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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Democratic National Committee, DSCC, and  
10 Arizona Democratic Party,

11 Plaintiffs,

12 v.

13 Michele Reagan and Mark Brnovich,

14 Defendants.

No. CV-16-01065-PHX-DLR

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

15  
16 Plaintiffs challenge two aspects of Arizona's election system: (1) Arizona's policy  
17 to not count provisional ballots cast in the wrong precinct, which derives from the  
18 collective effect of A.R.S. §§ 16-122, -135, -584, and related rules in the Arizona  
19 Election Procedures Manual; and (2) Arizona House Bill 2023 ("H.B. 2023"), codified at  
20 A.R.S. § 16-1005(H)-(I), which makes it a felony for anyone other than the voter to  
21 possess that voter's early mail ballot, unless the possessor falls within a statutorily  
22 enumerated exception. Plaintiffs allege that the challenged laws violate § 2 of the Voting  
23 Rights Act of 1965 ("VRA") by adversely and disparately impacting the electoral  
24 opportunities of Hispanic, African American, and Native American Arizonans, who  
25 Plaintiffs claim are among their core constituencies. Plaintiffs also contend that these  
26 provisions violate the First and Fourteenth Amendments to the United States Constitution  
27 by severely and unjustifiably burdening voting and associational rights. Lastly, Plaintiffs  
28 claim that H.B. 2023 violates § 2 of the VRA and the Fifteenth Amendment to the United

1 States Constitution because it was enacted with the intent to suppress voting by Hispanic  
2 and Native American voters. (Doc. 360 at 4-7.)<sup>1</sup> Plaintiffs seek (1) a declaration that the  
3 challenged election practices are unlawful and (2) a permanent injunction requiring  
4 Defendants to partially count out-of-precinct (“OOP”) provisional ballots for races for  
5 which the voter otherwise was eligible to cast a vote and enjoining Defendants from  
6 implementing, enforcing, or giving any effect to H.B. 2023. (Doc. 233 at 41-42.)

7 The Court presided over a ten-day bench trial beginning October 3, 2017 and  
8 ending October 18, 2017. Pursuant to Federal Rule of Civil Procedure 52, and for the  
9 following reasons, the Court finds against Plaintiffs and in favor of Defendants on all  
10 claims.<sup>2</sup>

## 11 I. PARTIES

12 Plaintiffs are the Democratic National Committee (“DNC”), the Democratic  
13 Senatorial Campaign Committee (“DSCC”), and the Arizona Democratic Party (“ADP”).  
14 The DNC is a national committee dedicated to electing local, state, and national  
15 candidates of the Democratic Party to public office. The DSCC is a Democratic political  
16 committee dedicated to encouraging the election of Democratic Senate candidates to  
17 office and is comprised of sitting Democratic members of the United States Senate. The  
18 ADP is a state committee dedicated to electing candidates of the Democratic Party to  
19 public office throughout Arizona.

20 Defendants are Arizona Secretary of State Michele Reagan and Arizona Attorney  
21 General Mark Brnovich. Secretary Reagan is Arizona’s chief elections officer. Attorney  
22 General Brnovich is Arizona’s chief legal officer, charged with enforcing state criminal  
23 statutes, including H.B. 2023 and other election-related offenses. Secretary Reagan  
24 drafts, and Attorney General Brnovich (in conjunction with the Governor of Arizona)

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25 <sup>1</sup> For purposes of this order, “Doc.” refers to documents on the Court’s electronic  
26 docket, “Ex.” to trial exhibits, “Tr.” to the official trial transcript, and “Dep.” to  
27 designated deposition transcripts. Record citations offer examples of supporting  
evidence, but are not intended to be exhaustive of all evidence supporting a proposition.

28 <sup>2</sup> Defendants’ oral motion, made during trial, for judgment on partial findings  
pursuant to Federal Rule of Civil Procedure 52(c) is denied as moot. (Doc. 384.)

1 approves, the Election Procedures Manual. A.R.S. §§ 41-191 et seq, 16-1021, -452.

2 The Court also permitted the following parties to intervene as defendants: (1) the  
3 Arizona Republican Party (“ARP”), a state committee dedicated to electing candidates of  
4 the Republican Party to public office; (2) Debbie Lesko, who at the time of intervention  
5 was an Arizona State Senator representing Arizona’s 21st legislative district and Precinct  
6 Committeewoman for Arizona’s 21st legislative district, and who recently was elected to  
7 represent Arizona’s 8th congressional district in the United States House of  
8 Representatives; (3) Tony Rivero, a member of the Arizona House of Representatives  
9 representing Arizona’s 21st legislative district; (3) Bill Gates, who at the time of  
10 intervention served as a City of Phoenix Councilman and Precinct Committeeman for  
11 Arizona’s 28th legislative district, and who now serves as a member of the Maricopa  
12 County Board of Supervisors representing district 3; and (4) Suzanne Klapp, a City of  
13 Scottsdale Councilwoman and Precinct Committeewoman for Arizona’s 23rd legislative  
14 district. (Docs. 39, 44, 56, 126.)

## 15 **II. OVERVIEW OF TRIAL TESTIMONY**

### 16 **A. Plaintiffs’ Expert Witnesses**

#### 17 **1. Dr. Allan Lichtman**

18 Dr. Allan Lichtman is a Distinguished Professor of History at American  
19 University in Washington, D.C., where he has been employed for 42 years. Dr. Lichtman  
20 formerly served as Chair of the History Department and Associate Dean of the College of  
21 Arts and Sciences at American University. He received his B.A. in History from  
22 Brandeis University in 1967 and his Ph.D. in History from Harvard University in 1973,  
23 with a specialty in the mathematical analysis of historical data. Dr. Lichtman’s areas of  
24 expertise include political history, electoral analysis, and historical and quantitative  
25 methodology. (Ex. 91 at 3-4.)

26 Dr. Lichtman has worked as a consultant or expert witness for plaintiffs and  
27 defendants in more than 80 voting and civil rights cases, including *League of United*  
28 *Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), in which Justice

1 Kennedy’s majority opinion authoritatively cited Dr. Lichtman’s statistical work. Dr.  
2 Lichtman also has testified several times for plaintiffs and defendants on issues of  
3 intentional discrimination and application of Section 2 in VRA cases. (Ex. 91 at 4.)

4 Dr. Lichtman opined, generally, that under the totality of the circumstances H.B.  
5 2023 causes minority voters to have less opportunity to participate in the political process  
6 than non-minority voters, and that the law was passed with the intent to suppress minority  
7 voters.<sup>3</sup> He supported his opinions with the standard sources used in political and  
8 historical analysis, including scholarly books, articles, reports, newspapers, voter  
9 registration and turnout data, and scientific surveys.

10 Dr. Lichtman’s underlying sources, research, and statistical information are useful.  
11 The surveys and data he supplied reveal significant socioeconomic disparities between  
12 non-minorities and minorities, including in areas of poverty, unemployment, education,  
13 transportation, and health. (Ex. 91 at 3-4.) His report also contains evidence that  
14 Arizona exhibits racially polarized voting and has a history of racial appeals in political  
15 campaigns that continue to this day. (Ex. 91 at 30, 44-45.) Dr. Lichtman opined that the  
16 strong ties between race and partisanship in Arizona make targeting minorities the most  
17 effective and efficient way for Republicans to advance their political prospects. (Ex. 93  
18 at 4-5.)

19 Although the Court finds Dr. Lichtman’s curation of material facts surrounding the  
20 legislative history and his underlying research to be helpful and reliable, the Court did not  
21 find Dr. Lichtman’s ultimate opinions useful. Dr. Lichtman applied the law as he  
22 interpreted it to the data he assembled. In this respect, his opinions presented more like  
23 an attorney’s closing argument than an objective analysis of data, and the credibility of  
24 his trial testimony was undermined by his seeming effort to advocate a position rather  
25 than answer a question. Moreover, applying law to facts is this Court’s duty, and it is one

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27 <sup>3</sup> For ease, the Court uses the terms “minority” to refer to the racial minorities  
28 alleged to be adversely impacted by the challenge laws, and “non-minority” to refer to  
non-Hispanic white voters.

1 the Court can do without the assistance of an expert opining on how he interprets the law  
2 and thinks it should be applied. The Court also has not considered Dr. Lichtman's  
3 opinions on the ultimate issue of legislative intent, both because this issue is not the  
4 proper subject of expert testimony and because it invades the province of the Court.

## 5 **2. Dr. David Berman**

6 Dr. David Berman is a Professor Emeritus of Political Science and a Senior  
7 Research Fellow at the Morrison Institute for Public Policy at Arizona State University.  
8 As a political science professor, he has taught undergraduate survey courses in American  
9 government and politics, state and local politics, and Arizona government and politics, as  
10 well as more specialized courses, including undergraduate seminars on Arizona politics  
11 during which students interacted with state and local office holders and political  
12 participants. He has also taught advanced graduate courses focusing on research methods  
13 in these areas. (Ex. 89 at 3.)

14 As a Senior Research fellow with the Morrison Institute, Dr. Berman specializes in  
15 research and writing on governance and election issues in Arizona, including  
16 redistricting, direct democracy, and campaign finance. He has been a professor at  
17 Arizona State University since 1966, and his previous work experience was as a Research  
18 Associate at the National League of Cities in Washington, D.C. from 1964 to 1966. (Ex.  
19 89 at 3-4.)

20 Dr. Berman opined that Arizona has a long history of discrimination against the  
21 voting rights of Native Americans, Hispanics, and African Americans, and that this  
22 discrimination is part of a more general pattern of political, social, and economic  
23 discrimination against minority groups in areas such as school segregation, educational  
24 funding and programming, equal pay and the right to work, and immigration.

25 The Court finds Dr. Berman credible. His opinions were well-researched and  
26 rendered using standard sources and methodologies in his field of expertise, and his  
27 sources were well-identified. Dr. Berman has authored ten books and over 70 published  
28 papers, book chapters, or refereed articles dealing with state and local government,

1 politics, and public policy, and his opinions were based substantially on these prior  
2 works. In particular, Dr. Berman drew heavily upon his book *Arizona Politics and*  
3 *Government: The Quest for Autonomy, Democracy, and Development* (University of  
4 Nebraska Press, 1998) and his review of archival papers and collections. (Ex. 89 at 3-4.)  
5 The Court affords great weight to Dr. Berman's opinions.

### 6 **3. Dr. Jonathan Rodden**

7 Dr. Jonathan Rodden is a tenured Professor of Political Science at Stanford  
8 University and the founder and director of the Stanford Spatial Social Science Lab, a  
9 center for research and teaching with a focus on the analysis of geo-spatial data in the  
10 social sciences. Students and faculty members affiliated with the lab are engaged in a  
11 variety of research projects involving large, fine-grained, geo-spatial data sets, including  
12 individual records of registered voters, Census data, survey responses, and election  
13 results at the level of polling. Prior to joining the Stanford faculty, Dr. Rodden was the  
14 Ford Professor of Political Science at the Massachusetts Institute of Technology. He  
15 received his Ph.D. from Yale University and his B.A. from the University of Michigan,  
16 Ann Arbor, both in political science. (Ex. 95 at 5-6.)

17 Dr. Rodden has expertise in the use of large data sets and geographic information  
18 systems to analyze aspects of political representation. He has developed a national data  
19 set of geo-coded precinct-level election results that has been used extensively in policy-  
20 oriented research related to redistricting and representation. He also has worked  
21 extensively with Census data from the United States and other countries.

22 Dr. Rodden has published papers on political geography and representation in a  
23 variety of academic journals and has been featured in popular publications like the Wall  
24 Street Journal, the New York Times, and Boston Review. Dr. Rodden has testified as an  
25 expert witness in three recent election law cases. (Ex. 95 at 6.)

26 Here, Dr. Rodden analyzed the rates and causes of OOP voting in Arizona during  
27 the 2012, 2014, and 2016 general elections. The Court finds his use of a combination of  
28 individual-level and aggregate data analyses, both of which have been accepted in

1 previous cases analyzing questions under the VRA, to be valid and generally trustworthy,  
2 and affords them great weight. (Ex. 97 at 7-9.)

3 Dr. Rodden found that Hispanic, Native American, and African American voters  
4 cast OOP ballots at statistically higher rates than their non-minority counterparts. (Ex. 95  
5 at 3-4; Ex. 97 at 2-4.) Focusing on Maricopa County in the 2012 election, Dr. Rodden  
6 found that the rate of OOP voting was “131 percent higher for Hispanics, 74 percent  
7 higher for African Americans, and 39 percent higher for Native Americans than whites.”  
8 (Ex. 95 at 3-4.)

9 Further, Dr. Rodden found that OOP voters are substantially more likely to be  
10 young and to live in neighborhoods characterized by large numbers of renters and with  
11 high rates of transience, and that the rate of OOP voting was 65 percent higher for  
12 Democratic voters than for Republican voters in Maricopa County, and 56 percent higher  
13 in Pima County. Dr. Rodden found that “changes in polling place locations are  
14 associated with higher rates of out-of-precinct voting,” and that “African Americans and  
15 Hispanics are substantially more affected by this than whites. In particular, the impact of  
16 precinct consolidation, while statistically significant for all groups, is more than twice as  
17 large for Hispanics and African Americans as for non-Hispanic whites.” (Ex. 95 at 3-4.)  
18 When analyzing Arizona’s non-metropolitan counties, Dr. Rodden found that OOP  
19 voting is “negligible in majority-white precincts, but increases dramatically in precincts  
20 where Hispanics and Native Americans make up majorities.” (Ex. 96 at 58.)

21 In addition to his analysis of OOP voting, Dr. Rodden employed standard and  
22 accepted methods in his field to analyze the “mailability” of Arizona’s non-metropolitan  
23 counties in order to estimate the populations that likely would be most affected by H.B.  
24 2023’s ballot collection restrictions. Though somewhat imprecise, the Court finds his  
25 method of analysis to be creative given the lack of direct data available on the subject,  
26 generally reliable, and based on sufficient data given the circumstances. Dr. Rodden  
27 found that “[o]utside of Maricopa and Pima counties” “around 86 percent of non-  
28 Hispanic whites have home mail service,” but “only 80 percent of Hispanics do, and only

1 18 percent of Native Americans have such access.” (Ex. 97 at 4.)

2 Dr. Rodden’s error rate is unknown, however, due to the lack of direct data. Also,  
3 his analysis did not include Arizona’s metropolitan counties and therefore does not reveal  
4 whether, on a statewide basis, minorities have disparate access to home mail service as  
5 compared to non-minorities. Further, mail access is an imprecise proxy for determining  
6 the number and demographics of voters who use or rely on ballot collection services.  
7 Simply because a voter lacks home mail access does not necessarily mean that she uses  
8 or relies on a ballot collector to vote, let alone a ballot collector who does not fall into  
9 one of H.B. 2023’s exceptions. Accordingly, although Dr. Rodden’s analysis provided  
10 useful insight into home mail access in non-metropolitan counties, the Court is mindful of  
11 its limitations and affords these opinions moderate weight.

12 **B. Plaintiffs’ Lay Witnesses**

13 Plaintiffs called the following lay witnesses to testify at trial: Carmen Arias,  
14 Michael Blair, Delilah Correa, Charlene Fernandez, LeNora Fulton, Steve Gallardo, Kate  
15 Gallego, Kathleen Giebelhausen, Marva Gilbreath, Leah Gillespie, Carolyn Glover,  
16 Leonard Gorman, Shari Kelso, Scott Konopasek, Joeseeph Larios, Daniel Magos, Lori  
17 Noonan, Patrick O’Connor, Martin Quezada, Nellie Ruiz, Spencer Scharff, Sam Shaprio,  
18 Ken Clark, and John Powers. These witnesses include individual voters, representatives  
19 from state, county, and municipal governments, community advocates who have  
20 collected ballots as part of get-out-the-vote (“GOTV”) efforts, community advocates  
21 focusing of Native American issues, Democratic Party operatives, a California state  
22 elections official, and a former United States Department of Justice (“DOJ”) official.

23 **C. Defendants’ Expert Witnesses**

24 **1. Dr. Donald Critchlow**

25 Dr. Donald Critchlow works at Arizona State University as the Director of the  
26 Center for Political Thought and Leadership, an organization funded by a grant from the  
27 Charles Koch Foundation. (Tr. 1533-37.) He opined on the relationship between racial  
28 discrimination and voting in Arizona. Dr. Critchlow made credible observations that



1 discrimination in Arizona has not been linear and that Arizona has taken effective action  
2 to combat discrimination and encourage participation in voting.

3 With that said, Dr. Critchlow has never published a book or article focused  
4 specifically on Arizona history, nor has he taught courses in Arizona history or politics.  
5 (Tr. 1531-32.) Further, in many respects he offered one-sided opinions of Arizona’s  
6 history, ignored incidents of discrimination, and failed to address the key political shift  
7 between the Democratic and Republican parties during the Civil Rights Movement. For  
8 example, he either was unfamiliar with or totally discounted the Republican strategy of  
9 confrontation of minority voters at the polls during “Operation Eagle Eye” in the 1960s.  
10 (Ex. 89 at 16; Tr. 1549.) Additionally, although Dr. Critchlow acknowledged that  
11 Arizona has a history of discrimination, his report appears to attribute past racial  
12 discrimination in Arizona only to the Democratic Party and claims that discrimination has  
13 not existed since the 1960s (in the Republican era). (Ex. 521 at 4.) For these reasons, the  
14 Court affords little weight to Dr. Critchlow’s opinions

## 15 **2. Sean Trende**

16 Sean Trende critiqued Dr. Lichtman’s analysis of Arizona’s voting patterns and  
17 history of racial discrimination, but offered no new information or analysis. Though the  
18 Court found some of his criticisms worth considering, overall they were insignificant.  
19 For example, although Trende generally agreed with Dr. Lichtman that Arizona  
20 experiences racially polarized voting, he made much of the irrelevant fact that Arizona  
21 voting is not as racially polarized as voting in Alabama. (Tr. 1837.) Additionally,  
22 Trende’s opinions on the weight to give certain evidence and on the proper interpretation  
23 and application of the law and evidence—like those of Dr. Lichtman’s—were not helpful  
24 and invade the province of the Court. Moreover, Trende does not have a Ph.D and has  
25 never written a peer-reviewed article. He has spent most of his professional career  
26 working as a lawyer or political commentator. He is not a historian and says nothing  
27 about the historical methods Dr. Lichtman utilized. (Tr. 1861-62.) For these reasons, the  
28 Court affords Trende’s opinions little weight.

1                                   **3. Dr. M.V. Hood**

2                   Dr. M.V. Hood is a Professor of Political Science at the University of Georgia.  
3 Dr. Hood responded to the reports of Drs. Lichtman, Rodden, and Berman. (Ex. 522 at 2-  
4 3.) For a number of reasons, the Court affords little weight to Dr. Hood’s opinions.

5                   Dr. Hood criticizes Dr. Berman’s use of older historical information. Yet Dr.  
6 Critchlow, another expert retained by Defendants, agrees with Dr. Berman that older  
7 historical information is relevant to understanding patterns. (Ex. 521 at 8-10; Ex. 522 at  
8 11.) Moreover, Dr. Hood admitted at trial that he examines historical information going  
9 back 50 to 200 years. (Tr. 2122-23.)

10                  Dr. Hood opined that H.B. 2023 does not hinder Native American voting because  
11 the rates of early voting on the Navajo Nation increased from 2012 to 2016. He based  
12 that opinion on early votes cast in three counties. This opinion is not reliable. Dr.  
13 Hood’s analysis did not include an assessment of racial disparities and turnout. He also  
14 conceded that myriad factors could affect turnout. (Tr. 2111-14.)

15                  Dr. Hood prepared a cross-state comparative analysis of ballot collection laws and  
16 policies related to counting OOP ballots. Although his analysis offered some insight, it  
17 overall was not useful because he did not address statutory differences and nuances, and  
18 his analysis reflected an incomplete understanding of the laws he categorized. For  
19 example, some of the states he labeled as prohibiting ballot collection do not have laws  
20 comparable to H.B. 2023 because they prohibit only the delivery of the ballot, not the  
21 collection and mailing of the ballot on someone else’s behalf. (Ex. 92 at 52-53.)

22                  The Court also notes that Dr. Hood’s testimony either has been rejected or given  
23 little weight in numerous other cases due to concerns over its reliability. *See Ne. Ohio*  
24 *Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at \*24 (S.D.  
25 Ohio June 7, 2016), *aff’d in part, rev’d in part*, 837 F.3d 612 (6th Cir. 2016); *Veasey v.*  
26 *Perry*, 71 F. Supp. 3d 627, 663 (S.D. Tex. 2014); *Frank v. Walker*, 17 F. Supp. 3d 837,  
27 881-84 (E.D. Wis. 2014), *rev’d on other grounds*, 768 F.3d 744 (7th Cir. 2014); *Fla. v.*  
28 *United States*, 885 F. Supp. 2d 299, 324 (D.D.C. 2012); *Common Cause/Ga. v. Billups*,

1 No. 4:05-cv-0201, 2007 WL 7600409, at \*14 (N.D. Ga. Sept. 6, 2007). Additionally,  
2 most of Dr. Hood's work has been as an expert on behalf of states defending against  
3 allegations that their laws violated the Constitution or the VRA. (Tr. 2123-25.)

