability to

influence the outcome of an election.” *Chisom*, 501 U.S. at 397. “[O]pportunity” in Section 2 is best understood as one’s ability to vote—not whether one *actually* votes. An “opportunity” means a “[c]hance” to do something—a “[f]it or convenient time,” or “a time or place favorable for executing a purpose”—whether or not the chance is taken. *Webster’s New International Dictionary* 1709 (2d ed. 1949); see 10 *The Oxford English Dictionary* 866 (2d ed. 1989) (similar).

That ordinary meaning of “less opportunity” is particularly appropriate here given the terms in Section 2 that this language defines. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). “[L]ess opportunity” in Section 2(b) defines what it means for “political processes” to be “not equally open” to persons of a particular race. 52 U.S.C. 10301(b). And the phrase “equally open” connotes that equal *access* to the political process, not equal exercise of that process, is the touchstone. Moreover, Section 2(b) defines a violation of Section 2(a), which prohibits only practices that “result[] in a denial or abridgment” of the right to vote. 52 U.S.C. 10301(a). Such a result does not occur where certain voters simply choose not to vote using means equally accessible to all.

Section 2’s history reinforces this reading. In 1982, Congress considered but rejected language that “would prohibit all discriminatory ‘effects’ of voting practices,” which some feared would mandate “proportional representation.” *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting). Instead, Congress adopted the “equally open” and “less opportunity” phrasing in Section 2(b) as a “compromise,” borrowing language from a prior opinion of this Court that the compromise’s sponsor and “many

supporters of [it]” understood to require only “equal ‘access’ to the political process.” *Id.* at 1010-1011 (citing *White v. Regester*, 412 U.S. 755, 766 (1973)); cf. 52 U.S.C. 10301(b) (providing that “nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population”). The Court should give effect to the “compromise” Congress enacted, *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1038 (2019), not to an alternative Congress “ha[d] earlier discarded,” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (citation omitted).

Thus, to violate Section 2’s results test, a plaintiff must show that members of one racial group are less able than others to vote by whatever methods state or local law allows. For example, if a jurisdiction situated its polling places disproportionately in predominantly white neighborhoods—causing much longer travel times for minority voters—a court could conclude that minority voters are less able to vote. See *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring in the judgment). In contrast, a rule requiring all mail-in ballots to be returned in sealed envelopes would be extremely unlikely to violate Section 2, even if statistics showed that members of one racial group failed to seal their return envelopes more frequently than other voters. Such evidence alone would not demonstrate that members of the group are less able to comply with the sealing requirement, and it is difficult to imagine additional circumstances that could alter that conclusion provided that fair notice of the rule were equally provided to all.

In addition, because the ultimate inquiry is whether voters of one race have less ability *to vote*, courts considering limitations on one voting method must account

for available alternative methods. A rule that leaves all voters readily able to vote and simply eliminates a method some prefer does not abridge anyone’s ability to vote and keeps the voting process equally open. For example, even if members of one race would prefer to vote by mail, Section 2’s results test does not require a State to adopt no-excuse absentee voting if persons of all races are otherwise readily and equally able to vote in person. Cf. *Holder*, 512 U.S. at 880 (plurality opinion) (Section 2 inquiry requires court to identify “a reasonable alternative practice as a benchmark against which to measure the existing voting practice”).

b. Even where members of one racial group have less ability to vote than others, Section 2’s results test further requires that the challenged practice is properly deemed responsible for that lesser ability. The meaning of Section 2(b)’s definition of a prohibited “result[]” under Section 2(a) is informed by Section 2(a) itself. See *Leocal*, 543 U.S. at 11. Section 2(a) prohibits only practices that “*result[] in a denial or abridgement of*” the right to vote “*on account of race or color [or language-minority status].*” 52 U.S.C. 10301(a) (emphases added). And the statutory “context” here reveals that the challenged practice must be not only a but-for cause, but the “proximate cause,” of minority voters’ lesser ability to vote. See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018).