#### 4 **4. Dr. Janet Thornton**

5 Dr. Janet Thornton is a Managing Director at Berkeley Research Group. Dr.  
6 Thornton did not conduct her own analysis, but instead offered her opinion that Dr.  
7 Rodden's statistical work is flawed. (Ex. 525 at 1.) For example, she challenged Dr.  
8 Rodden's approaches to measuring racial disparities in OOP voting. One approach uses  
9 individual surname data and geographic coordinates to infer race. Among Dr. Thornton's  
10 critiques was the presence of measurement error, which is well-taken. Indeed, even Dr.  
11 Rodden concedes measurement error exists, especially as it pertains to African American  
12 probabilities. Dr. Thornton did not critique the Hispanic probabilities assessed by Dr.  
13 Rodden, however, and Dr. Rodden credibly explained that the measurement error for  
14 Hispanic probabilities leads only to the under-estimation of racial disparities.

15 The second approach that Dr. Rodden employed relied on data collected by the  
16 Census Department on race and ethnicity at the lowest possible level of geographic  
17 aggregation. Dr. Thornton's challenge to the aggregate approach was neither about the  
18 data nor the presence of racial disparities in OOP voting, but rather the statistical model  
19 employed by Dr. Rodden. Dr. Rodden, however, credibly showed that results similar to  
20 those reported by his analysis are obtained using the alternative model specification or  
21 measurement strategies recommended by Dr. Thornton.

22 Dr. Thornton's opinion that there should have been a systematic decline in the  
23 number of ballots cast in Arizona's 13 non-metropolitan counties during 2016 if the  
24 limits on ballot collection impacted the ability of rural and minority persons to vote is  
25 simplistic and not credible. The statistical evidence suggests that increased turnout in  
26 rural counties for the 2016 election was driven by non-minority voters, not Native  
27 American and Hispanic voters. (Ex. 98 at 21-26.) Moreover, many factors impact voter  
28 turnout, including controversial candidates and partisan mobilization efforts, all of which

1 might drown out the potentially deleterious effects of H.B. 2023. Overall, the Court finds  
2 that Dr. Thornton’s critiques do not significantly undermine Dr. Rodden’s opinions and  
3 therefore affords them less weight.

4 **D. Defendants’ Lay Witnesses**

5 Defendants called the following lay witnesses to testify at trial: Brad Nelson, Eric  
6 Spencer, Helen Purcell, James Drake, Michael Johnson, Michelle Ugenti-Rita, Amy  
7 Chan (formerly Amy Bjelland), Tony Rivero, and Scott Freeman. These witnesses  
8 include current and former lawmakers, elections officials, and law enforcement officials.

9 **E. Witnesses Testifying By Deposition**

10 In addition to the live testimony, the following witnesses testified by deposition:  
11 Sheila Healy, Randy Parraz, Samantha Pstross, Secretary Reagan, Spencer Scharff,  
12 Donald Shooter, Eric Spencer, Robyn Stallworth-Pouquette, Alexis Tameron, Victor  
13 Vasquez, and Dr. Muer Yang. The parties each raised admissibility objections to certain  
14 of these deposition designations. The Court addresses these objections, along with other  
15 outstanding evidentiary matters, in a separate order.

16 **III. OVERVIEW OF CHALLENGED ELECTIONS PRACTICES**

17 **A. H.B. 2023**

18 Voting in Arizona involves a flexible mixture of early in-person voting, early  
19 voting by mail, and traditional, in-person voting at polling places on Election Day.  
20 Arizona voters do not need an excuse to vote early and Arizona permits early voting both  
21 in person and by mail during the 27 days before an election. A.R.S. § 16-541. For those  
22 voters who prefer to vote early and in-person, all Arizona counties operate at least one in-  
23 person early voting location. Some of these locations are open on Saturdays. (Doc. 361  
24 ¶ 59.)

25 Arizona has allowed early voting by mail for over 25 years, and it has since  
26 become the most popular method of voting, accounting for approximately 80 percent of  
27 all ballots cast in the 2016 election. In 2007, Arizona implemented permanent no-excuse  
28 early voting by mail, known as the Permanent Early Voter List (“PEVL”). Arizonans

1 now may vote early by mail either by requesting an early ballot on an election-by-  
2 election basis, or by joining the PEVL, in which case they will be sent an early ballot as a  
3 matter of course no later than the first day of the 27-day early voting period. A.R.S. §§  
4 16-542, -544. In 2002, Arizona also became the first state to make available an online  
5 voter registration option, allowing voters to register online through Arizona’s Motor  
6 Vehicle Division (“MVD”) website, www.servicearizona.com. When registering online  
7 through the MVD, voters can enroll in the PEVL by clicking a box. (Doc. 361 ¶ 56.)

8 To be counted, an early ballot must be received by the county recorder by 7:00  
9 p.m. on Election Day. A.R.S. § 16-548(A). Early ballots contain instructions that inform  
10 voters of the 7:00 p.m. deadline. Voters may return their early ballots by mail postage-  
11 free, but they must mail them early enough to ensure that they are received by this  
12 deadline. Additionally, some Arizona counties provide special drop boxes for early  
13 ballots, and voters in all counties may return their early ballots in person at any polling  
14 place, vote center, or authorized election official’s office without waiting in line. (Doc.  
15 361 ¶¶ 57, 61.)

16 Since 1997, it has been the law in Arizona that “[o]nly the elector may be in  
17 possession of that elector’s unvoted early ballot.” A.R.S. § 16-542(D). In 2016, Arizona  
18 amended A.R.S. § 16-1005 by enacting H.B. 2023, which limits who may collect a  
19 voter’s voted or unvoted early ballot:

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

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

25 1. An election held by a special taxing district formed  
26 pursuant to title 48 for the purpose of protecting or providing  
services to agricultural lands or crops and that is authorized to  
conduct elections pursuant to title 48.

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

(a) “Caregiver” means a person who provides medical or

1 health care assistance to the voter in a residence, nursing care  
2 institution, hospice facility, assisted living center, assisted  
3 living facility, assisted living home, residential care  
institution, adult day health care facility or adult foster care  
home.

4 (b) “Collects” means to gain possession or control of an early  
5 ballot.

6 (c) “Family member” means a person who is related to the  
7 voter by blood, marriage, adoption or legal guardianship.

8 (d) “Household member” means a person who resides at the  
9 same residence as the voter.

10 A.R.S. § 16-1005(H)-(I). Voters therefore may entrust a caregiver, family member,  
11 household member, mail carrier, or elections official to return their early ballots, but may  
12 not entrust other, unauthorized third parties to do so.

### 13 **B. Rejection of OOP Ballots**

14 Since at least 1970, Arizona has required voters who choose to vote in person on  
15 Election Day to cast their ballots in their assigned precinct and has enforced this system  
16 by counting only those ballots cast in the correct precinct. (Doc. 361 ¶ 46.) Because  
17 elections involve many different overlapping jurisdictions, the precinct-based system  
18 ensures that each voter receives a ballot reflecting only the races for which that person is  
19 entitled to vote. (Ex. 95 at 10.) If a voter arrives at a precinct but does not appear on the  
20 precinct register, Arizona allows the voter to cast a provisional ballot. A.R.S. §§ 16-122,  
21 -135, -584. After Election Day, county elections officials review all provisional ballots.  
22 If a voter’s address is determined to be within the precinct, the provisional ballot is  
23 counted. Arizona does not count any portion of a provisional ballot cast outside of a  
24 voter’s correct precinct. A majority of states do not count OOP ballots, putting Arizona  
well within the mainstream on this issue.<sup>4</sup> Indeed, at no point has the DOJ objected to

25 <sup>4</sup> See Ala. Code §§ 17-9-10, -10-2, -10-3; Ark. Code Ann. §§ 7-5-306(b), -  
26 308(d)(2); Conn. Gen. Stat. §§ 9-19j, -232n; Del. Code Ann. tit. 15, § 4948(b), h(7); Fla.  
27 Stat. § 101.048(1),(2); Haw. Admin. Rules § 3-172-140; Ind. Code §§ 3-11.7-2-1, -11-8-  
28 2, and -11.7-5-3; Iowa Code §§ 49.9, 49.79(2)(c), 49.80, 49.81, 53.23; Tit. 31 Ky.  
Admin. Regs. § 6:020(1),(14); Mich. Comp. Laws §§ 168.523a(1),(5),(7), 168.813(1);  
Miss. Code, Ann. § 23-15- 573(1),(3)(b); Mo. Rev. Stat. § 115.430(2),(3),(6); Mont.  
Code §§ 13-15-107(1),(3), 13-2-512, 13-13-114(1)(a),(2); Neb. Rev. Stat. §§ 32-915(1), -

1 this practice, and Plaintiffs object to it for the first time in this case.

2 In 2011, Arizona amended its elections code to allow counties to choose whether  
3 to conduct elections under the traditional precinct model or to use a “vote center” system.  
4 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (April 29, 2011) (amending A.R.S. § 16-  
5 411). Unlike the precinct-based system, the vote center model requires each vote center  
6 to be equipped to print a specific ballot, depending on each voter’s particular district, that  
7 includes all races for which that voter is eligible to vote. Thus, under a vote center  
8 system, voters may cast their ballots at any vote center in the county in which they reside  
9 and receive the appropriate ballot. A.R.S. § 16-411(B)(4). Graham, Greenlee, Cochise,  
10 Navajo, Yavapai, and Yuma counties have adopted the vote center model. These  
11 counties are mostly rural and sparsely populated. Precinct-based voting requirements,  
12 such as Arizona’s policy to not count OOP ballots, have no impact on voters in these  
13 counties. By comparison, the most populous counties in Arizona, such as Maricopa,  
14 Pima, and Pinal, currently adhere to the traditional precinct-based model.

#### 15 **IV. PRELIMINARY ISSUES**

##### 16 **A. Standing**

17 Article III of the United States Constitution limits federal courts to resolving  
18 “Cases” and “Controversies,” one element of which is standing. To have standing to  
19 litigate in federal court, a plaintiff “must have suffered or be imminently threatened with  
20 a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged  
21 action of the defendant and likely to be redressed by a favorable judicial decision.”  
22 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, -- U.S. --, 134 S. Ct. 1377, 1386  
23 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Only one  
24 plaintiff needs to have standing when only injunctive relief is sought. *Crawford v.*

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25  
26 1002(5)(b),(e); Nev. Rev. Stat. § 293.3081(1), 293.3085(4); N.Y. U.C.C. Law §§ 8-  
27 302(3)(e), § 9-209; Ohio Rev. Stat. §§ 3505.181(A)(1), 3505.183(B)(1), (4)(a); S.C. Code  
28 Ann. §§ 7-13-820, 7-13-830; S.D. Sess. Laws § 12-18-39, 12-20-5.1; Tenn. Code Ann. §  
2-7-112(a)(3)(A),(B); Tex. Elec. Code Ann. §§ 63.001(c),(g), 63.011(a),(b); Tex. Admin.  
Code § 81.172.

1 *Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7  
2 (2008).

3 Plaintiffs have organizational standing to challenge the election regulations at  
4 issue. Ballot collection was a GOTV strategy used primarily by the Democratic Party to  
5 increase electoral participation by otherwise low-efficacy voters. (Tr. 416-26, 632-33,  
6 659, 902, 930; Healy Dep. 28:15-29:13.) H.B. 2023's limitations will require Democratic  
7 organizations, such as the ADP, to retool their GOTV strategies and divert more  
8 resources to ensure that low-efficacy voters are returning their early mail ballots.  
9 Additionally, credible expert testimony shows that minority voters, who tend to vote  
10 disproportionately for Democratic candidates, vote OOP at higher rates than non-  
11 minority voters. Thus, Arizona's policy to not count OOP ballots places a greater  
12 imperative on organizations like the ADP to educate their voters. These are sufficiently  
13 concrete and particularized injuries that are fairly traceable to the challenged provisions.  
14 *See Crawford*, 472 F.3d at 951 ("Thus the new law injures the Democratic Party by  
15 compelling the party to devote resources to getting to the polls those of its supporters  
16 who would otherwise be discouraged by the new law from bothering to vote."); *One Wis.*  
17 *Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 967 (W.D. Wis. 2016) (finding expenditure of  
18 resources for educating voters about how to comply with new state voter registration  
19 requirements sufficient to establish standing).

20 Plaintiffs also have associational standing to challenge these provisions on behalf  
21 of their members.

22 [A]n association has standing to bring suit on behalf of its  
23 members when: (a) its members would otherwise have  
24 standing to sue in their own right; (b) the interests it seeks to  
25 protect are germane to the organization's purpose; and (c)  
neither the claim asserted nor the relief requested requires the  
participation of individual members in the lawsuit.

26 *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). A number of self-  
27 identified Democratic voters testified either that they have used ballot collection services  
28 in the past, or that they have voted OOP. The voting rights of such individuals are



1 germane to Plaintiffs’ goal of electing Democratic candidates to local, state, and federal  
2 offices. Further, neither the claims asserted nor the relief requested requires individual  
3 members to participate in this lawsuit.

4 Finally, Plaintiffs’ asserted injuries can be redressed by a favorable decision of  
5 this Court. “[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the  
6 state official designated to enforce that rule who is the proper defendant[.]” *Am. Civil*  
7 *Liberties Union v. The Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993). Here, county  
8 officials are responsible for counting ballots and verifying proper voter registration, *see*  
9 A.R.S. §§ 16-621(A), -584(E), but Secretary Reagan and Attorney General Brnovich also  
10 play a role in determining how OOP ballots are counted. Arizona law requires Secretary  
11 Reagan, after consulting with county officials, to “prescribe rules to achieve and maintain  
12 the maximum degree of correctness, impartiality, uniformity and efficiency on the  
13 procedures for early voting and voting, and of producing, distributing, collecting,  
14 counting, tabulating and storing ballots.” A.R.S. § 16-452(A). These rules are prescribed  
15 in the Election Procedures Manual and have the force of law. A.R.S. § 16-452(B)-(C).  
16 “Any person who does not abide by the Secretary of State’s rules is subject to criminal  
17 penalties,” *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003)  
18 (citing A.R.S. § 16-452(C)), and Attorney General Brnovich is authorized to prosecute  
19 such violations, A.R.S. § 16-1021. Although county officials are responsible for  
20 physically counting ballots, they are not empowered to count or reject ballots at their  
21 discretion. Rather, “[a]ll proceedings at the counting center shall be under the direction  
22 of the board of supervisors or other officer in charge of elections and shall be conducted  
23 in accordance with the approved instructions and procedures manual[.]” A.R.S. § 16-  
24 621(A).

25 Though the Court cannot require Secretary Reagan and Attorney General  
26 Brnovich to physically count OOP ballots for races for which the voter was otherwise  
27 eligible to cast a vote, it can require them to prescribe such a procedure in the Election  
28 Procedures Manual, which county election officials then would be bound by law to

1 follow. Further, Attorney General Brnovich can ensure compliance with such a directive  
2 because he is authorized to prosecute county officials who violate it.

3 Likewise, Attorney General Brnovich is empowered to enforce state election laws  
4 like H.B. 2023. He is not the only official with such authority; Attorney General  
5 Brnovich is authorized to enforce Arizona’s election laws “[i]n any election for state  
6 office, members of the legislature, justices of the supreme court, judges of the court of  
7 appeals or statewide initiative or referendum,” but in elections for “county, city or town  
8 office, community college district governing board, judge or a county, city, or town  
9 initiative or referendum,” that authority resides with “the appropriate county, city or town  
10 attorney[.]” A.R.S. § 16-1021. But most elections will include statewide races and  
11 therefore Attorney General Brnovich likely will share enforcement authority in most  
12 circumstances. Moreover, although Attorney General Brnovich might lack authority to  
13 direct the enforcement activities of county and municipal prosecutors, there is no reason  
14 to believe that these local law enforcement officials will attempt to enforce H.B. 2023  
15 should the Court declare it unconstitutional or unlawful under the VRA.

16 Lastly, although there is no evidence that Secretary Reagan or other state or local  
17 elections officials play a direct role in the enforcement of H.B. 2023, Secretary Reagan  
18 has some indirect involvement in the law’s implementation by virtue of her responsibility  
19 for drafting the Election Procedures Manual. If the Court were to enjoin H.B. 2023’s  
20 implementation and enforcement, the Election Procedures Manual would need to reflect  
21 as much.

### 22 **B. Effect of Preliminary Appellate Proceedings**

23 On September 23, 2016, the Court denied Plaintiffs’ motion to preliminarily  
24 enjoin enforcement of H.B. 2023. (Doc. 204.) On October 4, 2016, the Court also  
25 denied Plaintiffs’ motion to preliminarily enjoin enforcement of H.B. 2023 pending  
26 Plaintiffs’ appeal of the Court’s September 23 order. (Doc. 213.) Plaintiffs thereafter  
27 moved the Ninth Circuit Court of Appeals for an injunction pending appeal, which was  
28 denied by a three-judge motions panel. Later, on October 28, 2016, a divided three-judge

1 merits panel affirmed the Court’s order denying Plaintiffs’ preliminary injunction motion.  
2 Chief Judge Thomas dissented.

3 On November 2, 2016, a majority the Ninth Circuit’s non-recused active judges  
4 voted to rehear the case en banc. Two days later, a majority of the en banc panel voted to  
5 preliminarily enjoin enforcement of H.B. 2023 pending the panel’s rehearing, essentially  
6 for the reasons provided in Chief Judge Thomas’ dissent.<sup>5</sup> This preliminary injunction  
7 was short-lived, however, as the United States Supreme Court stayed the order on  
8 November 5, 2016, pending the Ninth Circuit’s final disposition of the appeal.

9 In light of this history, the parties disagree over the effect that Chief Judge  
10 Thomas’ dissent should have on the Court’s post-trial analysis. As explained during the  
11 final pretrial conference, although the Court has considered Chief Judge Thomas’ dissent,  
12 the Court is not bound by its factual analysis. To date, all appellate proceedings have  
13 occurred at the preliminary injunction stage on a less developed factual record. Findings  
14 and conclusions rendered at the preliminary injunction stage are just that—preliminary.  
15 They do not necessarily preclude the Court from making different findings or conclusions  
16 after thorough factual development and a full trial on the merits. Accordingly, although  
17 the Court is mindful of Chief Judge Thomas’ critiques and their preliminary adoption by  
18 a majority of the en banc panel, the Court is not bound to make identical findings and  
19 conclusions as those made at a preliminary phase of the litigation.

20 And with that, the Court proceeds to the merits.

## 21 **V. FIRST AND FOURTEENTH AMENDMENTS<sup>6</sup>**

22 “[T]he Constitution of the United States protects the right of all qualified citizens  
23 to vote, in state as well as in federal elections.” *Reynolds v. Sims*, 377 U.S. 533, 554

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24  
25 <sup>5</sup> The en banc panel technically issued a stay of the Court’s order denying  
26 Plaintiffs’ preliminary injunction motion, but the stay had the practical effect of an  
injunction pending appeal.

27 <sup>6</sup> Because Plaintiffs challenge state election laws, their claims technically arise  
28 under the Fourteenth Amendment, which applies the First Amendment’s protections  
against states and their political subdivisions. *See City of Ladue v. Gilleo*, 512 U.S. 43,  
45 n.1 (1994).

1 (1964). Relatedly, the First and Fourteenth Amendments protect the right of the people  
2 to associate for political purposes. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208,  
3 214 (1986). “It does not follow, however, that the right to vote in any manner and the  
4 right to associate for political purposes . . . are absolute.” *Burdick v. Takushi*, 504 U.S.  
5 428, 433 (1992). Rather, the Constitution empowers states to regulate the “Times, Places  
6 and Manner of holding Elections for Senators and Representatives,” U.S. Const. art. I, §  
7 4, cl. 1, and states retain “control over the election process for state offices,” *Tashjian*,  
8 479 U.S. at 217. “Common sense, as well as constitutional law, compels the conclusion  
9 that government must play an active role in structuring elections.” *Burdick*, 504 U.S. at  
10 433. “[A]s a practical matter, there must be a substantial regulation of elections if they  
11 are to be fair and honest and if some sort of order, rather than chaos, is to accompany the  
12 democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

13 Like an individual’s voting and associational rights, however, a state’s power to  
14 regulate elections is not absolute; it is “subject to the limitation that [it] may not be  
15 exercised in a way that violates other . . . provisions of the Constitution.” *Williams v.*  
16 *Rhodes*, 393 U.S. 23, 29 (1968); see *Wash. State Grange v. Wash. State Republican*  
17 *Party*, 552 U.S. 442, 451 (2008). But because all election regulations “invariably impose  
18 some burden upon individual voters,” *Burdick*, 504 U.S. at 433, “not every voting  
19 regulation is subject to strict scrutiny,” *Pub. Integrity Alliance, Inc. v. City of Tucson*, 836  
20 F.3d 1019, 1024 (9th Cir. 2016).

21 Instead, . . . a more flexible standard applies. A court  
22 considering a challenge to a state election law must weigh  
23 “the character and magnitude of the asserted injury to the  
24 rights protected by the First and Fourteenth Amendments that  
25 the plaintiff seeks to vindicate” against “the precise interests  
26 put forward by the State as justifications for the burden  
27 imposed by its rule,” taking into consideration “the extent to  
28 which those interests make it necessary to burden the  
29 plaintiff’s rights.”

30 *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).  
31 This framework commonly is referred to as the *Anderson/Burdick* test, after the two  
32 Supreme Court decisions from which it derives.

1 Under this framework, the degree to which the Court scrutinizes “the propriety of  
2 a state election law depends upon the extent to which a challenged regulation burdens  
3 First and Fourteenth Amendment rights.” *Id.* A law that imposes severe burdens is  
4 subject to strict scrutiny, meaning it must be narrowly tailored to serve a compelling state  
5 interest. *Id.* “Regulations imposing . . . [l]esser burdens, however, trigger less exacting  
6 review, and a State’s ‘important regulatory interests’ will usually be enough to justify  
7 ‘reasonable, nondiscriminatory restrictions.’” *Timmons v. Twin Cities Area New Party*,  
8 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434); *see also Pub. Integrity*  
9 *Alliance*, 836 F.3d at 1024 (“Applying these precepts, ‘[w]e have repeatedly upheld as  
10 ‘not severe’ restrictions that are generally applicable, evenhanded, politically neutral, and  
11 protect the reliability and integrity of the election process.” (quoting *Dudum v. Arntz*,  
12 640 F.3d 1098, 1106 (9th Cir. 2011)). Additionally, when applying *Anderson/Burdick*,  
13 the Court considers the state’s election regime as a whole, including aspects that mitigate  
14 the hardships that might be imposed by the challenged provisions. *See Ohio Democratic*  
15 *Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016); *see also Crawford v. Marion Cty.*  
16 *Election Bd.*, 553 U.S. 181, 199 (2008) (considering mitigating aspects of Indiana’s  
17 election laws).

## 18 **A. Application to H.B. 2023**

### 19 **1. Burden on Voting Rights**

20 At most, H.B. 2023 minimally burdens Arizona voters as a whole. In fact, the vast  
21 majority of Arizona voters are unaffected by the law. Although voting by early mail  
22 ballot has steadily increased in Arizona, in any given election there remains a subset of  
23 voters who choose to vote in person, either early at a designated early voting site or on  
24 Election Day. In-person voters are not impacted by limitations on who may collect early  
25 mail ballots. For example, 2,323,579 registered voters cast ballots during the 2012  
26 general election. (Ex. 543 at 2.) Of these, 1,542,855 submitted early mail ballots, over  
27 99 percent of which were counted. (Ex. 95 at 17.) Thus, roughly a third of all Arizonans  
28 voted in person during the 2012 general election. Similarly, approximately 80 percent of

1 the 2,661,497 Arizonans who voted during the 2016 general election cast an early ballot,  
2 meaning about 20 percent voted in person on Election Day. (Tr. 1925; Ex. 543.) H.B.  
3 2023 has no impact on these voters.

4 Further, even under a generous interpretation of the evidence, the vast majority of  
5 voters who choose to vote early by mail do not return their ballots with the assistance of a  
6 third-party collector who does not fall within H.B. 2023's exceptions. There are no  
7 records of the numbers of voters who, in any given election, return their ballots with the  
8 assistance of third parties. The ADP collected "a couple thousand" ballots in 2014.  
9 (Tameron Dep. 52:12-17.) According to Secretary Reagan, community advocate Randy  
10 Parraz testified before the Arizona Senate Elections Committee that he had once collected  
11 4,000 ballots. (Regan Dep. 101:12-21.) During closing argument, the Court asked  
12 Plaintiffs' counsel for his best estimate of the number of voters affected by H.B. 2023  
13 based on the evidence at trial, to which he responded: "Thousands . . . but I don't have a  
14 precise number of that." (Tr. 2268.) An estimate of "thousands" offers little guidance for  
15 determining where, on the scale of 1,000 to 999,999, the number falls, but the evidence  
16 and Counsel's response suggests that possibly fewer than 10,000 voters are impacted.

17 Purely as a hypothetical, if the Court were to draw the unjustified inference that  
18 100,000 early mail ballots were collected and returned by third parties during the 2012  
19 general election, that estimate would leave over 1.4 million early mail ballots that were  
20 returned without such assistance. The point, of course, is that H.B. 2023's limitations  
21 have no effect on the vast majority of voters who vote by early mail ballot because, even  
22 under generous assumptions, relatively few early voters give their ballots to individuals  
23 who would be prohibited by H.B. 2023 from possessing them.

24 On its face, H.B. 2023 is generally applicable and does not increase the ordinary  
25 burdens traditionally associated with voting. The law merely limits who may possess,  
26 and therefore return, a voter's early mail ballot. Early voters may return their own  
27 ballots, either in person or by mail, or they may entrust a family member, household  
28 member, or caregiver to do the same. Thus, the burden H.B. 2023 imposes is the burden

1 of traveling to a mail box, post office, early ballot drop box, any polling place or vote  
2 center (without waiting in line), or an authorized election official's office, either  
3 personally or with the assistance of a statutorily authorized proxy, during a 27-day early  
4 voting period.<sup>7</sup>

5 Even with H.B. 2023's limitations, the burden on early voters to return their early  
6 mail ballots is less severe than the burden on in-person voters, who must travel to a  
7 designated polling place or vote center on Election Day, often necessitating taking time  
8 off work and waiting in line. Indeed, the burden on early mail voters is less severe even  
9 than the burden on early in-person voters, who must travel to a designated early voting  
10 location during the 27-day early voting period. Plaintiffs do not contend that the more  
11 onerous travel required of in-person voters is unconstitutionally burdensome, nor would  
12 the law support such an argument.

13 For example, in *Crawford* the Supreme Court considered whether Indiana's voter  
14 identification law, which required in-person voters to present photo identification,  
15 unconstitutionally burdened the right to vote. 553 U.S. at 185. A voter who had photo  
16 identification but was unable to present it on Election Day, or a voter who was indigent  
17 or had a religious objection to being photographed, could cast a provisional ballot, which  
18 then would be counted if the voter traveled to the circuit court clerk within ten days after  
19 the election and either presented photo identification or executed an affidavit. *Id.* at 185-  
20 86.

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21  
22 <sup>7</sup> Throughout this case, Plaintiffs have conflated the burden imposed by H.B. 2023  
23 with the circumstances that might make that burden harder to surmount for certain voters.  
24 That is, Plaintiffs conflate the burden with its severity. For example, during closing  
25 argument the Court asked Plaintiffs' counsel to summarize the precise burdens that H.B.  
26 2023 imposes. (Tr. 2262.) Counsel responded that the burdens include lack of mail  
27 access, inadequate transportation, disabilities, low education attainment, and residential  
28 instability. (Tr. 2263.) But H.B. 2023 does not impose these conditions on any voter.  
The sole burden H.B. 2023 imposes is the burden of traveling to a mail box, post office,  
early ballot drop box, polling place or vote center, or authorized election official's office,  
either personally or with authorized assistance, during a 27-day early voting period. The  
socioeconomic circumstances cited by Plaintiffs might explain why this process is more  
difficult for some voters than others, but those circumstances are not themselves the  
burden imposed by the challenged law.

1 In his controlling opinion upholding the constitutionality of the challenged law,  
2 Justice Stevens explained “[t]he burdens that are relevant to the issue before us are those  
3 imposed on persons who are eligible to vote but do not possess a current photo  
4 identification that complies with the requirements of” the challenged law. *Id.* at 198.  
5 The Court characterized these burdens as “the inconvenience of making a trip to the  
6 [Indiana Bureau of Motor Vehicles], gathering the required documents, and posing for a  
7 photograph,” to obtain the required identification, and concluded that this process “does  
8 not qualify as a substantial burden on the right to vote, or even represent a significant  
9 increase over the usual burdens of voting.”<sup>8</sup> *Id.* The Court also reasoned that “[t]he  
10 severity of that burden is . . . mitigated by the fact that, if eligible, voters without photo  
11 identification may cast provisional ballots that will ultimately be counted,” although to do  
12 so voters would need to make two trips: one to vote in the first instance and another to the  
13 circuit court clerk’s office. *Id.* at 199.

14 At most, H.B. 2023 requires only that early mail voters make the first trip  
15 described in *Crawford*—the trip to vote. Further, the trip H.B. 2023 requires voters to  
16 make is less burdensome because an Arizona early mail voter has 27 days in which to  
17 make it, can choose between traveling to the nearer and most convenient of either a  
18 personal mailbox, post office, early ballot drop box, polling place or vote center, or  
19 authorized election official’s office, and can have a family member, household member,  
20 or caregiver make the trip on her behalf. Voting early by mail in Arizona is far easier  
21 than traditional, in-person voting on Election Day, and if laws that do not “represent a  
22 significant increase over the usual burdens of voting” do not severely burden the  
23 franchise, *id.* at 198, it is illogical to conclude that H.B. 2023 imposes a severe burden on  
24 Arizona voters.

25 For these reasons, Plaintiffs’ Fourteenth Amendment challenge is best understood

26 \_\_\_\_\_  
27 <sup>8</sup> The Supreme Court did not characterize the burdens imposed by Indiana’s photo  
28 identification law as the circumstances of particular voters that made it harder to obtain  
the required identification. Rather, those conditions informed the analysis of the severity  
of the burden on discrete subgroups.



1 as follows: H.B. 2023 has no impact on the vast majority of Arizona voters, but its  
2 limitations on who may return a voter’s early mail ballot present special difficulties for a  
3 small subset of socioeconomically disadvantaged voters. When evaluating the severity of  
4 burdens imposed by a challenged law, “courts may consider not only a given law’s  
5 impact on the electorate in general, but also its impact on subgroups, for whom the  
6 burden, when considered in context, may be more severe.” *Pub. Integrity Alliance*, 836  
7 F.3d at 1024 n.2 (citing *Crawford*, 553 U.S. at 199-203, 212-17 (Souter, J., dissenting)).  
8 But to do so, the challengers must present sufficient evidence to enable the court to  
9 quantify the magnitude of the burden imposed on the subgroup. *Id.*; see also *Ne. Ohio*  
10 *Coal. for the Homeless v. Husted*, 837 F.3d 612, 631-32 (6th Cir. 2016) (explaining that,  
11 even under this “more liberal approach to burden measuring,” the record must contain  
12 “quantifiable evidence from which an arbiter could gauge the frequency with which this  
13 narrow class of voters has been or will become disenfranchised as a result of” the  
14 challenged law).

15 Thus, in *Crawford* the Supreme Court acknowledged that Indiana’s voter  
16 identification law might place “a somewhat heavier burden . . . on a limited number of  
17 persons,” such as “elderly persons born out of State, who may have difficulty obtaining a  
18 birth certificate; persons who because of economic or other personal limitations may find  
19 it difficult either to secure a copy of their birth certificate or to assemble the other  
20 required documentation to obtain a state-issued identification; homeless persons; and  
21 persons with a religious objection to being photographed.” 553 U.S. at 199. But the  
22 Court declined to consider these burdens because “on the basis of the evidence in the  
23 record it [was] not possible to quantify either the magnitude of the burden on this narrow  
24 class of voters or the portion of the burden imposed on them that [was] fully justified.”  
25 *Id.* at 200.

26 Like in *Crawford*, this Court has insufficient evidence from which to measure the  
27 burdens on discrete subsets of voters. The Court cannot quantify with any degree of  
28 certainty “the number of registered voters” who, in past elections, returned early mail

1 ballots with the assistance of ballot collectors who do not fall within H.B. 2023's  
2 exceptions. *Id.* at 200. The Court therefore cannot determine how frequently voters will  
3 be impacted by H.B. 2023's limitations. And of the nebulous "thousands" who, in past  
4 elections, have entrusted their ballots to third parties, there is insufficient "concrete  
5 evidence" for the Court to gauge the magnitude of that burden or the portion of it that is  
6 justified. *Id.* at 201. Stated differently, it is not enough to know roughly how many  
7 voters have used ballot collection services—which, in any event, the Court cannot  
8 determine on this record. The Court also needs to know *why* voters used these services  
9 so that it may determine whether those voters did so out of convenience or personal  
10 preference, as opposed to meaningful hardship, and whether other aspects of Arizona's  
11 election system adequately mitigate those burdens.

12 The evidence available largely shows that voters who have used ballot collection  
13 services in the past have done so out of convenience or personal preference, or because of  
14 circumstances that Arizona law adequately accommodates in other ways. Joseph Larios,  
15 a community advocate who has collected ballots in past elections, testified that in his  
16 experience returning early mail ballots presents special challenges for communities that  
17 lack easy access to outgoing mail services; the elderly, homebound, and disabled voters;  
18 socioeconomically disadvantaged voters who lack reliable transportation; voters who  
19 have trouble finding time to return mail because they work multiple jobs or lack childcare  
20 services; and voters who are unfamiliar with the voting process and therefore do not vote  
21 without assistance or tend to miss critical deadlines. (Tr. 416-26, 432-39.)

22 As to this latter category of voters who, due either to forgetfulness or unfamiliarity  
23 with the voting process, choose not to vote or neglect to mail their ballots in time for  
24 them to reach the county recorder by 7:00 p.m. on Election Day, H.B. 2023 does not  
25 impose a severe burden. Remembering relevant election deadlines "does not qualify as a  
26 substantial burden on the right to vote, or even represent a significant increase over the  
27 usual burdens of voting." *Crawford*, 553 U.S. at 198. Moreover, nothing in H.B. 2023  
28 prohibits Plaintiffs or other organizations from educating voters and offering assistance in

1 understanding and completing a ballot.

2 As for the other types of voters Larios identified, Arizona accommodates many of  
3 the circumstances that tend to make voting in general (and not just early mail voting)  
4 more difficult for them. For example, all counties must provide special election boards  
5 for voters who cannot travel to a polling location because of an illness or disability.  
6 A.R.S. § 16-549. If an ill or disabled voter timely requests an accommodation, the  
7 county recorder must arrange for a special election board to deliver a ballot to the voter in  
8 person. Although relatively few voters are aware of this service (Tr. 864-65), nothing in  
9 H.B. 2023 prevents Plaintiffs from educating voters about the special election board  
10 option and assisting them in making those arrangements. Arizona also allows curbside  
11 voting at polling places, where election officials will go out to a vehicle to assist voters as  
12 necessary.<sup>9</sup>

13 For working voters, Arizona law requires employers to give an employee time off  
14 to vote if the employee is scheduled to work a shift on Election Day that provides fewer  
15 than three consecutive hours between either the opening of the polls and the beginning of  
16 the shift, or the end of the shift and the closing of the polls. A.R.S. § 16-402. An  
17 employer is prohibited from penalizing an employee for exercising this right. If voters  
18 nonetheless feel uncomfortable requesting time off, they have a 27-day window to vote in  
19 person at an on-site early voting location. Additionally, even under H.B. 2023 voters  
20 with transportation difficulties or time limitations may entrust their early ballots to family  
21 members, household members, caregivers, or elections officials.

22 The testimony of individual voters who have used ballot collection services in past  
23 elections largely confirms that H.B. 2023 does not impose significant burdens. Five  
24 voters testified at trial about their personal experiences with ballot collectors: Nellie Ruiz,

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25  
26 <sup>9</sup> It is of no moment that entrusting a ballot to a volunteer is relatively more  
27 convenient than arranging a special election board. In *Crawford*, voting without the  
28 required identification certainly would have been easier than voting provisionally and  
then travelling to the circuit court clerk's office within ten days. Nonetheless, the  
controlling opinion found this option to be an adequate mitigating alternative.

1 Carolyn Glover, Daniel Magos, Carmen Arias, and Marva Gilbreath. None of these  
2 voters would be severely burdened by H.B. 2023's limitations.

3 Ruiz, a 71-year-old early mail voter in Phoenix, testified that she typically asks her  
4 neighbor to return her ballot because her rheumatoid arthritis and deteriorating eyesight  
5 make it difficult for her to return it personally. Ruiz lives with her adult son and  
6 daughter-in-law. Although Ruiz has a personal mailbox, she prefers not to mail  
7 important documents, like bill payments and ballots. Instead, her son delivers her bill  
8 payments whenever he delivers his own mail. Ruiz testified that she preferred to give her  
9 ballot to her neighbor because she "didn't want to impose on [her] children," but could  
10 not explain why her son could not return her ballot the same way he returns her bills, or  
11 why asking him to deliver a ballot was any more of an imposition than asking him to  
12 deliver her bills. Ruiz also was not aware that her son could drop off her ballot when he  
13 goes to the polls to vote in person. Ruiz testified that she was not able to give her early  
14 mail ballot to her neighbor during the 2016 general election because of H.B. 2023.  
15 Nonetheless, Ruiz successfully returned her ballot by mailing it from her home mailbox.  
16 (Tr. 93-96, 98-100, 102-103, 111.)

17 H.B. 2023 does not burden voters like Ruiz. She admittedly was able to mail her  
18 ballot in 2016 without relying on her neighbor and lives with her adult son who is capable  
19 of returning her ballots, either by mail the same way he returns her bill payments, or at a  
20 polling place when he votes in person.

21 Glover, a retired voter with mobility issues who resides in a senior citizens  
22 apartment complex in Phoenix, testified that prior to the 2016 general election persons  
23 affiliated with the Democratic Party would collect her early mail ballot. Glover initially  
24 testified that her sister returned her ballot for her during the 2016 election, but on cross-  
25 examination Glover claimed her ballot was returned by her "sister from church," rather  
26 than a family member. Glover testified that her apartment building has outgoing mail,  
27 but the slots are too small for the ballot. Although a postal worker collects mail at the  
28 building, Glover sometimes forgets to give the postal worker her outgoing mail. Glover

1 testified that others in the community have caregivers, but that she would not feel  
2 comfortable giving her ballot to a caregiver. Glover also testified that she was unaware  
3 she could request to vote via a special election board. (Tr. 222-25, 228-230, 232-33.)

4 H.B. 2023 does not severely burden voters like Glover, who admittedly can hand  
5 her ballot to a postal worker, provided she remembers to do so. Further, if Glover's  
6 mobility issues make it difficult for her to travel to a post office, she can request to vote  
7 via a special election board. Nothing in H.B. 2023 prevents volunteers from the  
8 Democratic Party from assisting her with making those arrangements.

9 Magos is a 72-year-old Phoenix resident who prefers to vote by mail. He has a  
10 home mailbox but prefers not to use it to send important items because his mailbox has  
11 been tampered with in the past. Magos once gave his ballot to a collector because a flood  
12 impacted his home and he did not want to leave his wife alone. But in most elections, he  
13 either takes his ballot to the post office or drops it off at a polling place. Magos is  
14 capable of driving to a polling place and voting in person, and he has family members  
15 who could return his ballot if he found himself in need of such a service, though he  
16 testified that he "would hate to burden them with one more duty" because "they already  
17 do enough for" him. Magos successfully voted in 2016, even though H.B. 2023 was in  
18 effect. (Tr. 235, 238-40, 242, 247, 250.)

19 Arias is a registered voter in Phoenix who testified that she once gave her ballot to  
20 a collector because her vehicle had broken down. Additionally, Arias voted by early  
21 ballot in the 2016 presidential preference and general elections by driving to Democratic  
22 Party headquarters and dropping her voted early ballots off there, presumably so  
23 volunteers could later deliver those ballots to an appropriate destination. Although Arias  
24 testified that the postal service in her neighborhood is unreliable, she did not explain why  
25 she could drive her ballots to Democratic Party headquarters but not to a post office, early  
26 ballot drop box, polling location, or elections office. (Tr. 1166-68, 1173.)

27 The only early mail voter who testified that she did not vote during the 2016  
28 general election was Gilbreath, a 72-year-old Laveen resident. Gilbreath testified that she

1 has mobility issues due to her arthritis. During the 2014 election, Gilbreath gave her  
2 early mail ballot to a friend because she waited too long to mail it. Gilbreath voted in the  
3 2016 presidential preference election by mailing her early ballot herself. She received an  
4 early mail ballot for the general election but did not return it because she waited too long  
5 to mail it and was not sure where to go to deliver it in person. Thus, Gilbreath has access  
6 to a mailbox; she simply must remember to timely mail her ballot.<sup>10</sup> (Tr. 128, 130, 133,  
7 135, 142.)