A results-focused test like Section 2 compels defendants to alter their facially neutral practices in order to avoid certain racially disparate impacts that occur because of how the practices interact with external factors (*e.g.*, poverty), even where defendants have not been shown to have intended those impacts. Especially un-

der a statute that is prophylactically enforcing a constitutional prohibition limited to intentional discrimination, holding a defendant liable in such circumstances is appropriate only if the disparate impact stems from factors that the defendant can fairly be compelled to account for in adopting the challenged practice. Cf. *Inclusive Communities*, 576 U.S. at 542 (emphasizing the need for “[a] robust causality requirement” under another disparate-impact regime in order to “protect[] defendants from being held liable for racial disparities they did not create”). And in the Section 2 context, proximate cause is an appropriate means of differentiating between two categories: the disproportionate burdens on racial minorities’ ability to vote that a jurisdiction may be required to eliminate by modifying its practice, and the burdens that a jurisdiction is permitted to tolerate despite (though not because of) their racially disproportionate impact. Cf. *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (proximate cause “limit[s] a person’s responsibility for the consequences of that person’s own acts” based on “what justice demands” and “what is administratively possible”).

For example, in the early 1980s, many States offered only limited methods for voting—typically in-person voting on election day and limited-excuse absentee voting. See Paul Gronke & Eva Galanes-Rosenbaum, *The Growth of Early and Nonprecinct Place Balloting: When, Why, and Prospects for the Future*, in *America Votes! A Guide to Election Law and Voting Rights* 261, 267-269 (Benjamin E. Griffith ed. 2008). And minority voters in some of those jurisdictions may well have had less ability to vote under those limited methods as a result of various socioeconomic disadvantages. But it

would be contrary to both logic and history to conclude that Congress’s adoption of Section 2’s results test in 1982 required all such jurisdictions to abandon those traditional practices absent any further showing.

Constitutional concerns confirm this construction. A voting practice that disproportionately impairs the ability of minorities to vote only because of factors not fairly attributable to the government is relatively unlikely to be the product of hidden or subtle discriminatory intent that the Fifteenth Amendment prohibits. Indeed, if “less opportunity” to vote were established based on that showing alone, many commonplace voting practices would be in danger. “No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system,” *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (Easterbrook, J.), cert. denied, 575 U.S. 913 (2015), and any differential ability to comply with ordinary voting practices may stem from socioeconomic and other factors rather than a jurisdiction’s voting practices. Deeming a jurisdiction liable for such results without any further showing would require excessive race-conscious steps to equalize participation rates. Cf. *Strickland*, 556 U.S. at 18, 21 (plurality opinion). Taken to its logical endpoint, that interpretation would compel the government to take every affirmative step possible (such as collecting votes door to door) to ensure *proportionate* minority-voter participation. Cf. *De Grandy*, 512 U.S. at 1016-1017.

Reading Section 2 to require proximate causation avoids these constitutional concerns. Under that approach, voting-behavior data may be relevant, but only to the extent they provide indirect evidence of an unequal burden on the ability to vote for which the govern-

ment is properly deemed responsible. While “States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA,” *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017), a diluted causation test risks requiring disparate-impact defendants to “use[] and consider[] [race] in a pervasive way” that raises “serious constitutional questions,” *Inclusive Communities*, 576 U.S. at 542. A Section 2 plaintiff thus must “point to a defendant’s policy or policies” that may be fairly deemed to be “causing” voters of one race to have less ability to vote than others. *Ibid.*

c. Finally, in determining whether the challenged practice is responsible for members of a particular racial group having less ability to vote, a court must consider the “totality of circumstances.” 52 U.S.C. 10301(b). “[T]he State’s interest” in its challenged practice “is a legitimate factor to be considered.” *Houston Lawyers’ Ass’n v. Attorney Gen.*, 501 U.S. 419, 426 (1991). Although a valid governmental interest “does not automatically” defeat a Section 2 results claim, *id.* at 427, it may show that a practice is not the type of “artificial, arbitrary, and unnecessary barrier[]” that is the focus of disparate-impact liability, *Inclusive Communities*, 576 U.S. at 540 (citation omitted). Indeed, Congress borrowed Section 2(b)’s “not equally open” language from this Court’s decision in *Regester*, which had applied the pre-1982 version of Section 2 that proscribed only intentional discrimination. See pp. 19-20, *supra*.