8 In addition to these voters, Plaintiffs designated for admission portions of the  
9 deposition testimony of Victor Vasquez, who said that he suffered a heart attack during  
10 the 2014 general election and asked a hospital nurse to return his early ballot for him, but  
11 she refused. Accordingly, he checked himself out of the hospital on Election Day and  
12 had a friend drive him to a polling place, where he cast a provisional ballot that  
13 ultimately was not counted because Vasquez was not in his assigned precinct. (Vasquez  
14 Dep. 15:18-18:13; 25:7-25.) The Court has concerns about the credibility of Vasquez’s  
15 account. If Vasquez had already completed an early mail ballot, it is not clear why he  
16 completed an entirely new, provisional ballot at the polling place rather than simply drop  
17 off the early ballot he previously completed. Vasquez also stated that in a prior election  
18 he gave his ballot to a friend to mail at the post office because he does not trust the  
19 outgoing mail service where he lives, but he did not explain whether he easily can go to  
20 the post office on his own.

21 In sum, though for voters like those who testified at trial H.B. 2023 might have  
22 eliminated a preferred or convenient way of returning an early mail ballot, it does not  
23 follow that what H.B. 2023 expects them to do instead is burdensome. The Constitution  
24 does not demand “recognition and accommodation of such variable personal preferences,  
25 even if the preferences are shown to be shared in higher numbers by members of certain

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26  
27 <sup>10</sup> Plaintiffs do not challenge Arizona’s requirement that early mail ballots be  
28 received by the county recorder by 7:00 p.m. on Election Day, which appears to cause  
more problems for voters than H.B. 2023’s limitations on ballot collection.

1 identifiable segments of the voting public.” *Ohio Democratic Party*, 834 F.3d at 630.  
2 Nor does it require states to prioritize voter convenience above all other regulatory  
3 considerations. *Id.* at 629. H.B. 2023 has no impact on the vast majority of Arizona  
4 voters, and the Court lacks sufficient evidence to assess whether the law imposes a more  
5 severe burden for discrete subsets of voters. The evidence that was adduced at trial,  
6 however, indicates that, for many, ballot collection is used out of convenience and not  
7 because the alternatives are particularly difficult.

## 8 **2. Burden on Associational Rights**

9 In Count V of their Second Amended Complaint, Plaintiffs alleged that H.B. 2023  
10 unjustifiably infringes upon Plaintiffs’ associational rights, as distinct from voting rights.  
11 (Doc. 233 ¶¶ 112-115.) The parties’ joint proposed pretrial order, however, does not  
12 include this claim as a contested issue of fact and law. Instead, the proposed pretrial  
13 order states that Plaintiffs challenge H.B. 2023 under the Fourteenth Amendment only  
14 “because it imposes burdens on voters that outweigh the state’s interest in this policy.”  
15 (Doc. 360 at 7.) Although Plaintiffs’ pretrial brief asserts that H.B. 2023 “infringes on  
16 the right to associate,” it does not elaborate further on the issue. (Doc. 359 at 6.)  
17 Moreover, Plaintiffs’ proposed findings of fact and conclusions of law contain no  
18 proposed factual findings or legal conclusions regarding H.B. 2023’s impact on  
19 associational rights. (Doc. 362 ¶ 131.) Defendants did not brief the associational rights  
20 issue because, based on the parties’ joint description of contested issues in the joint  
21 proposed pretrial order, they understood that Plaintiffs would not be seeking to prove that  
22 claim at trial. (Doc. 356 at 11 n.6.) Plaintiffs did not seriously advance this issue at trial,  
23 though when asked whether the claim still is at issue, Plaintiffs’ responded affirmatively  
24 and explained that the claim is “part and parcel of our *Anderson/Burdick* claim.” (Tr.  
25 1500.)

26 To the extent this claim has not been abandoned, Plaintiffs have offered no  
27 evidence or argument that would lead the Court to deviate from the conclusion it reached  
28 at the preliminary injunction stage, where Plaintiffs argued that H.B. 2023 burdens the

1 associational rights of groups that encourage and facilitate voting through ballot  
2 collection. (Doc. 85 at 16-18.) The *Anderson/Burdick* framework applies to Plaintiff’s  
3 First Amendment claim. *Timmons*, 520 U.S. at 358. As the party invoking the First  
4 Amendment’s protection, however, Plaintiffs bear the additional, threshold burden of  
5 proving that it applies. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293  
6 n.5 (1984).

7 Conduct, such as collecting a ballot, is not “speech” for purposes of the First  
8 Amendment simply because “the person engaging in the conduct intends thereby to  
9 express an idea.” *U.S. v. O’Brien*, 391 U.S. 367, 376 (1968). Rather, the First  
10 Amendment extends “only to conduct that is inherently expressive.” *Rumsfeld v. Forum*  
11 *for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). The Court continues to  
12 find persuasive the Fifth Circuit’s opinion in *Voting for Am. v. Steen*, 732 F.3d 382 (5th  
13 Cir. 2013), which considered a challenge to various Texas laws that regulated the receipt  
14 and delivery of completed voter registration applications. The Fifth Circuit rejected the  
15 argument that collecting and delivering voter registration applications were inherently  
16 expressive activities protected by the First Amendment. *Id.* at 392. In doing so, the court  
17 agreed that “some voter registration activities involve speech—‘urging’ citizens to  
18 register; ‘distributing’ voter registration forms; ‘helping’ voters fill out their forms; and  
19 ‘asking’ for information to verify registrations were processed successfully.” *Id.* at 389.  
20 It determined, however, that “there is nothing inherently expressive about receiving a  
21 person’s completed [voter registration] application and being charged with getting that  
22 application to the proper place.” *Id.* at 392 (internal quotation and citation omitted).  
23 Likewise, though many GOTV activities involve First Amendment protected activity,  
24 there is nothing inherently expressive or communicative about collecting a voter’s  
25 completed early ballot and delivering it to the proper place.

26 Moreover, assuming that H.B. 2023 implicates protected associational rights, it  
27 does not impose severe burdens. Nothing in H.B. 2023 prevents Plaintiffs from  
28 encouraging, urging, or reminding people to vote, informing and reminding them of



1 relevant election deadlines, helping them fill out early ballots or request special election  
2 boards, or arranging transportation to on-site early voting locations, post offices, county  
3 recorder’s offices, or polling places. *See id.* at 393 (noting that voter registration  
4 volunteers remained “free to organize and run the registration drive, persuade others to  
5 register to vote, distribute registration forms, and assist others in filling them out”);  
6 *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1322 (S.D. Fla.  
7 2008) (“[The challenged law] does not place any restrictions on who is eligible to  
8 participate in voter registration drives or what methods or means third-party voter  
9 registration organizations may use to solicit new voters and distribute registration  
10 applications. Instead, [it] simply regulates an administrative aspect of the electoral  
11 process—the handling of voter registration applications by third-party voter registration  
12 organizations after they have been collected from applications.”). H.B. 2023 merely  
13 regulates who may possess, and therefore return, another’s early ballot. Accordingly,  
14 H.B. 2023 no more than minimally burdens Plaintiffs’ associational rights.

### 15 **3. Justifications**

16 Because H.B. 2023 no more than minimally burdens Plaintiffs’ First and  
17 Fourteenth Amendment rights, Defendants must show only that it serves important  
18 regulatory interests. *Wash. State Grange*, 552 U.S. at 452. Defendants advance two  
19 justifications for H.B. 2023. First, they claim that H.B. 2023 is a prophylactic measure  
20 intended to prevent absentee voter fraud by creating a chain of custody for early ballots  
21 and minimizing the opportunities for ballot tampering, loss, and destruction. Second,  
22 Defendants argue that H.B. 2023 improves and maintains public confidence in election  
23 integrity.

24 Fraud prevention and preserving public confidence in election integrity are facially  
25 important state regulatory interests. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)  
26 (“Confidence in the integrity of our electoral process is essential to the functioning of our  
27 participatory democracy. Voter fraud drives honest citizens out of the democratic  
28 process and breeds distrust of our government.”); *Eu v. S.F. Cty. Democratic Cent.*

1 *Comm.*, 489 U.S. 214, 231 (1989) (“A State indisputably has a compelling interest in  
2 preserving the integrity of its election process.”); *see also Crawford*, 553 U.S. at 195  
3 (“There is no question about the legitimacy or importance of the State’s interest in  
4 counting only the votes of eligible voters. . . . While the most effective method of  
5 preventing election fraud may well be debatable, the propriety of doing so is perfectly  
6 clear.”). Plaintiffs do not argue otherwise. Instead, they argue that H.B. 2023 is  
7 unjustified because (1) there is no evidence of absentee voter fraud perpetrated by ballot  
8 collectors or of widespread public perception that ballot collection leads to fraud and (2)  
9 H.B. 2023 is not an appropriately tailored means of accomplishing Arizona’s objectives.

10 On the first point, there has never been a case of voter fraud associated with ballot  
11 collection charged in Arizona. (Tr. 1682, 1981, 2198.) Although three specific  
12 allegations of ballot collection voter fraud have been investigated in Arizona, none of the  
13 incidents resulted in a criminal prosecution. (Tr. 834-37 1659, 1680-81, 2163-68, 2185-  
14 87, 2202-05; Exs. 81, 372, 400.) No specific, concrete example of voter fraud  
15 perpetrated through ballot collection was presented by or to the Arizona legislature  
16 during the debates on H.B. 2023 or its predecessor bills. No Arizona county produced  
17 evidence of confirmed ballot collection fraud in response to subpoenas issued in this case,  
18 nor has the Attorney General’s Office produced such information. (Ex. 44, 65.)

19 The Republican National Lawyers Association (“RNLA”) performed a study  
20 dedicated to uncovering cases of voter fraud between 2000 and 2011. (Tr. 1868.) The  
21 study found no evidence of ballot collection or delivery fraud, nor did a follow-up study  
22 through May 2015. (Ex. 91 at 19-20.) Although the RNLA reported instances of  
23 absentee ballot fraud, none were tied to ballot collection and delivery. (Tr. 1368-69.)  
24 Likewise, the Arizona Republic conducted a study of voter fraud in Maricopa County and  
25 determined that, out of millions of ballots cast in Maricopa County from 2005 to 2013, a  
26 total of 34 cases of fraud were prosecuted. Of these, 18 involved a felon voting without  
27 her rights first being restored. Fourteen involved non-Arizona citizens voting. The study  
28 uncovered no cases of fraud perpetrated though ballot collection. (Ex. 91 at 19.)

1           As for public perception of fraud, the legislative record contains no evidence of  
2 widespread public concern that ballot collectors were engaging in voter fraud. (Ex. 91 at  
3 19.) H.B. 2023’s sponsor, Representative Michelle Ugenti-Rita, was not aware of any  
4 polling data indicating that Arizonans lacked confidence in the State’s election system at  
5 the time she introduced the bill. (Tr. 1805.)

6           Although there is no direct evidence of ballot collection fraud or of widespread  
7 public perception that ballot collection undermined election integrity, Arizona’s  
8 legislature is not limited to reacting to problems as they occur, nor is it required to base  
9 the laws it passes on evidence that would be admissible in court. *See Voting for Am.*, 732  
10 F.3d at 394 (explaining that states “need not show specific local evidence of fraud in  
11 order to justify preventative measures”). A more exacting review of the evidence  
12 supporting Arizona’s concerns might be appropriate if H.B. 2023 severely burdened the  
13 franchise. But because H.B. 2023’s burdens are at most minimal, the Court’s review is  
14 less exacting. *Timmons*, 520 U.S. at 358.

15           For example, in *Crawford* the Supreme Court upheld Indiana’s voter identification  
16 requirement as a measure designed to prevent in-person voter fraud even though “[t]he  
17 record contain[ed] no evidence of any such fraud actually occurring in Indiana at any  
18 time in its history.” 553 U.S. at 195. Similarly, in *Munro v. Socialist Workers Party*, the  
19 Supreme Court upheld a Washington law requiring all minor party candidates for partisan  
20 office to receive at least one percent of all votes cast during the primary election in order  
21 to appear on the general election ballot. 479 U.S. 189 (1986). Washington argued that  
22 the law prevented voter confusion from ballot overcrowding by ensuring candidates  
23 appearing on the general election ballot had sufficient community support. *Id.* at 194. In  
24 upholding the law, the Supreme Court explained: “We have never required a State to  
25 make a particularized showing of the existence of voter confusion, ballot overcrowding,  
26 or the presence of frivolous candidates prior to the imposition of reasonable restrictions  
27 on ballot access.” *Id.* at 194-95. Rather, “[l]egislatures . . . should be permitted to  
28 respond to potential deficiencies in the electoral process with foresight rather than

1 reactively[.]” *Id.* at 195; *see also Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577,  
2 609 (E.D. Va. 2016) (“Outlawing criminal activity before it occurs is not only a wise  
3 deterrent, but also sound public policy.”), *aff’d*, 843 F.3d 592 (4th Cir. 2016).

4 Furthermore, many courts have recognized that absentee voting presents a greater  
5 opportunity for fraud. *See Crawford*, 553 U.S. at 225 (Souter, J. dissenting) (noting that  
6 “absentee-ballot fraud . . . is a documented problem in Indiana”); *Griffin v. Roupas*, 385  
7 F.3d 1128, 1131 (7th Cir. 2004) (“Voting fraud . . . is facilitated by absentee voting.”);  
8 *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) (“It is evident that  
9 the integrity of the vote is even more susceptible to influence and manipulation when  
10 done by absentee ballot.”). Indeed, mail-in ballots by their very nature are less secure  
11 than ballots cast in person at polling locations. Accordingly, the Court finds that the  
12 regulatory interests Arizona seeks to advance are important.

13 The question then becomes one of means-end tailoring. Because H.B. 2023 does  
14 not impose severe burdens, it need not be narrowly tailored to achieve the State’s goals.  
15 Nevertheless, the Court still must take into consideration the extent to which Arizona’s  
16 important regulatory interests make it necessary to impose those minimal burdens.  
17 *Burdick*, 504 U.S. at 434

18 Plaintiffs contend that H.B. 2023 is not necessary because Arizona law already  
19 includes measures designed to ensure the security of early mail ballots, and because H.B.  
20 2023 is unlikely to be a useful tool to prevent or deter voter fraud or to preserve public  
21 confidence in election integrity. For example, ballot tampering, vote buying, or  
22 discarding someone else’s ballot all were illegal prior to the passage of H.B. 2023.  
23 (Shooter Dep. 51:16-52:5.) Arizona law has long provided that any person who  
24 knowingly collects voted or unvoted ballots and does not turn those ballots in to an  
25 elections official is guilty of a class 5 felony. A.R.S. § 16-1005. Further, Arizona has  
26 long made all of the following class 5 felonies: “knowingly mark[ing] a voted or unvoted  
27 ballot or ballot envelope with the intent to fix an election;” “receiv[ing] or agree[ing] to  
28 receive any consideration in exchange for a voted or unvoted ballot;” possessing

1 another’s voted or unvoted ballot with intent to sell; “knowingly solicit[ing] the  
2 collection of voted or unvoted ballots by misrepresenting [one’s self] as an election  
3 official or as an official ballot repository or . . . serv[ing] as a ballot drop off site, other  
4 than those established and staffed by election officials;” and “knowingly collect[ing]  
5 voted or unvoted ballots and . . . not turn[ing] those ballots in to an election official . . . or  
6 any . . . entity permitted by law to transmit post.” A.R.S. §§ 16-1005(a)-(f). The early  
7 voting process also includes a number of other safeguards, such as tamper evident  
8 envelopes and a rigorous voter signature verification procedure. (Tr. 834-35, 1563-66,  
9 1752, 1878, 2209.)

10 Plaintiffs also note that, to the extent Arizona wanted to create a chain of custody  
11 for early ballots, the legislature rejected a less restrictive amendment to H.B. 2023  
12 proposed by Representative Ken Clark and Senator Martin Quezada, which would have  
13 allowed ballot collection if the collector issued a tracking receipt. (Shooter Dep. at  
14 50:21-23; Ex. 91 at 12; Ex. 16 at 54.) As enacted, H.B. 2023 is less effective at creating  
15 a chain of custody because it allows certain individuals to possess another’s voted early  
16 ballot but does not require a record of that collection. (Reagan Dep. 83:25-85:20.) H.B.  
17 2023 also is not enforced by county recorders. (Ex. 526 at 5 n.15; Ex. 75.) Instead,  
18 county recorders will accept all ballots, even those returned by prohibited possessors  
19 under H.B. 2023.

20 Plaintiffs raise fair concerns about whether, as a matter of public policy, H.B.  
21 2023 is the best way to achieve Arizona’s stated goals. If H.B. 2023 severely burdened  
22 the franchise, and Arizona consequently was required to narrowly tailor the law to  
23 achieve compelling ends, Plaintiffs’ arguments would carry more weight. But because  
24 H.B. 2023’s burdens are minimal, and the Court’s review consequently less exacting,  
25 H.B. 2023’s means-end fit can be less precise.

26 Defendants contend that one of H.B. 2023’s purposes is to reduce the opportunity  
27 for early mail ballot fraud by limiting who may possess a voter’s early ballot. They also  
28 use the term “fraud” broadly to encompass not just vote tampering, which is amply

1 addressed by other provisions of Arizona law, but also early ballot loss or destruction.  
2 By limiting who may possess another’s early ballot, H.B. 2023 reasonably reduces  
3 opportunities for early ballots to be lost or destroyed.

4 Although Arizona’s legislature arguably could have addressed this concern  
5 through a more narrowly tailored, but also more complex, system of training and  
6 registering ballot collectors and requiring tracking receipts or other proof of delivery, the  
7 Constitution does not require Arizona to erect such a bureaucracy if the alternative it has  
8 chosen is not particularly burdensome. Arizona reasonably chose to limit possession of  
9 early ballots to the voter herself, and to a handful of presumptively trustworthy proxies,  
10 such as family and household members. Indeed, H.B. 2023 closely follows the  
11 recommendation of the bipartisan Commission on Federal Election Reform, chaired by  
12 former President Jimmy Carter and former Secretary of State James A. Baker III, which  
13 in 2005 wrote:

14 Fraud occurs in several ways. Absentee ballots remain the  
15 largest source of potential voter fraud. . . . Absentee balloting  
16 is vulnerable to abuse in several ways: . . . Citizens who vote  
17 at home, at nursing homes, at the workplace, or in church are  
18 more susceptible to pressure, overt and subtle, or to  
19 intimidation. Vote buying schemes are far more difficult to  
detect when citizens vote by mail. States therefore should  
reduce the risks of fraud and abuse in absentee voting by  
prohibiting “third-party” organizations, candidates, and  
political party activists from handling absentee ballots.

20 *Building Confidence in U.S. Elections* § 5.2 (Sept. 2005) (“Carter-Baker Report”),  
21 available at <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF>.<sup>11</sup> Though it might not

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22  
23 <sup>11</sup> The Carter-Baker Report was not offered into evidence by either party. It was  
24 part of the record in *Crawford*, however, and the Supreme Court cited it favorably. 553  
25 U.S. at 193. It also was cited favorably by Judge Bybee in his dissent from the en banc  
26 Ninth Circuit panel’s November 4, 2016 order temporarily enjoining enforcement of H.B.  
27 2023 pending en banc review of this Court’s order denying a preliminary injunction. See  
28 *Feldman v. Ariz. Sec. of State’s Office*, 843 F.3d 366, 414 (9th Cir. 2016) (Bybee, J.  
dissenting). The Court may take judicial notice of the Carter-Baker Report’s  
recommendations pursuant to Federal Rule of Evidence 201. The Carter-Baker Report is  
a government document publicly available on the United States Election Assistance  
Commission’s website. Though Plaintiffs might disagree with the Carter-Baker Report’s  
recommendations, their continued validity, or their relevance to this case, there is no  
question that this recommendation was made and is authentic.

1 be the most narrowly tailored provision, H.B. 2023 is one reasonable way to advance  
2 what are otherwise important state regulatory interests. Accordingly, H.B. 2023 does not  
3 violate the First and Fourteenth Amendments.

4 **B. Application to OOP Ballot Policy**

5 **1. Burden on Voting Rights**

6 Arizona consistently is at or near the top of the list of states that collect and reject  
7 the largest number of provisional ballots each election. (Ex. 95 at 23-25.) In 2012 alone  
8 “[m]ore than one in every five [Arizona in-person] voters . . . was asked to cast a  
9 provisional ballot, and over 33,000 of these—more than 5 percent of all in-person ballots  
10 cast—were rejected. No other state rejected a larger share of its in-person ballots in  
11 2012.” (Ex. 95 at 24-25.) Interstate comparisons of provisional voting are complicated,  
12 however, because states use provisional ballots in different ways, and some states do not  
13 utilize provisional voting in any form. For example, nationwide a much higher  
14 proportion of provisional votes are rejected for reasons not specified or because the voter  
15 voted in an incorrect jurisdiction, as compared to Arizona. Moreover, the overall number  
16 of provisional ballots in Arizona, both as a percentage of the registered voters and as a  
17 percentage of the number of ballots cast, has consistently declined.