Again, construing Section 2 to preclude considering such justifications would raise “serious constitutional questions.” *Inclusive Communities*, 576 U.S. at 540-542. Forcing courts applying Section 2 to disregard a com-

elling race-neutral justification for a challenged practice would make it more difficult to characterize Section 2 as enforcing the Fifteenth Amendment's ban on intentional discrimination, cf. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring), and could lead to excessive subordination of race-neutral interests to achieve racial balancing, cf. *Strickland*, 556 U.S. at 18, 21 (plurality opinion).

* * * * *

Taken together, these three requirements ensure that Section 2's text is not stretched far beyond its constitutional context. By prohibiting results where (1) voters of one racial group have less ability to vote, and (2) the challenged practice is fairly deemed responsible, after (3) taking into account the government's justifications and all other relevant circumstances, Section 2 targets the types of disguised discrimination and arbitrary barriers to voting on account of race that are appropriate enforcement targets under the Fifteenth Amendment. At the same time, that interpretation avoids invalidating countless commonplace voting procedures, such as voter registration.

B. The Challenged Practices Do Not Cause The Result Prohibited By Section 2

1. Arizona's out-of-precinct policy and its ballot-collection restriction do not violate Section 2's results test.

a. At the outset, respondents failed to show that minority voters have less ability to vote under Arizona's out-of-precinct policy. Respondents offered statistical and other evidence indicating that minority voters more frequently vote outside the correct precinct, J.A. 331-333, and evidence suggesting reasons why out-of-precinct voting may be more common among minority

voters in Arizona, such as “higher rates of residential mobility.” J.A. 335. But they did not demonstrate that minority voters are less able to identify and appear at the proper precinct—any more than minority mail-in voters would be less able to comply with a hypothetical requirement to seal their ballots before mailing, see p. 20, *supra*—let alone that they are less able to vote once the multiple other accessible (and much more popular) voting methods Arizona affords are considered. See J.A. 334-335.

Moreover, even if minorities were less able to vote in the correct precinct *and* less able to vote by other means, respondents did not demonstrate that Arizona’s challenged practices are responsible. As the district court found, respondents offered no evidence showing that Arizona’s enforcement of its precinct requirement makes it more difficult for minorities to vote in the correct precinct. J.A. 335-336. They “d[id] not challenge the manner in which Arizona counties allocate and assign polling places” or its “requirement that voters re-register to vote when they move.” J.A. 336. They “offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while non-minority voters were given correct information.” *Ibid.* Nor did they “show[] that precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters.” *Ibid.* Whatever external factors not fairly attributable to the State might explain any disparate ability to vote in the correct precinct, Section 2 does not require Arizona to restructure its precinct system to eliminate the disparity for that reason alone—any more than it would require Arizona to abandon its voter-

registration requirement if minority voters registered less frequently simply due to socioeconomic disadvantages.