18 One of the most frequent reasons that provisional ballots are rejected in Arizona is  
19 because they are cast OOP. (Ex. 95 at 22-29.) Arizona’s rejection of OOP ballots,  
20 however, has no impact on the vast majority of Arizona voters. Early mail voting is the  
21 most popular method of voting in Arizona, accounting for approximately 80 percent of all  
22 ballots cast in the 2016 election. Voters who cast early mail ballots are unaffected by  
23 Arizona’s policy to not count OOP ballots. Likewise, this policy has no impact on voters  
24 in Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma counties, which have  
25 adopted the vote center model.

26 Moreover, the vast majority of in-person voters successfully vote in their assigned  
27 precincts, and OOP voting has consistently declined as a percentage of the total ballots  
28 cast in Arizona. In the 2008 general election, Arizona voters cast 14,885 OOP ballots out

1 of the 2,320,851 ballots cast statewide, meaning OOP ballots constituted 0.64 percent of  
2 all votes cast in that election. In the 2012 general election, Arizona voters cast 10,979  
3 OOP ballots out of the 2,323,579 ballots cast statewide, accounting for 0.47 percent of all  
4 votes cast. In that same election, 1,542,855 Arizona voters submitted early ballots, and  
5 more than 99 percent were counted. In the 2016 general election, Arizona voters cast  
6 3,970 OOP ballots out of the 2,661,497 ballots cast statewide, representing 0.15 percent  
7 of all votes cast. Since 2008, OOP voting during general presidential elections has  
8 declined 73 percent statewide, dropping from 14,885 in 2008 to 3,970 in the 2016  
9 election. (Tr. 1927-32; Exs. 578, 581.)

10 OOP voting has declined in midterm elections, as well. In the 2010 general  
11 election, Arizona voters cast 4,919 OOP ballots out of the 1,750,840 ballots cast  
12 statewide, constituting 0.28 percent of all votes cast. By comparison, in the 2014 general  
13 election, Arizona voters cast 3,582 OOP ballots out of the 1,537,671 ballots cast  
14 statewide, constituting 0.23 percent of all votes cast. During this same period, the  
15 number of registered voters in Arizona increased as follows: 2,987,451 in 2008;  
16 3,146,418 in 2010; 3,124,712 in 2012; 3,235,963 in 2014; and 3,588,466 in 2016. (Exs.  
17 577, 578.)

18 These trends also hold true at the county level. For example, Maricopa County  
19 (Arizona's most populous) has experienced a consistent decline in the number of OOP  
20 ballots, both in terms of raw numbers and as a percentage of the total ballots cast. In the  
21 2008 general election, Maricopa County voters cast 9,159 OOP ballots out of the  
22 1,380,571 ballots cast countywide, accounting for 0.66 percent of the all votes cast. In  
23 the 2012 general election, Maricopa County voters cast 7,529 OOP ballots out of the  
24 1,390,836 ballots cast countywide, representing 0.54 percent of all votes. In the 2016  
25 general election, Maricopa County voters cast 2,197 OOP ballots out of the 1,608,875  
26 ballots cast countywide, representing 0.14 percent of all votes cast. Likewise, in the 2010  
27 general midterm election, Maricopa County voters cast 3,527 OOP ballots out of the  
28 1,004,125 ballots cast countywide, accounting for 0.35 percent of all votes. In the 2014



1 general election, Maricopa County voters cast 2,781 OOP ballots out of the 877,187  
2 ballots cast countywide, constituting 0.32 percent of all votes. Between 2008 and 2016,  
3 Maricopa County had a staggering decrease of 76 percent in the raw number of OOP  
4 ballots. During this same period, the number of registered voters in Maricopa County  
5 increased as follows: 1,730,886 in 2008; 1,851,956 in 2010; 1,817,832 in 2012;  
6 1,935,729 in 2014; and 2,161,716 in 2016. (Exs. 579, 582.)

7 Pima County (Arizona's second most populous) also has experienced a consistent  
8 decline in OOP voting. In the 2008 general election, Pima County voters cast 3,227 OOP  
9 ballots out of the 397,503 ballots cast countywide, accounting for 0.81 percent of all  
10 votes. In the 2012 general election, Pima County voters cast 2,212 OOP ballots out of  
11 the 385,725 ballots cast countywide, accounting for 0.57 percent of all votes. In the 2016  
12 general election, Pima County voters cast 1,150 OOP ballots out of the 427,102 ballots  
13 cast countywide, representing 0.27 percent of all votes. As for Pima County midterm  
14 elections, in the 2010 general election Pima County voters cast 641 OOP ballots out of  
15 the 318,995 ballots cast countywide, or 0.20 percent of all votes. By comparison, in the  
16 2014 general election, Pima County voters cast just 371 OOP ballots out of the 274,449  
17 ballots cast countywide, constituting 0.14 percent of the total ballots. The raw number of  
18 OOP ballots thus dropped by 64 percent in Pima County between 2008 and 2016. During  
19 this same period, the number of registered voters in Pima County increased as follows:  
20 498,777 in 2008; 486,697 in 2010; 494,630 in 2012; 497,542 in 2014; and 544,270 in  
21 2016. (Exs. 580, 583.)

22 In light of these figures, and much like their H.B. 2023 claim, Plaintiffs' challenge  
23 to Arizona's treatment of OOP ballots is best described as follows: Arizona's rejection of  
24 OOP ballots has no impact on the vast majority of Arizona voters, though a small subset  
25 of voters is affected more often because of their special circumstances. But Plaintiffs'  
26 contention that Arizona's rejection of OOP ballots severely burdens this small subset of  
27 voters is unavailing for two independent reasons.

28 First, Plaintiffs do not directly challenge the electoral practices actually

1 responsible for higher rates of OOP voting. For example, high rates of residential  
2 mobility are associated with higher rates of OOP voting. Almost 70 percent of Arizonans  
3 have changed their residential address in the decade between 2000 and 2010, the second  
4 highest rate of any state. The vast majority of Arizonans who moved in the last year  
5 moved to another address within their current city of residence and, compared with other  
6 states, Arizona has the second highest rate of within-city moves. Most of these within-  
7 city moves took place in Maricopa and Pima Counties. (Ex. 95 at 11-12.) Relatedly,  
8 rates of OOP voting are higher in neighborhoods where renters make up a larger share of  
9 householders. (Ex. 96 at 41.) One significant reason residential mobility tends to result  
10 in higher rates of OOP voting is because voters who move sometimes neglect to timely  
11 update their voter registration. (*See, e.g.*, Tr. 602-06.) Relatedly, voters registered for  
12 PEVL who move and do not update their address information will not have their early  
13 ballot forwarded to their new address. Arizona in-person voters are more likely to vote  
14 OOP if they have signed up for the PEVL and have moved. (*See, e.g.*, Tr. 124, 987-89.)

15 Additionally, changes in polling locations from election to election, inconsistent  
16 election regimes used by and within counties, and placement of polling locations all tend  
17 to increase OOP voting rates. (Ex. 95 at 12-15, 26-27, 44-52, 54-58.) In Maricopa  
18 County, between 2006 and 2008 at least 43 percent of polling locations changed from one  
19 year to the next. Likewise, approximately 40 percent of Maricopa County's active  
20 registered voters' polling locations changed between 2010 and 2012. Changes in  
21 Maricopa County polling locations and election regimes continued to occur in 2016,  
22 when Maricopa County experimented with 60 vote centers for the presidential preference  
23 election, then reverted to a precinct-based system with 122 polling locations for the May  
24 special election, and then implemented over 700 assigned polling places in the August  
25 primary and November general elections. The OOP voting rate was 40 percent higher for  
26 voters who had experienced such polling place changes. (Ex. 95 at 14-15, 56-57.)  
27 Further, some individual voters testified that they arrived at an incorrect polling place but  
28 were not redirected by poll workers to the correct location, nor were the implications of

1 casting a provisional ballot explained. These voters stated that they would have gone to  
2 the correct polling location had they been so advised. (Tr. 120, 265-66, 352-54, 493,  
3 935-36.)

4 Plaintiffs do not challenge as unconstitutional the manner in which Arizona and its  
5 counties allocate or relocate polling places, inform voters of their assigned precincts, or  
6 train poll workers. They do not challenge Arizona’s requirement that voters update their  
7 voter registrations after moving to a new address. Nor do Plaintiffs challenge Arizona’s  
8 use of the precinct-based system, though the logical implication of their argument is that  
9 Arizona may utilize a precinct-based system but cannot enforce it as to races for which an  
10 OOP voter otherwise would be eligible to vote (usually so-called “top of the ticket”  
11 races). (Tr. 1495-96.) Instead, Plaintiffs challenge what Arizona does with OOP ballots  
12 after they have been cast. But there is no evidence that it will be easier for voters to  
13 identify their correct precincts if Arizona eliminated its prohibition on counting OOP  
14 ballots. Though the consequence of voting OOP might make it more imperative for  
15 voters to correctly identify their precincts, it does not increase the burdens associated  
16 with doing so.

17 Second, the burdens imposed by precinct-based voting—a system which, again,  
18 Plaintiffs do not directly challenge—are not severe. Precinct-based voting merely  
19 requires voters to locate and travel to their assigned precincts, which are ordinary burdens  
20 traditionally associated with voting.<sup>12</sup> See *Colo. Common Cause v. Davidson*, No.  
21 04CV7709, 2004 WL 2360485, at \*14 (Colo. Dist. Ct. Oct. 18, 2004) (“[I]t does not  
22 seem to be much of an intrusion into the right to vote to expect citizens, whose judgment  
23 we trust to elect our government leaders, to be able to figure out their polling place.”); see

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24 <sup>12</sup> Plaintiffs again conflate the burdens imposed by the (indirectly) challenged  
25 practice with the socioeconomic circumstances that can make those burdens more  
26 difficult for certain subsets of voters to surmount. Arizona’s precinct-based system does  
27 not impose residential instability, transportation difficulties, or informational deficits on  
28 any voter. These circumstances exist independent of the precinct-based system. Instead,  
the precinct-based system imposes on voters the burden of locating and travelling to an  
assigned precinct, which might be more difficult for some voters to do because of their  
circumstances.

1 *also Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012)  
2 (explaining that voters cannot be absolved “of all responsibility for voting in the correct  
3 precinct or correct polling place by assessing voter burden solely on the basis of the  
4 outcome—i.e., the state’s ballot validity determination”).

5 Moreover, Arizona does not make it needlessly difficult for voters to find their  
6 assigned precincts. Indeed, a 2016 Survey of Performance of American Elections  
7 (“SPAЕ”) found that none of the survey respondents for Arizona reported that it was  
8 “very difficult” to find their polling places. By comparison, several other states had  
9 respondents who reported that it was very difficult to find their polling places. The 2016  
10 SPAЕ also reported that approximately 94 percent of the Arizona respondents thought it  
11 was very easy or somewhat easy to find their polling places. (Tr. 1350-51.)

12 In Arizona counties with precinct-based systems, voters generally are assigned to  
13 precincts near where they live, and county officials consider access to public  
14 transportation when assigning polling places. (Tr. 1570-73.) Arizona voters also can  
15 learn of their assigned precincts in a variety of ways. (*See Ex. 526 at 11-18.*)

16 If precincts or polling places have been altered since the previous election,  
17 registered voters are sent a mailing informing them of this fact and of where their new  
18 polling places are located. (Tr. 1575-76.) State law requires that election officials send  
19 each household with a registered voter who is not on the PEVL a sample ballot at least  
20 eleven days prior to election day, A.R.S. § 16-510(C), which contains instructions and  
21 identifies their polling location. (Doc. 361 ¶ 52.) The Secretary of State’s Office  
22 operates several websites that make voter-specific polling place information available and  
23 allow the Secretary’s staff to respond directly to voter inquiries. The Secretary of State’s  
24 Office also mails a publicity pamphlet to voters, which includes information on how to  
25 locate their correct precincts. This information is provided in English and Spanish. The  
26 Secretary also uses social media, town halls, and live events (such as county and state  
27 fairs) to register voters and answer questions.

28 In addition, several Arizona counties, including Maricopa and Pima Counties,

1 operate online polling place locators that are available in English and Spanish. Voters  
2 also can learn their assigned polling locations by calling the office of the county recorder  
3 for the county in which they reside. Counties spread awareness about polling place  
4 locations and the consequences of OOP voting through news and social media. This  
5 information is communicated in both English and Spanish. Some counties—including  
6 the state’s most populous, Maricopa and Pima—post signs at polling places informing  
7 voters that OOP ballots will not be counted. (Tr. 1586-88; Ex. 368.) Poll workers also  
8 are trained to direct voters who appear at an incorrect polling location to their correct  
9 polling location and to notify such voters that their votes will not be counted if they vote  
10 with a provisional ballot at the wrong location.

11 The Arizona Citizens Clean Elections Commission (“CCEC”) operates a website  
12 in English and Spanish that provides a tool for voters to determine their polling place.  
13 The CCEC also engages in advertising to help educate voters on where to vote. Partisan  
14 groups, such as the ADP and political campaigns, also help educate voters on how to find  
15 their assigned polling places. (Tr. 1575-76.)

16 In sum, Arizona’s rejection of OOP ballots has no impact on the vast majority of  
17 voters. Although a small and ever-dwindling subset of voters still vote OOP, how  
18 Arizona treats OOP ballots after they have been cast does not make it difficult for these  
19 voters to find and travel to their correct precincts. To the extent Plaintiffs’ claim may  
20 properly be considered as an indirect challenge to Arizona’s strictly enforced precinct-  
21 based system, the burdens imposed on voters to find and travel to their assigned precincts  
22 are minimal and do not represent significant increases in the ordinary burdens  
23 traditionally associated with voting. Moreover, for those who find it too difficult to  
24 locate their assigned precinct, Arizona offers generous early mail voting alternatives.<sup>13</sup>

## 25 **2. Justifications**

26  
27 <sup>13</sup> If a voter is capable of travelling to an incorrect precinct, she certainly is  
28 capable of mailing an early ballot. Moreover, early mail voters may drop their ballots off  
at any polling place, even one to which they are not assigned.

1 Weighing against the minimal burdens imposed by precinct-based voting are  
2 numerous important state regulatory interests. Precinct-based voting serves an important  
3 planning function for Arizona counties by helping them estimate the number of voters  
4 who may be expected at any particular precinct, which allows for better allocation of  
5 resources and personnel. In turn, orderly administration of elections helps to increase  
6 voter confidence in the election system and reduces wait times. (Tr. 1608-10, 1896-913.)  
7 Because elections involve many different overlapping jurisdictions, the precinct-based  
8 system also ensures that each voter receives a ballot reflecting only the races for which  
9 that person is entitled to vote. Precincts must be created, and ballots printed, so that the  
10 residential address of every voter is connected to the correct assortment of local elected  
11 officials. The system thus promotes voting for local candidates and issues and helps  
12 make ballots less confusing by not providing voters with ballots that include races for  
13 which they are not eligible to vote. (Ex. 95 at 10; Doc. 361 ¶ 47.)

14 Indeed, other courts have recognized these numerous and significant advantages:

15 [Precinct-based voting] caps the number of voters attempting  
16 to vote in the same place on election day; it allows each  
17 precinct ballot to list all of the votes a citizen may cast for all  
18 pertinent federal, state, and local elections, referenda,  
19 initiatives, and levies; it allows each precinct ballot to list  
20 only those votes a citizen may cast, making ballots less  
21 confusing; it makes it easier for election officials to monitor  
22 votes and prevent election fraud; and it generally puts polling  
23 places in closer proximity to voter residences.

24 *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004).

25 Plaintiffs do not quarrel with the importance or legitimacy of these interests or  
26 contest that precinct-based voting brings significant advantages. Instead, they argue that  
27 Arizona need not reject OOP ballots in their entirety to accomplish these goals. Plaintiffs  
28 contend that Arizona can just as easily accomplish these goals and reap these benefits by  
partially counting OOP ballots, accepting votes in races for which the voter is eligible to  
vote and rejecting votes in races for which the voter is not.

Counting OOP ballots is administratively feasible. Twenty states partially count  
OOP ballots. (Ex. 94 at 32-33.) These include the neighboring states of California, Utah,

1 and New Mexico. Cal. Elec. Code §§ 14310(a)(3), 14310 (c)(3), 15350; Utah Code Ann.  
2 § 20A-4-107(1)(b)(iii), 2(a)(ii), 2(c); N.M. Stat. Ann § 1-12-25.4(F); N.M. Admin. Code  
3 1.10.22.9(N). Elections administrators in these and other states have established  
4 processes for counting only the offices for which the OOP voter is eligible to vote. Some  
5 states, such as New Mexico, use a hand tally procedure, whereby a team of elections  
6 workers reviews each OOP ballot, determines the precinct in which the voter was  
7 qualified to vote, and marks on a tally sheet for that precinct the votes cast for each  
8 eligible office. *See* N.M. Admin Code 1.10.22.9(H)-(N). Other states, such as  
9 California, use a duplication method, whereby a team of elections workers reviews each  
10 OOP ballot, determines the precinct in which the voter was qualified to vote, obtains a  
11 new paper ballot for the correct precinct, and duplicates the votes cast on the OOP ballot  
12 onto the ballot for the correct precinct. Only the offices that appear on both the OOP  
13 ballot and the ballot for the correct precinct are copied. The duplicated ballot then is  
14 scanned through the optical scan voting machine and electronically tallied. (Tr. 777-81.)

15 Arizona has a similar duplication procedure that it uses to process certain types of  
16 ballots that cannot be read by an optical scan voting machine, such as ballots that are  
17 damaged, marked with the wrong color pen, or submitted to the county recorder by a  
18 military or overseas voter via facsimile. (Tr. 1564-66; Ex. 455 at 177-78.) Arizona also  
19 uses the duplication procedure to process some provisional ballots cast by voters who are  
20 eligible to vote in federal elections, but whom Arizona does not permit to vote in state  
21 elections. (Ex. 455 at 187.) This duplication procedure takes about twenty minutes per  
22 ballot. (Tr. 1604-606.)

23 If strict scrutiny applied and Arizona were required to narrowly tailor its precinct  
24 enforcement to achieve compelling state interests, Plaintiffs' critiques might carry more  
25 weight. But in light of the minimal burdens associated with the precinct-based system,  
26 Arizona's policy need not be the narrowest means of enforcement.

27 Moreover, Plaintiffs are incorrect that Arizona can accomplish all of its goals  
28 without its strict enforcement regime. If voters in precinct-based counties can have their

1 ballots counted for statewide and countywide races even if they vote in the wrong  
2 precinct, they will have far less incentive to vote in their assigned precincts and might  
3 decide to vote elsewhere. Other voters might incorrectly believe that that they can vote at  
4 any location and receive the correct ballot. Voters might also be nefariously directed to  
5 vote elsewhere. North Carolina, for example, has experienced a problem with “political  
6 organizations intentionally transporting voters to the wrong precinct.” *See N.C. State*  
7 *Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 461 (M.D.N.C. 2016) *rev’d on*  
8 *other grounds*, 831 F.3d 204 (4th Cir. 2016). This, in turn, would undermine both the  
9 ability of Arizona counties to accurately estimate the number of voters who may be  
10 expected at any particular precinct and allocate appropriate resources and personnel, and  
11 Arizona’s goal of promoting voting for local candidates. Consequently, if OOP ballots  
12 are partially counted in Arizona, candidates for local office will have to expend resources  
13 to educate voters on why it nevertheless is important to vote within their assigned  
14 precincts. Moreover, requiring counties to review all OOP ballots for any given election  
15 and determine the specific contests in which each voter was eligible to vote would  
16 impose a significant financial and administrative burden on Maricopa and Pima Counties  
17 because of their high populations.

18 Plaintiffs’ requested relief essentially would transform Arizona’s precinct-based  
19 counties, including its two most populous, into quasi-vote-center counties. But the vote-  
20 center model is not appropriate for every jurisdiction. Compared to precinct-based  
21 polling places, it can be difficult for counties to predict the number of voters at each vote  
22 center. Consequently, vote centers can cause voter wait times to increase, with  
23 corresponding decreases in turnout, due to the potential for uneven distribution of voters.  
24 (Tr. 1607-611, 1896-913.) Plaintiffs’ requested relief therefore would deprive precinct-  
25 based counties of the full range of benefits that correspond with the precinct-based  
26 system.

27 Precinct-based voting is a quintessential time, place, and manner election  
28 regulation. Arizona’s policy to not count OOP ballots is one mechanism by which it



1 enforces and administers this precinct-based system to ensure that it reaps the full extent  
2 of its benefits. This policy is sufficiently justified in light of the minimal burdens it  
3 imposes. Accordingly, Arizona’s rejection of OOP ballots does not violate the  
4 Fourteenth Amendment.

5 **VI. SECTION 2 OF THE VOTING RIGHTS ACT (RESULTS TEST)**

6 “Inspired to action by the civil rights movement, Congress responded in 1965 with  
7 the Voting Rights Act.” *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013). In its original  
8 form, § 2 of the VRA prohibited all states from enacting any “standard, practice, or  
9 procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the  
10 United States to vote on account of race or color.” *Id.* (quoting § 2, 79 Stat. 437).

11 “At the time of passage of the Voting Rights Act of 1965, § 2, unlike other  
12 provisions of the Act, did not provoke significant debate in Congress because it was  
13 viewed largely as a restatement of the Fifteenth Amendment.” *Chisom v. Roemer*, 501  
14 U.S. 380, 392 (1991). The Supreme Court took a similar view, holding in a 1980  
15 plurality opinion that “the language of § 2 no more than elaborates upon that of the  
16 Fifteenth Amendment,” and therefore § 2 is violated only if a state enacted the challenged  
17 law with the intent to discriminate on account of race or color. *City of Mobile v. Bolden*,  
18 446 U.S. 55, 60-62 (1980) (plurality opinion).

19 In 1982, in response to the Supreme Court’s opinion in *Bolden*, “Congress  
20 substantially revised § 2 to make clear that a violation could be proved by showing  
21 discriminatory effect alone[.]” *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). In its  
22 current form, § 2 provides:

23 (a) No voting qualification or prerequisite to voting or  
24 standard, practice, or procedure shall be imposed or applied  
25 by any State or political subdivision in a manner which  
26 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).

27 (b) A violation of subsection (a) is established if, based on the  
28 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

1 members of a class of citizens protected by subsection (a) in  
2 that its members have less opportunity than other members of  
3 the electorate to participate in the political process and to  
elect representatives of their choice.

4 52 U.S.C. § 10301. To succeed on a § 2 claim, a plaintiff now may show either that the  
5 challenge law was enacted with the intent to discriminate on account of race or color, or  
6 that “under the totality of the circumstances, a challenged election law or procedure ha[s]  
7 the effect of denying a protected minority equal chance to participate in the electoral  
8 process.” *Gingles*, 478 U.S. at 44 n.8. “The essence of a § 2 claim” brought under the  
9 so-called “effects” or “results test” “is that a certain electoral law, practice, or structure  
10 interacts with social and historical conditions to cause an inequality in the opportunities  
11 enjoyed by [minority and non-minority] voters to elect their preferred representatives.”  
12 *Id.* at 47.

13 When determining whether, under the totality of the circumstances, a challenged  
14 voting practice interacts with social and historical conditions to cause inequality in the  
15 electoral opportunities of minority and non-minority voters, courts may consider, as  
16 relevant, the following factors derived from the Senate Report accompanying the 1982  
17 amendments to the VRA (“Senate Factors”):

- 18 1. the extent of any history of official discrimination in the  
19 state or political subdivision that touched the right of the  
20 members of the minority group to register, to vote, or  
21 otherwise to participate in the democratic process;
- 22 2. the extent to which voting in the elections of the state or  
23 political subdivision is racially polarized;
- 24 3. the extent to which the state or political subdivision has  
25 used unusually large election districts, majority vote  
26 requirements, anti-single shot provisions, or other voting  
27 practices or procedures that may enhance the opportunity for  
28 discrimination against the minority group;
4. if there is a candidate slating process, whether the members  
of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the  
state or political subdivision bear the effects of discrimination  
in such areas as education, employment and health, which  
hinder their ability to participate effectively in the political  
process;

1                   6. whether political campaigns have been characterized by  
2                   overt or subtle racial appeals; [and]

3                   7. the extent to which members of the minority group have  
4                   been elected to public office in the jurisdiction.

5                   *Id.* at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). Courts also may consider  
6                   “whether there is a significant lack of responsiveness on the part of elected officials to the  
7                   particularized needs of the members of the minority group,” and “whether the policy  
8                   underlying the state or political subdivision’s use of such voting qualification,  
9                   prerequisite to voting, or standard, practice or procedure is tenuous.” *Id.*; *see also*  
10                  *Houston Lawyers’ Ass’n v. Attorney Gen. of Tex.*, 501 U.S. 419, 426-27 (1991)  
11                  (explaining that courts may consider a state’s “justification for its electoral system”).  
12                  “[T]here is no requirement that any particular number of factors be proved, or that a  
13                  majority of them point one way or the other.” *Gingles*, 478 U.S. at 45.

14                  Until relatively recently, “Section 2’s use . . . has primarily been in the context of  
15                  vote-dilution cases,” which ““involve challenges to methods of electing representatives—  
16                  like redistricting or at-large districts—as having the effect of diminishing minorities  
17                  voting strength.”” *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 239 (4th Cir.  
18                  2014) (quoting *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 554 (6th  
19                  Cir. 2014), *vacated on other grounds by* 2014 WL 10384647 (6th Cir. 2014)). *Gingles*  
20                  itself was a vote dilution case. “While vote-dilution jurisprudence is well-developed,  
21                  numerous courts and commentators have noted that applying Section 2’s ‘results test’ to  
22                  vote-denial claims is challenging, and a clear standard for its application has not been  
23                  conclusively established.”<sup>14</sup> *Ohio Democratic Party*, 834 F.3d at 636; *see also Veasey v.*  
24                  *Abbott*, 830 F.3d 216, 243-44 (5th Cir. 2016) (“Although courts have often applied the  
25                  *Gingles* factors to analyze claims of vote dilution . . . there is little authority on the proper  
26                  test to determine whether the right to vote has been *denied* or *abridged* on account of  
27                  race.”); *League of Women Voters*, 769 F.3d at 239 (“[T]here is a paucity of appellate case

28                  <sup>14</sup> A “vote denial” claim generally refers “to any claim that is not a vote dilution  
                  claim.” *Ohio State Conference*, 768 F.3d at 554

1 law evaluating the merits of Section 2 claims in the vote-denial context.”); *Ohio State*  
2 *Conference*, 768 F.3d at 554 (“A clear test for Section 2 vote denial claims . . . has yet to  
3 emerge.”); *Simmons v. Galvin*, 575 F.3d 24, 41-42 n.24 (1st Cir. 2009) (“While *Gingles*  
4 and its progeny have generated a well-established standard for vote dilution, a  
5 satisfactory test for vote denial cases under Section 2 has yet to emerge . . . [and] the  
6 Supreme Court’s seminal opinion in *Gingles* . . . is of little use in vote denial cases.”  
7 (quoting Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the*  
8 *Voting Rights Act*, 57 S.C. L. Rev. 689, 709 (2006))); Janai S. Nelson, *The Causal*  
9 *Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579, 595 (2013) (“[T]he legal  
10 contours of vote denial claims remain woefully underdeveloped as compared to vote  
11 dilution claims.”). Indeed, some of the Senate Factors cited by the *Gingles* Court as  
12 relevant to the totality of the circumstances inquiry do not seem particularly germane to  
13 vote denial claims. *Cf. Gingles*, 478 U.S. at 45 (“While the enumerated factors will often  
14 be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other  
15 factors may also be relevant and considered.”); *see Frank v. Walker*, 768 F.3d 744, 752-  
16 55 (7th Cir. 2014) (questioning usefulness of Senate Factors in vote denial claims); *Ohio*  
17 *Democratic Party*, 834 F.3d at 638 (explaining that totality of circumstances inquiry in  
18 vote denial cases is “*potentially* informed by the ‘Senate Factors’ discussed in *Gingles*”  
19 (emphasis added)).

20 Several circuit courts that recently have analyzed vote denial claims have adopted  
21 the following two-part framework based on the text of § 2 and the Supreme Court’s  
22 guidance in *Gingles*:

23 First, the challenged standard, practice, or procedure must  
24 impose a discriminatory burden on members of a protected  
25 class, meaning that members of the protected class have less  
26 opportunity than other members of the electorate to  
27 participate in the political process and to elect representatives  
28 of their choice.

Second, that burden must in part be caused by or linked to  
social and historical conditions that have or currently produce  
discrimination against members of the protected class.

1 *League of Women Voters*, 769 F.3d at 240 (internal quotations and citations omitted); *see*  
2 *also Veasey*, 830 F.3d at 244; *Ohio Democratic Party*, 834 F.3d at 636; *Frank*, 768 F.3d  
3 at 754-55 (adopting two-part framework for sake of argument but expressing skepticism  
4 of the second step “because it does not distinguish between discrimination by [the state]  
5 from other persons’ discrimination”). The Ninth Circuit likewise endorsed this two-part  
6 framework in the context of this case. *Feldman v. Ariz. Sec. of State’s Office*, 840 F.3d  
7 1057, 1070 (9th Cir. 2016); *id.* at 1091 (Thomas, C.J. dissenting); *Feldman*, 843 F.3d at  
8 367.

9 “The first part of this two-prong framework inquires about the nature of the  
10 burden imposed and whether it creates a disparate effect[.]” *Veasey*, 830 F.3d at 244.  
11 Drawing on the Supreme Court’s guidance in *Gingles*, “[t]he second part . . . provides the  
12 requisite causal link between the burden on voting rights and the fact that this burden  
13 affects minorities disparately because it interacts with social and historical conditions that  
14 have produced discrimination against minorities currently, in the past, or both.” *Id.* That  
15 is, “the second step asks not just whether social and historical conditions ‘result in’ a  
16 disparate impact, but whether the challenged *voting standard or practice* causes the  
17 discriminatory impact as *it* interacts with social and historical conditions.” *Ohio*  
18 *Democratic Party*, 834 F.3d at 638 (emphasis in original).

19 Although proving a violation of § 2 does not require a  
20 showing of discriminatory intent, only discriminatory results,  
21 proof of a causal connection between the challenged voting  
22 practice and a prohibited result is crucial. Said otherwise, a §  
23 2 challenge based purely on a showing of some relevant  
statistical disparity between minorities and whites, without  
any evidence that the challenged voting qualification causes  
that disparity, will be rejected.

24 *Gonzales v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (internal quotations and citations  
25 omitted); *see also Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109  
26 F.3d 586, 595 (9th Cir. 1997).

27 A close reading of the decisions of courts that recently have grappled with vote  
28 denial claims reveals two important nuances of the results test. The first bears on the

1 meaning of “disparity” as it has been used in vote denial cases. “No state has exactly  
2 equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting  
3 system.” *Frank*, 768 F.3d at 754. Perfect racial parity is unlikely to exist in any aspect of  
4 a state’s election system, which is to say it is unlikely that minorities and non-minorities  
5 will be impacted by laws in perfect proportion to their representation in the overall voting  
6 population. Unless the VRA is to be interpreted to sweep away all elections regulations,  
7 some degree of disproportionality must be tolerable.

8 Therefore, not every disparity between minority and non-minority voters is  
9 cognizable under the VRA. Rather, to be cognizable the disparity must be meaningful  
10 enough to work “an inequality in the opportunities enjoyed by [minority as compared to  
11 non-minority] voters to elect their preferred representatives.” *Gingles*, 478 U.S. at 47;  
12 see *Gonzales*, 677 F.3d at 405 (suggesting that disparity must be “relevant”). For  
13 example, the Seventh Circuit rejected the notion that:

14 if whites are 2% more likely to register than blacks, then the  
15 registration system top to bottom violates § 2; and if white  
16 turnout on election day is 2% higher, then the requirement of  
17 in-person voting violates § 2. Motor-voter registration, which  
18 makes it simple for people to register by checking a box when  
19 they get drivers’ licenses, would be invalid, because black  
20 and Latino citizens are less likely to own cars and therefore  
less likely to get drivers’ licenses. . . . Yet it would be  
implausible to read § 2 as sweeping away almost all  
registration and voting rules. It is better to understand § 2(b)  
as an equal-treatment requirement (which is how it reads)  
than as an equal-outcome command[.]

21 *Frank*, 768 F.3d at 754.

22 The second nuance bears on the definition of “impact” or “effect.” To be  
23 cognizable, the challenged voting practice must “impose a discriminatory burden,”  
24 *League of Women Voters*, 769 F.3d at 240, and not merely result in a “disproportionate  
25 impact,” *Salt River Project*, 109 F.3d at 595. Section 2 “does not sweep away all election  
26 rules that result in a disparity in the convenience of voting.” *Lee v. Va. State Bd. of*  
27 *Elections*, 843 F.3d 592, 601 (4th Cir. 2016). A contrary interpretation would require the  
28 Court to accept:

1 an unjustified leap from the disparate inconveniences that  
2 voters face when voting to the denial or abridgment of the  
3 right to vote. Every decision that a State makes in regulating  
4 its elections will, inevitably, result in somewhat more  
5 inconvenience for some voters than for others. For example,  
6 every polling place will, by necessity, be located closer to  
7 some voters than to others. To interpret § 2 as prohibiting  
8 any regulation that imposes a disparate inconvenience would  
9 mean that every polling place would need to be precisely  
10 located such that no group had to spend more time traveling  
11 to vote than did any other. Similarly, motor-voter registration  
12 would be found to be invalid [if] members of [a] protected  
13 class were less likely to possess a driver's license. Yet, courts  
14 have also correctly rejected that hypothetical.

9 *Id.*; see also *N.E. Ohio Coal. for the Homeless*, 837 F.3d at 628 (“A law cannot  
10 disparately impact minority voters if its impact is insignificant to begin with.”); *Ohio*  
11 *Democratic Party*, 834 F.3d at 623 (“[W]hile the challenged regulation may slightly  
12 diminish the convenience of registration and voting, it applies even-handedly to all  
13 voters, and, despite the change, Ohio continues to provide generous, reasonable, and  
14 accessible voting options to all Ohioans. The issue is not whether some voter somewhere  
15 would benefit from six additional days of early voting or from the opportunity to register  
16 and vote at the same time. Rather, the issue is whether the challenged law results in a  
17 cognizable injury under the Constitution or the Voting Rights Act.”); *Frank*, 843 F.3d at  
18 753 (“[U]nless the State of Wisconsin made it ‘needlessly hard’ to obtain the requisite  
19 photo identification for voting, this requirement did not result in a ‘denial’ of anything by  
20 Wisconsin, as § 2(a) requires.”); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp.  
21 2d 1326, 1335 (M.D. Fla. 2004) (“While it may be true that having to drive to an early  
22 voting site and having to wait in line may cause people to be inconvenienced,  
23 inconvenience does not result in a denial of ‘meaningful access to the political process.’”  
24 (quoting *Osburn v. Cox*, 369 F.2d 1283, 1289 (11th Cir. 2004)); *Glover v. S.C.*  
25 *Democratic Party*, No. C/A 4-04-CV-2171-25, 2004 WL 3262756, at \*6 (D.S.C. Sept. 3,  
26 2004) (“[T]he Court does not find that difficulty voting equates with a ‘denial or  
27 abridgment’ of the right to vote.”).

28 With these principles in mind, the Court first will apply step one of the two-part

1 vote denial framework to each of the challenged voting practices to determine whether  
2 either disparately burdens minority voters. The Court then will discuss step two and the  
3 Senate Factors.

4 **A. Step One (Disparate Impact)**

5 **1. H.B. 2023**

6 H.B. 2023 is facially neutral. It applies to all Arizonans regardless of race or  
7 color. Plaintiffs nonetheless allege that H.B. 2023 disparately burdens Hispanic, Native  
8 American, and African American voters as compared to non-minority voters because  
9 these groups disproportionately rely on others to collect and return their early ballots.  
10 But there are no records of the numbers of people who, in past elections, have relied on  
11 now-prohibited third parties to collect and return their early mail ballots, and of this  
12 unknown number Plaintiffs have provided no quantitative or statistical evidence  
13 comparing the proportion that is minority versus non-minority.

14 This evidentiary hole presents a practical problem. Disparate impact analysis is a  
15 comparative exercise. To determine whether a practice disparately impacts minorities,  
16 the Court generally must know approximately: (1) how many people will be affected by  
17 the practice, and (2) their racial composition. Without this information, it becomes  
18 difficult to compare the law's impact on different demographic populations and to  
19 determine whether the disparities, if any, are meaningful. That is, it might be true that  
20 minorities qualitatively have used ballot collection services more often than non-  
21 minorities, but the discrepancy might be slight enough that it does not meaningfully deny  
22 minorities an equal opportunity to participate in the political process and elect their  
23 preferred representatives. *See Frank*, 768 F.3d at 754.

24 Indeed, the Court is aware of no vote denial case in which a § 2 violation has been  
25 found without quantitative evidence measuring the alleged disparate impact of a  
26 challenged law on minority voters. Rather, the standards developed for analyzing § 2  
27 vote denial cases suggest that proof of a relevant statistical disparity might be necessary  
28 at step one, even though it is not alone sufficient to prove a § 2 violation because of the



1 causation requirement at step two.<sup>15</sup> See *Gonzales*, 677 F.3d at 405; *Veasey*, 830 F.3d at  
2 244 (noting that “courts regularly utilize statistical analyses to discern whether a law has  
3 a discriminatory impact”). Further, in other contexts courts have “recognized the  
4 necessity of statistical evidence in disparate impact cases.” *Budnick v. Town of Carefree*,  
5 518 F.3d 1109, 1118 (9th Cir. 2008) (Fair Housing Act); *Pottenger v. Potlatch Corp.*, 329  
6 F.3d 740, 749 (9th Cir. 2003) (Age Discrimination in Employment Act); *Cooper v. S.*  
7 *Co.*, 390 F.3d 695, 716 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson*  
8 *Foods, Inc.*, 546 U.S. 454 (2006) (Title VII); *Rollins v. Alabama Cmty. Coll. Sys.*, No.  
9 2:09-CV-636-WHA, 2010 WL 4269133, at \*9 (M.D. Ala. Oct. 25, 2010) (Equal Pay  
10 Act); *Davis v. City of Panama City, Fla.*, 510 F. Supp. 2d 671, 689 (N.D. Fla. 2007)  
11 (Title VII and 42 U.S.C. § 1983).

12 The Court is not suggesting that quantitative evidence of a challenged voting  
13 practice’s actual effect is needed in vote denial cases. As Chief Judge Thomas noted in  
14 his dissent during the preliminary appellate phase of this case, “quantitative evidence of  
15 the effect of a rule on voting behavior is only available after an election has occurred, at  
16 which point the remedial purpose of the Voting Rights Act is no longer served.”  
17 *Feldman*, 840 F.3d at 1092 n.5 (Thomas, C.J. dissenting). But quantitative evidence of  
18 the number of voters who used ballot collection *before* H.B. 2023’s enactment, together  
19 with similar evidence of those voters’ demographics, would permit the Court to  
20 reasonably infer how many voters would be affected by H.B. 2023’s limitations in future  
21 elections, and whether those voters disproportionately would be minorities.<sup>16</sup> As one  
22

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23 <sup>15</sup> In vote dilution cases the Senate Factors “are sometimes used as a non-statistical  
24 proxy . . . to link disparate impacts to current or historical conditions of discrimination.”  
25 *Ohio Democratic Party*, 834 F.3d at 637 n.11. But to use the *Gingles* factors to prove the  
26 existence of a disparity essentially would collapse the step one and step two inquiries.  
That is, a plaintiff could simply assume that the challenged law causes a meaningful  
27 disparity between minorities and non-minorities because of social and historical  
28 discrimination in the state. This perhaps is another illustration of how the *Gingles* vote-  
dilution framework is an imperfect fit for vote denial claims.

<sup>16</sup> Notably, the trial in this matter occurred after H.B. 2023 had been in effect for  
two major elections—the 2016 presidential preference election and the 2016 general  
election—yet Plaintiffs still were unable to produce data on the law’s impact.

1 commentator has argued:

2 It can be difficult to document the racial composition of those  
3 who use a voting opportunity . . . , given that election and  
4 other public records often do not include racial or ethnic data.  
5 There is no getting around this problem. But given that § 2  
6 forbids the denial or abridgement of the vote on account of  
7 race, it is reasonable that plaintiffs be required to make a  
threshold showing they are disproportionately burdened by  
the challenged practice, in the sense that it eliminates an  
opportunity they are more likely to use or imposes a  
requirement they are less likely to satisfy.

8 Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev.  
9 439, 476 (2015).

10 The Court is mindful, however, that no court has explicitly required quantitative  
11 evidence to prove a vote denial claim, and a majority of the en banc Ninth Circuit panel  
12 reviewing the preliminary phase of this case appears to have rejected such a rule. The  
13 Court therefore does not find against Plaintiffs on this basis. Rather, the Court finds that  
14 Plaintiffs' circumstantial, qualitative evidence is insufficient to establish a cognizable  
15 disparity under § 2.