Finally, this conclusion is confirmed by the strong race-neutral justifications supporting Arizona’s out-of-precinct policy. Precinct requirements serve “significant and numerous” race-neutral goals—including avoiding overcrowding at polling places, enabling each ballot to list all of (and only) the appropriate contests, locating polling places closer to voters’ residences, and enhancing detection and prevention of fraud. J.A. 728 (Bybee, J., dissenting) (citation omitted). Arizona’s approach of enforcing that “‘well established practice’” by not counting out-of-precinct ballots is a “standard feature of American democracy” that helps to ensure the precinct system operates as intended. J.A. 727, 729 (citation omitted); see J.A. 729-737.

b. Respondents’ challenge to Arizona’s ballot-collection restriction likewise fails at the threshold because they did not demonstrate that minority voters are less able to vote by means other than third-party ballot collectors. Respondents offered only “circumstantial and anecdotal evidence” showing that “minorities generically were more likely” to use third-party collectors than other voters. J.A. 324, 330. And the district court found that those “voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways,” not because they are less able to vote by other means. J.A. 278; see J.A. 324-331.

In addition, to the extent any minority voters are less able to vote in light of Arizona’s modest restriction on

third-party ballot collection, respondents did not demonstrate that the State’s voting practices can fairly be deemed responsible. None of respondents’ individual-voter witnesses “testified that H.B. 2023’s limitations on who may collect an early ballot would make it significantly more difficult to vote.” J.A. 331; see J.A. 278-284. Respondents presented evidence that slightly fewer Hispanics (80%) and many fewer Native Americans (18%) have home mail service compared to non-Hispanic whites (86%). J.A. 252. But as the district court explained, lack of mail access “does not necessarily mean that” a voter “uses or relies on a ballot collector to vote, let alone a ballot collector who does not fall into one of H.B. 2023’s exceptions.” *Ibid.*

Even if respondents had shown that minority voters have less ability to vote as a result of Arizona’s third-party ballot-collection restriction, the race-neutral justifications for such limits on third-party ballot collection—which tracks the bipartisan Carter-Baker Commission’s recommendation—would counsel strongly against construing Section 2 to invalidate that practice. J.A. 744 (Bybee, J., dissenting). At the time of the Commission’s report, absentee voting “remain[ed] the largest source of potential voter fraud” and was “vulnerable to abuse,” including through “[v]ote buying schemes,” which “are far more difficult to detect when citizens vote by mail.” J.A. 742-743 (citation omitted).

2. a. The en banc majority reached the wrong conclusion because it asked the wrong question. The majority concluded that both the out-of-precinct policy and the ballot-collection restriction caused disparate burdens on minority voters based solely on evidence of their voting *behavior*. J.A. 618-622, 659-662. The majority deemed it sufficient that minority voters

“are overrepresented among [out-of-precinct] voters,” and that “third parties collected a large and disproportionate number of early ballots from minority voters.” J.A. 618, 659. But what matters under Section 2 is whether a challenged practice causes voters of one race to have less *ability* to vote. The evidence the majority cited indicating that minority voters were more likely than others to appear at the wrong precinct, and to use third-party ballot collectors before H.B. 2023, does not show they have less ability to vote today, including by other authorized methods.

The en banc majority criticized the district court for considering the small fraction of ballots cast out of precinct, or collected by now-prohibited third parties, relative to the total number of ballots cast by all allowed methods. J.A. 618-620, 661-662. To the extent the majority held that a practice can violate Section 2 even if it affects only a small number of voters, J.A. 620, that is correct. A single polling-place clerk violates Section 2 by turning away only minority voters whether or not their votes would swing the election. See *Chisom*, 501 U.S. at 397 & n.24. But the fact that a facially neutral practice adversely affects very few minority voters—including because other voting methods remain readily available—may bear on whether the practice actually deprives them of equal ability to vote. It may be that voters’ behavior, preferences, or inexperience—not a state-erected barrier—is the cause of the statistical disparity in voting behavior.