16 To overcome the lack of quantification, Plaintiffs attempt to prove the existence of  
17 a meaningful disparity through two general categories of circumstantial evidence. First,  
18 lawmakers, elections officials, and community advocates testified that ballot collection  
19 tends to be used more by communities that lack easy access to secure, outgoing mail  
20 services; the elderly, homebound, and disabled; the poor; those who lack reliable  
21 transportation; those who work multiple jobs or lack childcare; and less educated voters  
22 who are unfamiliar with or more intimidated by the voting process. In turn, data shows  
23 that these socioeconomic circumstances are disproportionately reflected in minority  
24 communities. (*See* Ex. 97 at 57; Tr. 59-60, 416-26, 432-39, 629-35, 895-900.) It stands  
25 to reason, then, that prior to H.B. 2023's enactment minorities qualitatively were more  
26 likely than non-minorities to give their early ballots to third parties.

27 For example, relative to non-minorities, Hispanics and African Americans are  
28 nearly two times more likely to live in poverty, and the poverty rate for Native Americans

1 is over three times higher. (Ex. 93 at 15.) Wages and unemployment rates for Hispanics,  
2 African Americans, and Native Americans consistently have exceeded non-minority  
3 unemployment rates for the period of 2010 to 2015. (Ex. 91 at 40; Ex. 93 at 15.)  
4 According to the 2015 American Community Survey 1-year estimates, unemployment  
5 rates were 10.5 percent for African Americans, 7.7 percent for Hispanics, 16.8 percent for  
6 Native Americans, and only 5.6 percent for non-minorities. In Arizona, 68.9 percent of  
7 non-minorities own a home, whereas only 32.3 percent of African Americans, 49 percent  
8 of Hispanics, and 56.1 percent of Native Americans do so. (Ex. 93 at 15, 17; Ex. 98 at  
9 33.)

10 Non-minorities remain more likely than Hispanics, Native Americans, and African  
11 Americans to graduate from high school, and are nearly three times more likely to have a  
12 bachelor's degree than Hispanics and Native Americans. Additionally, in a recent  
13 survey, over 22.4 percent of Hispanics and 11.2 percent of Native Americans rated  
14 themselves as speaking English less than "very well," as compared to only 1.2 percent of  
15 non-minorities. (Ex. 93 at 16.) Due to their lower levels of literacy and education,  
16 minority voters are more likely to be unaware of certain technical rules, such as the  
17 requirement that early ballots be received by the county recorder, rather than merely  
18 postmarked, by 7:00 p.m. on Election Day. (Ex. 91 at 38.)

19 As of 2015, Hispanics, Native Americans, and African Americans fared worse  
20 than non-minorities on a number of key health indicators. (Ex. 93 at 18.) Native  
21 Americans in particular have much higher rates of disability than non-minorities, and  
22 Arizona counties with large Native American populations have much higher rates of  
23 residents with ambulatory disabilities. For example, "17 percent of Native Americans are  
24 disabled in Apache County, 22 percent in Navajo County, and 30 percent in Coconino  
25 County." Further, "11 percent [of individuals] have ambulatory difficulties in Apache  
26 County, 13 percent in Navajo County, and 12 percent in Coconino County, all of which  
27 contain significant Native American populations and reservations." (Ex. 97 at 60.)

28 Hispanics, Native Americans, and African Americans also are significantly less

1 likely than non-minorities to own a vehicle, more likely to rely upon public  
2 transportation, more likely to have inflexible work schedules, and more likely to rely on  
3 income from hourly wage jobs. (Ex. 93 at 12-18; Ex. 97 at 51-52; Tameron Dep. 155:5-  
4 20; Pstross Dep. 34:11-22.) Ready access to reliable and secure mail service is  
5 nonexistent in some minority communities. (Ex. 97 at 57; Ex. 98 at 18; Tr. 506.)

6         These disparities exist in both urban and rural areas. For example, Representative  
7 Charlene Fernandez described a lack of home mail service in rural San Luis, a city that is  
8 98 percent Hispanic. Almost 13,000 residents rely on a post office located across a major  
9 highway. With no mass transit, a median income of \$22,000, and many people not  
10 owning cars, receiving and sending mail in San Luis can be more difficult than in other  
11 communities. (Tr. 40-46.) A surprising number of voters in the Hispanic community  
12 also distrust returning their voted ballot via mail, particularly in low-income communities  
13 where mail theft is common. Although a lack of outgoing mail presents a problem for  
14 rural minority voters, unsecure mailboxes are an impediment for urban minorities who  
15 distrust the mail service and prefer instead to give their ballots to a volunteer. (Tr. 98,  
16 238-39, 896-97, 1170; Healy Dep. 97:18-24; Scharff Dep. 92:5-17.)

17         These problems are particularly acute in Arizona's Native American communities,  
18 in which vehicle ownership is significantly lower than non-minority Arizonans. (Ex. 91  
19 at 42.) Between one quarter and one half of all households on Native American  
20 reservations lack access to a vehicle. (Ex. 98 at 16.) Moreover, according to Dr. Rodden,  
21 "the extent to which rural Native Americans lack mail service is quite striking." "[T]he  
22 majority of Native Americans in non-metropolitan Arizona do not have residential mail  
23 service." "Only 18 percent of Native American registered voters have home mail  
24 delivery. . . . The rate at which registered voters have home mail service is over 350  
25 percent higher for non-Hispanic whites than for Native Americans." As such, most  
26 Native American registered voters must travel to a town to retrieve their mail, "[y]et rates  
27 of vehicle access are quite low." (Ex. 97 at 57.) On the Navajo Reservation, most people  
28 live in remote communities, many communities have little to no vehicle access, and there

1 is no home incoming or outgoing mail, only post office boxes, sometimes shared by  
2 multiple families. (Tr. 172-75, 297-98.)

3       There is no home delivery in the Tohono O’odham Nation, where there are 1,900  
4 post office boxes and some cluster mail boxes. The postmaster for the Tohono O’odham  
5 Nation anecdotally related to Representative Fernandez that she observes residents come  
6 to the post office every two or three weeks to get their mail. Due to the lack of  
7 transportation, the condition of the roads, and health issues, some go to post office only  
8 once per month. (Tr. 52-58, 315-17.)

9       Thus, “for many Native Americans living in rural locations, especially on  
10 reservations, voting is an activity that requires the active assistance of friends and  
11 neighbors.” (Ex. 97 at 60.) LeNora Fulton—a member of the Navajo Nation, former  
12 representative of the Fort Defiance Chapter of the Navajo National Council, member of  
13 the Navajo Election Board of Supervisors, and the Apache County Recorder from 2004  
14 through 2016, where her responsibilities included overseeing voter registration, early  
15 voting and voter outreach—explained that people in the Navajo Nation trust non-family  
16 members to deliver their early ballots because “[i]t’s part of the culture. . . . [T]here is a  
17 clan system. They may not be related by blood, but they are related by clan. Everyone  
18 on the Navajo Nation is related on way or another through the clan system.” Ballot  
19 collection and delivery by those with the means to travel “was the standard practice with  
20 the Apache County . . . but also with the Nation[.]” “We have many people that would  
21 come into our office in St. Johns that help individuals that not are not able to get a ballot,  
22 you know, to the office. They would bring it in. And so it was just a standard  
23 practice . . . It was a norm for us.” According to Fulton, limiting who may collection and  
24 deliver early ballots “would be a huge devastation . . . . The laws are supposed to be  
25 helpful to people, but in this instance, it’s harmful.” (Tr. 283-85, 300, 322-324.)

26       The second category of circumstantial evidence concerns those who tend to offer  
27 ballot collection services. Within the last decade, ballot collection has become a larger  
28 part of the Democratic Party’s GOTV strategy. The Democratic Party and community

1 advocacy organizations have focused their ballot collection efforts on low-efficacy  
2 voters, who trend disproportionately minority. In turn, minorities in Arizona tend to vote  
3 for Democratic candidates. (Ex. 93 at 4-6, 11; Tr. 92, 283, 309, 416-26, 632-33, 659,  
4 902-03, 1143, 1191-96, 1200, 1407, 1770-71, 1843-44; Healy Dep. 28:15-29:13.)  
5 Individuals who have collected ballots in past elections observed that minority voters,  
6 especially Hispanics, were more interested in utilizing their services. Indeed, Helen  
7 Purcell, who served as the Maricopa County Recorder for 28 years from 1988 to 2016,  
8 observed that ballot collection was disproportionately used by Hispanic voters. (Tr. 417-  
9 19, 635, 642, 866, 895-900, 931-32, 1039-40, 1071, 1170.)

10 In contrast, the Republican Party has not significantly engaged in ballot collection  
11 as a GOTV strategy. The base of the Republican Party in Arizona trends non-minority.  
12 On average, non-minorities in Arizona vote 59 percent for Republican candidates, as  
13 compared with 35 percent of Hispanic voters. Individuals who have collected ballots in  
14 past elections have observed that voters in predominately non-minority areas were not as  
15 interested in ballot collection services. (Tr. 430-31, 898, 1170, 1192, 1408; Ex. 91 at 31.)

16 Based on this evidence, the Court finds that prior to H.B. 2023's enactment  
17 minorities qualitatively were more likely than non-minorities to return their early ballots  
18 with the assistance of third parties. The Court, however, cannot speak in more specific or  
19 precise terms than "more" or "less." Although there are significant socioeconomic  
20 disparities between minorities and non-minorities in Arizona, these disparities are an  
21 imprecise proxy for disparities in ballot collection use. Plaintiffs do not argue that all or  
22 even most socioeconomically disadvantaged voters use ballot collection services, nor  
23 does the evidence support such a finding. Rather, the anecdotal estimates from individual  
24 ballot collectors indicate that a relatively small number of voters have used ballot  
25 collection services in past elections. It reasonably follows, then, that even among  
26 socioeconomically disadvantaged voters, most do not use ballot collection services to  
27 vote. Considering the vast majority of Arizonans, minority and non-minority alike, vote  
28 without the assistance of third-parties who would not fall within H.B. 2023's exceptions,

1 it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a  
2 meaningful inequality in the electoral opportunities of minorities as compared to non-  
3 minorities.

4 Moreover, H.B. 2023 does not impose burdens beyond those traditionally  
5 associated with voting. Although, for some voters, ballot collection is a preferred and  
6 more convenient method of voting, H.B. 2023 does not deny minority voters meaningful  
7 access to the political process simply because the law makes it slightly more difficult or  
8 inconvenient for a small, yet unquantified subset of voters to return their early ballots. In  
9 fact, no individual voter testified that H.B. 2023's limitations on who may collect an  
10 early ballot would make it significantly more difficult to vote. The Court therefore finds  
11 that Plaintiffs have not carried their burden at step one of the vote denial framework.

## 12 **2. OOP Voting**

13 Unlike their H.B. 2023 challenge, Plaintiffs provided quantitative and statistical  
14 evidence of disparities in OOP voting through the expert testimony of Dr. Rodden.  
15 Because Arizona does not track the racial demographics of its voters, Dr. Rodden used an  
16 open-source software algorithm that he found online to predict each voter's race. (Tr.  
17 378-414, 520-24.) Specifically, Dr. Rodden placed the names of individuals who cast  
18 ballots in particular elections into Census blocks and tracts, for which racial data is  
19 available from the Census, and then combined that information with surname data to  
20 estimate the race of each voter. This approach has become common in academic studies,  
21 as well as VRA litigation. Dr. Rodden added further precision to his estimates by  
22 conditioning them on not just surnames and neighborhood race statistics, but also on  
23 additional information found in the voter file, such as the individual's age and party.<sup>17</sup>

24  
25 <sup>17</sup> Dr. Thornton criticized Dr. Rodden's analysis of racial disparities in OOP  
26 voting among the smallest minority groups in Arizona's smaller counties, but when Dr.  
27 Rodden conducted an analysis addressing Dr. Thornton's criticisms he reached the same  
28 results. Dr. Thornton also was critical of Dr. Rodden's analysis because the application  
of the algorithm to Arizona voters includes unidentifiable measurement error. But  
because there is no concrete racial data for individual voters, Dr. Rodden has no means to  
compare his estimates. Indeed, if such concrete data existed, there would have been no  
need for Dr. Rodden's estimates. Moreover, as Dr. Rodden explains in his Second Expert

1 (Ex. 97 at 10-15.)

2 Dr. Rodden's analysis is credible and shows that minorities are over-represented  
3 among the small number of voters casting OOP ballots. For example, in Maricopa  
4 County—which accounts for 61 percent of Arizona's population—non-minority voters  
5 accounted for only 56 percent of OOP ballots cast during the 2012 general election,  
6 despite casting 70 percent of all in-person voters. In contrast, African American and  
7 Hispanic voters made up 10 percent and 15 percent of in-person voters, but accounted for  
8 13 percent and 26 percent of OOP ballots, respectively. Native American voters  
9 accounted for 1.1 percent of in-person voters, and 1.3 percent of OOP ballots. Dr.  
10 Rodden observed similar results for Pima County. (Ex. 91 at 52; Ex. 95 at 31-33, 37, 43.)

11 Similarly, minority voters cast a disproportionate share of OOP ballots during the  
12 2016 general election. In Maricopa County, estimated rates of OOP voting were twice as  
13 high for Hispanics, 86 percent higher for African Americans, and 73 percent higher for  
14 Native Americans than for their non-minority counterparts. In Pima County, rates of  
15 OOP voting were 150 percent higher for Hispanics, 80 percent higher for African  
16 Americans, and 74 percent higher for Native Americans than for non-minorities.  
17 Moreover, in Pima County the overall rate of OOP voting was higher, and the racial  
18 disparities larger, in 2016 than in 2014. Among all counties that reported OOP ballots in  
19 the 2016 general election, a little over 1 in every 100 Hispanic voters, 1 in every 100  
20 African-American voters, and 1 in every 100 Native American voters cast an OOP ballot.  
21 For non-minority voters, the figure was around 1 in every 200 voters. Racial disparities  
22 in OOP voting were found in all counties except La Paz County, which has a small  
23 minority population. (Ex. 97 at 3, 19-21, 28-34.)

24 Although Dr. Rodden's race estimation is credible, his analysis paints an  
25 incomplete picture of the practical impact of OOP voting because the majority of  
26 Arizonans successfully vote by mail and therefore are unaffected by precinct

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27 Report, his methods lead to more conservative estimates of disparities, a fact not  
28 challenged by Dr. Thornton. (Ex. 98 at 3, 8-11.)



1 requirements. For example, in the 2012 general election Arizona voters cast 10,979 OOP  
2 ballots out of the 2,323,579 ballots cast statewide, accounting for 0.47 percent of all votes  
3 cast. In Maricopa County, 1,390,836 total ballots were cast, of which 7,529 (or 0.54  
4 percent) were rejected for being cast out of the voter's assigned precinct. OOP ballots  
5 cast by non-minority voters therefore accounted for only 0.3 percent of all votes cast in  
6 Maricopa County during the 2012 election, whereas OOP ballots cast by Hispanic and  
7 African American voters accounted only for approximately 0.14 percent and 0.07  
8 percent, respectively. These figures dropped substantially in the 2016 general election,  
9 during which only 3,970 Arizonans voted OOP out of the 2,661,497 ballots cast  
10 statewide, representing only 0.15 percent of all votes cast. In Maricopa County,  
11 1,608,875 total ballots were cast, of which only 2,197 (or 0.14 percent) were cast OOP.  
12 (Tr. 1927-32; Exs. 578-79, 581.)

13         Considering OOP ballots represent such a small and ever-decreasing fraction of  
14 the overall votes cast in any given election, OOP ballot rejection has no meaningfully  
15 disparate impact on the opportunities of minority voters to elect their preferred  
16 representatives. To be clear, the Court is not suggesting that the votes of individuals who  
17 show up at the wrong precinct are unimportant. But, as a practical matter, the disparity  
18 between the proportion of minorities who vote at the wrong precinct and the proportion  
19 of non-minorities who vote at the wrong precinct does not result in minorities having  
20 unequal access to the political process. *See* Fed. Judicial Ctr., *Reference Manual on*  
21 *Scientific Evidence* 252 (3d ed. 2011) (discussing difference between statistical  
22 significance and practical significance). No state has exactly equal rates at every stage of  
23 its voting system, and in the end the vast majority of all votes in Arizona—cast by  
24 minority and non-minority voters alike—are counted. *See Frank*, 768 F.3d at 754.

25         Moreover, Arizona's policy to not count OOP ballots is not the cause of the  
26 disparities in OOP voting. Dr. Rodden's analysis confirms that OOP voting is  
27 concentrated in relatively dense precincts that are disproportionately populated with  
28 renters and those who move frequently. These groups, in turn, are disproportionately

1 composed of minorities. (Ex. 97 at 16-18.) Because minority voters in Arizona have  
2 disproportionately higher rates of residential mobility, they are more likely to need to  
3 renew their voter registration and reeducate themselves about their new voting locations.  
4 (Ex. 91 at 39; Ex. 93 at 17; Ex. 95 at 4, 7-12; Ex. 98 at 33.)

5 Polling place locations present additional challenges for Native American voters.  
6 For example, Navajo voters in Northern Apache County lack standard addresses, and  
7 their precinct assignments for state and county elections are based upon guesswork,  
8 leading to confusion about the voter's correct polling place. Additionally, boundaries for  
9 purposes of tribal elections and Apache County precincts are not the same. As a result, a  
10 voter's polling place for tribal elections often differs from the voter's polling place for  
11 state and county elections. Inadequate transportation access also can make travelling to  
12 an assigned polling place difficult. (Ex. 97 at 51-54; Tr. 299-301.)

13 Plaintiffs, however, do not challenge the manner in which Arizona counties  
14 allocate and assign polling places or Arizona's requirement that voters re-register to vote  
15 when they move. Plaintiffs also offered no evidence of a systemic or pervasive history of  
16 minority voters being given misinformation regarding the locations of their assigned  
17 precincts, while non-minority voters were given correct information. Nor have they  
18 shown that precincts tend to be located in areas where it would be more difficult for  
19 minority voters to find them, as compared to non-minority voters. To the contrary, there  
20 are many ways for voters in Arizona to locate their assigned precincts, and state, county,  
21 and local elections officials engage in substantial informational campaigns and voter  
22 outreach. Plaintiffs, instead, have challenged what Arizona does with OOP ballots after  
23 they have been cast, which does not cause the observed disparities in OOP voting.

24 In sum, Plaintiffs have not carried their burden at step one of the vote denial  
25 framework for two independent reasons. First, they have not shown that Arizona's policy  
26 to not count OOP ballots causes minorities to show up to vote at the wrong precinct at  
27 rates higher than their non-minority counterparts. Second, given that OOP ballots  
28 account for such a small fraction of votes cast statewide, Plaintiffs have not shown that

1 the racial disparities in OOP voting are practically significant enough to work a  
2 meaningful inequality in the opportunities of minority voters as compared to non-  
3 minority voters to participate in the political process and elect their preferred  
4 representatives.

### 5 **B. Step Two (Senate Factors)**

6 Step two of the results test is informed by the Senate Factors and asks whether the  
7 disparate burdens imposed by the challenged voting practices are in part caused by or  
8 linked to social and historical conditions within the state that have or currently produce  
9 discrimination against the affected minorities. The Court does not need to reach this step  
10 because Plaintiffs have not shown at step one that the challenged voting practices impose  
11 meaningfully disparate burdens on minority voters as compared to non-minority voters.  
12 *Cf. Ohio Democratic Party*, 834 F.3d at 638 (“If this first element is met, the second step  
13 comes into play, triggering consideration of the ‘totality of the circumstances,’ potentially  
14 informed by the ‘Senate Factors’ discussed in ‘*Gingles*.’”). Nonetheless, to ensure that  
15 the record is fully developed, the Court will address below the evidence pertinent to the  
16 Senate Factors. The Court will not discuss factors three and four, however, because they  
17 are not germane to the challenged voting practices and there is insufficient evidence to  
18 warrant discussion.

#### 19 **1. Relevant History of Official Discrimination**

20 Arizona has a history of discrimination against Native Americans, Hispanics, and  
21 African Americans. Such discrimination began as early as 1912, when Arizona became a  
22 state, and continued into the modern era. In 1975, Arizona’s history of discrimination  
23 resulted in it becoming one of only nine states to be brought wholly under § 5 of the VRA  
24 as a “covered jurisdiction.” In addition to being covered under § 5, it was one of only  
25 three states to be covered under § 4(f)(4) of the Act for Spanish Heritage. (Ex. 89 at 5-  
26 24; Ex. 91 at 2, 24-30; Ex. 521 at 43-45; Doc. 361 ¶ 42.)

27 When Arizona became a state in 1912, Native Americans were excluded from  
28 voting. Even after Congress acknowledged that Native Americans were citizens in 1924,

1 thereby affording them the right to vote, Arizona’s Constitution continued to deny Native  
2 Americans that right. (Ex. 89 at 17; Ex. 521 at 43.) It was not until 1948—24 years after  
3 federal law allowed Native Americans to vote—that the Arizona Supreme Court found  
4 the State’s disenfranchisement of Native Americans was unconstitutional and finally  
5 granted Native Americans the right to vote. (Doc. 361 ¶ 17; Ex. 89 at 17; Ex. 521 at 45.);  
6 *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948).