The en banc majority also gave short shrift to the strong, race-neutral justifications for both practices. J.A. 654-657, 666-670. It could envision no “plausible justification” for the out-of-precinct policy besides avoiding additional “delay and expense.” J.A. 656. But

avoiding unnecessary delay and expense in elections is undoubtedly an important, non-discriminatory aim. Moreover, the policy also serves other objectives, including encouraging compliance with the precinct system, which in turn brings numerous benefits. J.A. 733-735. The majority also discounted the value of ballot-collection restrictions in preventing fraud because it found no evidence of actual fraud. J.A. 667-669. But it never addressed the inherent difficulty of detecting such fraud, which the Carter-Baker Commission explained supports prophylactic restrictions on third-party collection. J.A. 742-745 (Bybee, J., dissenting).

b. After an erroneous analysis of disparate effects, the en banc majority addressed at length whether those effects are “in part caused by or linked to” the Senate factors this Court discussed in *Thornburg v. Gingles*, *supra*. J.A. 659; see J.A. 623-659, 662-771. The majority’s approach was fundamentally misguided.

In *Gingles*, a vote-dilution case, the Court relied extensively on the 1982 Senate report to shed light on the totality-of-circumstances inquiry called for by amended Section 2(b). 478 U.S. at 43-46. The Court derived from that report a non-exhaustive list of nine considerations—such as a jurisdiction’s history of voting-related discrimination and racially polarized voting—that the committee anticipated “typically may be relevant to a § 2 claim,” especially in “vote dilution” cases. *Id.* at 44-45. The report “stresse[d]” that its list “[wa]s neither comprehensive nor exclusive.” *Id.* at 45. This Court likewise underscored that “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” *Ibid.* (citation omitted).

To the extent any of the Senate factors bear on the proper Section 2 inquiry in a particular case, courts may consider them among the “totality of circumstances,” 52 U.S.C. 10301(b). Although the factors appear principally directed to vote-dilution cases, some of them conceivably could be relevant in adjudicating a vote-denial claim. Whether or not a jurisdiction has a history of voting-related discrimination, for example, might be material in assessing causation. See, *e.g.*, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594-596 (9th Cir. 1997). And whether or not “the policy underlying” the challenged practice “is tenuous,” *Gingles*, 478 U.S. at 37 (citation omitted), is also relevant. See pp. 24-25, *supra*. But where the Senate factors do not help courts determine whether a challenged practice is fairly deemed responsible for voters of one racial group having less ability to vote, they have no place in a proper Section 2 analysis. The Court in *Gingles* intended those factors to help courts apply the test Section 2 establishes, see *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006), not to supplant the statutory text and context with a free-standing inquiry.

Here, the en banc majority canvassed a variety of irrelevant circumstances—such as the State’s level of spending on public-health programs and conduct by territorial officials in the 19th century long before statehood. J.A. 625-628, 653-654. The majority should have focused on Section 2’s text and context, which directed it to ask the question whether Arizona’s out-of-precinct policy and ballot-collection restriction are responsible for voters of a protected group having less ability to vote, considering all relevant circumstances. Because the answer is no, the Section 2 results claim fails.

II. THE COURT OF APPEALS ERRED IN REJECTING THE DISTRICT COURT’S FACTUAL FINDING THAT H.B. 2023 WAS NOT MOTIVATED BY DISCRIMINATORY INTENT

The en banc majority separately erred by overturning the district court’s determination that discriminatory intent was not a motivating factor in the enactment of Arizona’s ballot-collection restriction. Under clear-error review, the majority had no basis to second-guess the district court’s factual findings, and the grounds it articulated for doing so were seriously flawed.

A. “[A] finding of intentional discrimination is a finding of fact.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). “[A]ssessing a jurisdiction’s motivation in enacting voting changes is a complex task requiring a ‘sensitive inquiry into such circumstantial and direct evidence as may be available.’” *Bossier Parish*, 520 U.S. at 488 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

A district court’s “findings of fact” on discriminatory intent “are subject to review only for clear error.” *Harris*, 137 S. Ct. at 1465 (citation omitted). Under that standard, an appellate court “may not reverse just because [it] ‘would have decided the matter differently’”; instead, any “finding that is ‘plausible’ in light of the full record—even if another is equally or more so—must govern.” *Ibid.* (brackets and citation omitted).

B. The en banc majority “overstep[ped] the bounds” of its review. *Anderson*, 470 U.S. at 573. Respondents bore the burden of proving that racial discrimination was “a motivating factor” behind H.B. 2023. *Arlington Heights*, 429 U.S. at 266. The majority improperly second-guessed the district court’s finding that respondents had not met their burden.

After examining the ballot-collection restriction's history, the district court "f[ound] that H.B. 2023 was not enacted with a racially discriminatory purpose." J.A. 350. It explained that, although "some individual legislators and proponents" of H.B. 2023 and similar measures "harbored partisan motives," "perhaps implicitly informed by racial biases," "the legislature as a whole enacted H.B. 2023 *in spite of* opponents' concerns about its potential effect on [get-out-the-vote] efforts in minority communities, not *because of* that effect." *Ibid.* (emphases added). The court found that "the majority of H.B. 2023's proponents were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure" to safeguard "early mail ballot security." *Ibid.*; see J.A. 357.

The en banc majority rejected that finding, J.A. 674, but it identified nothing in the record that rendered the finding "[im]plausible," *Anderson*, 470 U.S. at 574. The majority did not question the district court's determination that most supporters of H.B. 2023 in the legislature "had a sincere, though mistaken, non-race-based" reason for supporting it. J.A. 677. Instead, the majority imputed what it viewed as Senator Shooter's and LaFaro's race-based motives to other, "well meaning legislators," stating that those other legislators were "used as 'cat's paws.'" J.A. 678. As Judge O'Scannlain explained, the majority's reliance on that "employment discrimination doctrine [wa]s misplaced." J.A. 719.

In employment law, "cat's-paw liability" permits imputing a supervisor's discriminatory motive to an employer because the "supervisor is an agent of the employer." *Staub v. Proctor Hosp.*, 562 U.S. 411, 421

(2011). When the supervisor “causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a ‘motivating factor in the employer’s action.’” *Ibid.* No similar agency relationship generally exists among members of a legislative body. See *United States v. O’Brien*, 391 U.S. 367, 384 (1968).

The appropriate analogy would be to an employer that is considering an applicant and receives feedback about the applicant from the applicant’s former supervisor at another company. If the former supervisor provides a false negative evaluation based on his own racial bias, and the prospective employer (unaware of that bias) relies on that evaluation to reject the applicant, the prospective employer has not discriminated based on race. The former supervisor’s intent cannot be imputed to the prospective employer because he is not its agent. So too, unless other members of a legislature have “delegated” to a particular member authority to act on behalf of the body, *Staub*, 562 U.S. at 421 (citation omitted), discriminatory motives of one legislator cannot reflexively be imputed to the whole chamber, regardless of his own motives for supplying false information that the body believes to be true.

Moreover, the en banc majority failed to support its premise that Senator Shooter and others who advocated the ballot-collection restriction were motivated by race. The majority conflated “*partisan* motives” with “*racial* motives” by finding discriminatory intent based solely on Shooter’s partisan aims of eliminating a get-out-the-vote strategy used by his opponents, coupled with the fact that voting in his district was racially polarized. J.A. 717 (O’Scannlain, J., dissenting). The

district court, in contrast, properly recognized the difference, explaining that “partisan motives are not necessarily racial in nature, even though racially polarized voting can sometimes blur the lines.” J.A. 357. The district court’s finding that the restriction was not the product of racial considerations was not clearly erroneous, and the en banc majority erred in overturning that factual finding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
JOHN B. DAUKAS
Principal Deputy Assistant Attorney General
JONATHAN C. BOND
Assistant to the Solicitor General
THOMAS E. CHANDLER
Attorney

DECEMBER 2020

APPENDIX

1. U.S. Const. Amend. XV provides:

Section 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.

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

2. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, provides in pertinent part:

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the “Voting Rights Act of 1965”.

SEC. 2. 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.

* * * * *

3. 52 U.S.C. 10301 provides:

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.