7 Despite this ruling, Native Americans, as well as Hispanics and African  
8 Americans, continued to face barriers to participation in the franchise. For example, in  
9 1912 Arizona enacted an English literacy test for voting. The test was enacted  
10 specifically to limit “the ignorant Mexican vote,” but it also had the effect of reducing the  
11 ability of African Americans and Native Americans to register and vote, as registrars  
12 applied the test to these communities as well. Well into the 1960s, white Arizonans  
13 challenged minority voters at the polls by asking them to read and explain literacy cards.  
14 (Doc. 361 ¶ 14; Ex. 89 at 14-17; Ex. 521 at 44-45.)

15 In 1970, Congress amended the VRA to enact a nationwide ban on literacy tests  
16 after finding that they were used to discriminate against voters on account of their race or  
17 ethnicity. In reaching that finding, Congress cited evidence that showed application of  
18 the literacy test had significantly lowered the participation rates of minorities. It  
19 specifically found that in Arizona “only two counties out of eight with Spanish surname  
20 populations in excess of 15% showed a voter registration equal to the state-wide  
21 average.” It also noted that Arizona had a serious deficiency in Native American voter  
22 registrations. Rather than comply with the VRA and repeal its literacy test, Arizona  
23 challenged the ban, arguing that it could not be enforced to the extent that it was  
24 inconsistent with the State’s literacy requirement. Even after the Supreme Court upheld  
25 Congress’s ban, Arizona waited an additional two years to formally repeal its literacy  
26 test. (Ex. 89 at 14-18; Ex. 91 at 24); *see Or. v. Mitchell*, 400 U.S. 112, 118 (1970).

27 The effects of Arizona’s literacy test were compounded by the State’s history of  
28 discrimination in the education of its Hispanic, Native American, and African American

1 citizens. (Doc. 361 ¶¶ 2-4; Ex. 89 at 9-10; Ex. 91 at 5.) From 1912 until the Supreme  
2 Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), segregated  
3 education was widespread throughout Arizona and sanctioned by both the courts and the  
4 state legislature. (Ex. 521 at 35-39; Ex. 89 at 9-12); *see also Dameron v. Bayless*, 126 P.  
5 273 (Ariz. 1912); *Gonzales v. Sheely*, 96 F. Supp. 1004, 1008-09 (D. Ariz. 1951)  
6 (enjoining segregation of Mexican school children in Maricopa County). In fact, the  
7 Tucson Public Schools only recently reached a consent decree with the DOJ over its  
8 desegregation plan in 2013. (Ex. 91 at 27.) The practice of segregation also extended  
9 beyond schools; it was common place to have segregated public spaces such as  
10 restaurants, swimming pools, and theaters. (Ex. 89 at 15; Ex. 521 at 34). Even where  
11 schools were not segregated, Arizona enacted restrictions on bilingual education. As  
12 recently as 2000, Arizona banned bilingual education with the passage of Proposition  
13 203. (Ex. 89 at 20; Ex. 91 at 47.)

14 Arizona has a record of failing to provide adequate funding to teach its non-  
15 English speaking students. This under-funding has taken place despite multiple court  
16 orders instructing Arizona to develop an adequate funding formula for its programs,  
17 including a 2005 order in which Arizona was held in contempt of court for refusing to  
18 provide adequate funding for its educational programs. (Ex. 91 at 46-47); *Flores v.*  
19 *Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *vacated*, 204 Fed. App'x 580 (9th Cir.  
20 2006). "According to the Education Law Center's latest National Report Card that  
21 provided data for 2013, Arizona ranked 47th among the states in per-student funding for  
22 elementary and secondary education." (Ex. 91 at 47.)

23 Along with the State's hostility to bilingual education, Maricopa County has  
24 sometimes failed to send properly translated education materials to its Spanish speaking  
25 residents, resulting in confusion and distrust from Hispanic voters. For example, in 2012,  
26 Maricopa County misprinted the date of the election on over 2,000 Spanish language  
27 information cards and bookmarks, some of which were distributed into the community.  
28 (Ex. 89 at 22; Ex. 91 at 51; Healy Dep. 114:1-22.)

1           With that said, discrimination against minorities in Arizona has not been linear.  
2 (Ex. 521 at 4.) For example, Arizona was subject to § 5 preclearance requirements until  
3 2013. In *Shelby*, however, the Supreme Court found the formula used to determine  
4 which states were subject to preclearance requirements unconstitutional because it was  
5 “based on 40-year-old facts having no logical relation to the present day.” 570 U.S. at  
6 553-54. Moreover, during the time that Arizona was under preclearance requirements  
7 (1975-2013), the DOJ did not issue any objections to any of its statewide procedures for  
8 registration or voting.

9           From 1982 to 2002, the DOJ objected to four of Arizona’s statewide redistricting  
10 plans. Arizona acted to avoid the politics of racially discriminatory redistricting when, in  
11 2000, the Arizona Independent Redistricting Commission (“AIRC”) was formed pursuant  
12 to a voter initiative (Proposition 106). The AIRC is composed of two Republicans, two  
13 Democrats, and an Independent, and it is tasked with redrawing of legislative and  
14 congressional district lines following each decennial Census. According to its enacting  
15 constitutional provisions, the AIRC considers the following six criteria when  
16 redistricting: (a) equal population; (b) compactness and contiguousness; (c) compliance  
17 with the Constitution and the VRA; (d) respect for communities of interest; (e)  
18 incorporation of visible geographic features, including city, town and county boundaries,  
19 as well as undivided census tracts; and (f) creation of competitive districts where there is  
20 no significant detriment to other goals. (Doc. 361 ¶ 44.) The most recent AIRC set a  
21 goal to pass preclearance with its first submittal to DOJ. The AIRC did this by ensuring  
22 the competitiveness of legislative and congressional districts and ensuring that minorities  
23 have the opportunity to elect candidates of their choice. *See Harris v. Ariz. Indep.*  
24 *Redistricting Comm’n*, -- U.S. --, 136 S. Ct. 1301, 1308 (2016). The Commission  
25 succeeded, and the DOJ approved Arizona’s new maps on April 9, 2012 without  
26 objection.

27           In sum, “[d]iscriminatory action has been more pronounced in some periods of  
28 state history than others . . . [and] each party (not just one party) has led the charge in

1 discriminating against minorities over the years.” Sometimes, however, partisan  
2 objectives are the motivating factor in decisions to take actions detrimental to the voting  
3 rights of minorities. “[M]uch of the discrimination that has been evidenced may well  
4 have in fact been the unintended consequence of a political culture that simply ignores  
5 the needs of minorities.” (Ex. 90 at 8.) Arizona’s recent history is a mixed bag of  
6 advancements and discriminatory actions.

## 7 **2. Racially Polarized Voting**

8 Arizona has a history of racially polarized voting, which continues today. (Ex. 91  
9 at 30-33, 44-45). In the most recent redistricting cycle, experts for the AIRC found that  
10 at least one congressional district and five legislative districts clearly exhibited racially  
11 polarized voting. (Ex. 91 at 29-33.) Exit polls for the 2016 general election demonstrate  
12 that voting between non-minorities and Hispanics continues to be polarized along racial  
13 lines. (Ex. 91 at 29-33, 44-45; Ex. 92 at 12, 14; Ex. 94 at 4); *see also Gonzalez*, 677 F.3d  
14 at 407.

## 15 **3. Socioeconomic Effects of Discrimination**

16 Racial disparities between minorities and non-minorities in socioeconomic  
17 standing, income, employment, education, health, housing, transportation, criminal  
18 justice, and electoral representation have persisted in Arizona. (Ex. 89 at 7-8, 12, 23; Ex.  
19 91 at 39-43; Ex. 93 at 12-18, 21, 24; Ex. 95 at 4, 9-11; Ex. 97 at 46-52, 56-58; Ex. 98 at  
20 16, 18, 33; Tameron Dep. 155:5-20; Pstross Dep. 34:11-22; Tr. 506.) Of these,  
21 disparities in transportation, housing, and education are most pertinent to the specific  
22 burdens imposed by the challenged laws.

## 23 **4. Racial Appeals in Political Campaigns**

24 Arizona’s racially polarized voting has resulted in racial appeals in campaigns.  
25 For example, when Raul Castro ran for governor in the 1970s, his opponents urged  
26 support for the white candidate because “he looked like a governor.” In that same  
27 election, a newspaper published a picture of Fidel Castro with a headline that read  
28 “Running for governor of Arizona.” (Ex. 89 at 19.) In a 2010 bid for State

1 Superintendent of Public Education, John Huppenthal “ran an advertisement in which the  
2 announcer said that Huppenthal was ‘one of us.’ The announcer noted that Huppenthal  
3 voted against bilingual education and ‘will stop La Raza.’” Similarly, when running for  
4 governor in 2014, Maricopa County Attorney Andrew Thomas ran an ad describing  
5 himself as “the only candidate who has stopped illegal immigration” while  
6 “simultaneously show[ing] a Mexican flag with a red strikeout line through it  
7 superimposed over the outline of Arizona.” (Ex. 91 at 44.)

8 Moreover, racial appeals have been made in the specific context of legislative  
9 efforts to limit ballot collection. During the legislative hearings on earlier bills to  
10 criminalize ballot collection, Republican sponsors and proponents expressed beliefs that  
11 ballot collection fraud regularly was occurring but struggled with the lack of direct  
12 evidence substantiating those beliefs. In 2014, the perceived “evidence” arrived in the  
13 form of a racially charged video created by Maricopa County Republican Chair A.J.  
14 LaFaro (the “LaFaro Video”) and posted on a blog. (Ex. 121.) The LaFaro Video  
15 showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver  
16 early ballots. It also contained a narration of “Innuendos of illegality . . . [and] racially  
17 tinged and inaccurate commentary by . . . LaFaro.” (Ex. 91 at 18 n.40; Ex. 524 at 23-  
18 24.) LaFaro’s commentary included statements that the man was acting to stuff the ballot  
19 box; that LaFaro did not know if the person was an illegal alien, a dreamer, or citizen, but  
20 knew that he was a thug; and that LaFaro did not follow him out to the parking lot to take  
21 down his tag number because he feared for his life. The LaFaro Video goes on to tell  
22 about ballot parties where people gather en mass and give their un-voted ballots to  
23 operatives of organizations so they can not only collect them, but also vote them illegally.  
24 (Ex. 91 at 18; Ex. 121.)

25 The LaFaro Video did not show any obviously illegal activity and there is no  
26 evidence that the allegations in the narration were true. Nonetheless, it “became quite  
27 prominent in the debates over H.B. 2023.” (Tr. 1154.) The LaFaro video also was  
28 posted on Facebook and YouTube, shown at Republican district meetings, and was



1 incorporated into a television advertisement—entitled “Do You Need Evidence  
2 Terry?”—for Secretary Reagan when she ran for Secretary of State. (Ex. 91 at 18; Ex.  
3 107.) In the ad, the LaFaro Video plays after a clip of then-Arizona Attorney General  
4 Terry Goddard stating he would like to see evidence that there has been ballot collection  
5 fraud. While the video is playing, Secretary Reagan’s narration indicates that the LaFaro  
6 Video answers Goddard’s request for evidence of fraud. The LaFaro Video, however,  
7 merely shows a man of apparent Hispanic heritage dropping off ballots and not obviously  
8 violating any law.<sup>18</sup> (Ex. 107.)

### 9 **5. Minority Representation in Public Offices**

10 Notwithstanding racially polarized voting and racial appeals, the disparity in the  
11 number of minority elected officials in Arizona has declined. Arizona has been  
12 recognized for improvements in the number of Hispanics and Native Americans  
13 registering and voting, as well as in the overall representation of minority elected officials  
14 in the State. (Ex. 521 at 27-28.) “Nonwhites make up 25 percent of Arizona’s elected  
15 office holders, compared to 44 percent of the total population. This gives [Arizona] the  
16 16th best representation ratio in the country.” (Ex. 524 at 44.)

17 Nevertheless, Arizona has seen only one Hispanic and one African American  
18 elected to statewide office, and Arizona has never elected a Native American to statewide  
19 office. No Native American or African American has been elected to represent Arizona  
20 in the United States House of Representatives. Further, no Hispanic, Native American,  
21 or African American has ever served as a United States Senator representing Arizona or  
22 as Arizona Attorney General. (Ex. 91 at 45; Ex. 93 at 19-20; Ex. 89 at 19, 22.)

### 23 **6. Lack of Responsiveness to Minority Needs**

24 Plaintiffs’ evidence on this factor, presented through the analysis and opinions of  
25 Dr. Lichtman, is insufficient to establish a lack of responsiveness on the part of elected

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26 <sup>18</sup> Notably, LaFaro was not called as a witness in this case, Defendants do not rely  
27 on the LaFaro Video as evidence of fraud, and, despite the implications of her campaign  
28 advertisement, Secretary Reagan testified in deposition that “I have never accused anyone  
collecting ballots as doing fraudulent activities[.]” (Reagan Dep. 91:2-3.)

1 officials to particularized needs of minority groups. Dr. Lichtman ignored various topics  
2 that are relevant to whether elected officials have shown responsiveness, and he did not  
3 conduct research on the issues in Arizona when considering this factor.

4 Notably, the CCEC engages in outreach to various communities, including the  
5 Hispanic and Native American communities, to increase voter participation. The CCEC  
6 develops an annual voter education plan in consultation with elections officials and  
7 stakeholders, and the current Chairman of the CCEC is Steve Titla, an enrolled member  
8 of the San Carlos Apache Tribe, who has been particularly vocal in supporting CCEC  
9 outreach to Native Americans.

### 10 **7. Justifications for Challenged Provisions**

11 Precinct-based voting helps Arizona counties estimate the number of voters who  
12 may be expected at any particular precinct, allows for better allocation of resources and  
13 personnel, improves orderly administration of elections, and reduces wait times. The  
14 precinct-based system also ensures that each voter receives a ballot reflecting only the  
15 races for which that person is entitled to vote, thereby promoting voting for local  
16 candidates and issues and making ballots less confusing. Arizona's policy to not count  
17 OOP ballots is one mechanism by which it strictly enforces this system to ensure that  
18 precinct-based counties maximize the system's benefits. This justification is not tenuous.

19 As for H.B. 2023, there is no direct evidence that the type of ballot collection  
20 fraud the law is intended to prevent or deter has occurred. Although the justifications for  
21 H.B. 2023 are weaker than the justifications for the State's OOP ballot policy, Arizona  
22 nonetheless has a constitutionally adequate justification for the law: to reduce  
23 opportunities for early ballot loss or destruction.

### 24 **8. Overall Assessment**

25 In sum, of the germane Senate Factors, the Court finds that some are present in  
26 Arizona and others are not. Plaintiffs have shown that past discrimination in Arizona has  
27 had lingering effects on the socioeconomic status of racial minorities. But Plaintiffs'  
28 causation theory is too tenuous to support their VRA claim because, taken to its logical

1 conclusion, virtually any aspect of a state’s election regime would be suspect as nearly all  
2 costs of voting fall heavier on socioeconomically disadvantaged voters. Such a loose  
3 approach to causation, which potentially would sweep away any aspect of a state’s  
4 election regime in which there is not perfect racial parity, is inconsistent with the Ninth  
5 Circuit’s repeated emphasis on the importance of a “causal connection between the  
6 challenged voting practice and a prohibited discriminatory result.” *Salt River Project*,  
7 109 F.3d at 595. For these reasons, the Court concludes that Plaintiffs have not carried  
8 their burden at either step of the § 2 results test.

9 **VII. FIFTEENTH AMENDMENT/§ 2 (INTENTIONAL DISCRIMINATION)**

10 Lastly, Plaintiffs contend that H.B. 2023 violates § 2 and the Fifteenth  
11 Amendment because it was enacted with the intent to suppress minority votes. The  
12 Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote  
13 shall not be denied or abridged by the United States or by any State on account of race,  
14 color, or previous condition of servitude,” and authorizes Congress to enforce this  
15 mandate “by appropriate legislation.” Section 2 is such legislation. Although Congress  
16 amended the VRA in 1982 to add the results test, § 2 continues to prohibit intentional  
17 discrimination in a manner coextensive with the Fifteenth Amendment. Consequently,  
18 the standards for both the statutory and the constitutional claim overlap.

19 The parties agree that the standard for finding unconstitutional, intentional racial  
20 discrimination is governed by the Supreme Court’s decision in *Village of Arlington*  
21 *Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the  
22 Supreme Court explained that “official action will not be held unconstitutional solely  
23 because it results in a racially disproportionate impact.” *Id.* at 264-65. Rather, “[p]roof  
24 of racially discriminatory intent or purpose is required to show a violation” of the  
25 Constitution. *Id.* at 265.

26 Discriminatory purpose must be “a motivating factor in the decision,” but it need  
27 not be the only factor. *Id.* at 265-66. “Determining whether invidious discriminatory  
28 purpose was a motivating factor demands a sensitive inquiry into such circumstantial and

1 direct evidence of intent as may be available.” *Id.* at 266. “[A]n invidious discriminatory  
2 purpose may often be inferred from the totality of the relevant facts, including the fact, if  
3 it is true, that the law bears more heavily on one race than another.” *Wash. v. Davis*, 426  
4 U.S. 229, 242 (1976). “But the ultimate question remains: did the legislature enact a law  
5 ‘because of,’ and not just ‘in spite of,’ its discriminatory effect.” *N.C. St. Conf. of*  
6 *NAACP v. McCrory*, 831 F.3d 204, 200 (4th Cir. 2016) (quoting *Pers. Adm’r of Mass. v.*  
7 *Fenney*, 442 U.S. 256, 279 (1979)).

8 To guide this inquiry, the *Arlington Heights* Court articulated a non-exhaustive list  
9 of factors courts should consider. These so-called “*Arlington Heights* Factors” include:  
10 (1) the historical background and sequence of events leading to enactment; (2)  
11 substantive or procedural departures from the normal legislative process; (3) relevant  
12 legislative history; and (4) whether the law has a disparate impact on a particular racial  
13 group. *Arlington Heights*, 429 U.S. at 266-68. If “racial discrimination is shown to have  
14 been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts  
15 to the law’s defenders to demonstrate that the law would have been enacted without this  
16 factor.” *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). This same framework applies  
17 to § 2 claims based on allegations of discriminatory purpose. *See Garza v. Cty. of L.A.*,  
18 918 F.2d 763, 766 (9th Cir. 1990).

19 Having considered these factors, the Court finds that H.B. 2023 was not enacted  
20 with a racially discriminatory purpose. Though some individual legislators and  
21 proponents of limitations on ballot collection harbored partisan motives—perhaps  
22 implicitly informed by racial biases about the propensity of GOTV volunteers in minority  
23 communities to engage in nefarious activities—the legislature as a whole enacted H.B.  
24 2023 in spite of opponents’ concerns about its potential effect on GOTV efforts in  
25 minority communities, not because of that effect. Despite the lack of direct evidence  
26 supporting their concerns, the majority of H.B. 2023’s proponents were sincere in their  
27 belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023  
28 was a necessary prophylactic measure to bring early mail ballot security in line with in-

1 person voting.

2 Beginning with the historical background, H.B. 2023 emerged in the context of  
3 racially polarized voting, increased use of ballot collection as a Democratic GOTV  
4 strategy in low-efficacy minority communities, and on the heels of several prior efforts to  
5 restrict ballot collection, some of which were spearheaded by former Arizona State  
6 Senator Don Shooter.<sup>19</sup> Due to the high degree of racial polarization in his district,  
7 Shooter was in part motivated by a desire to eliminate what had become an effective  
8 Democratic GOTV strategy. (Tr. 1061-63, 1200, 1687-88, 2158-62; Ex. 89 at 24; Ex. 91  
9 at 52-55; Ex. 92 at 2-10; Ex. 93 at 2; Shooter Dep. at 117:5-16.) Indeed, Shooter's 2010  
10 election was close: he won with 53 percent of the total vote, receiving 83 percent of the  
11 non-minority vote but only 20 percent of the Hispanic vote. (Ex. 94 at 4.)

12 Shooter's efforts to limit ballot collection were marked by unfounded and often  
13 farfetched allegations of ballot collection fraud. (Tr. 1064, 2162, 2194, 2205; Ex. 3 at 7-  
14 8; Ex. 10 at 3-9; Ex. 25 at 22-23; Ex. 91 at 19-20; Ex. 123.) Though his allegations were  
15 demonstrably false, they—along with the racially-tinged LaFaro Video—spurred a larger  
16 debate in the legislature about the security of early mail voting as compared to in-person  
17 voting.<sup>20</sup> (Tr. 1644, 1687, 2158-59, 2161-62; Ex. 10 at 49-53; Ex. 17 at 15-16; Ex. 23 at  
18 83-84.)

19 Turning to the relevant legislative history, proponents of H.B. 2023 repeatedly  
20 voiced concerns that mail-in ballots were less secure than in-person voting, and that  
21 ballot collection created opportunities for fraud. Although no direct evidence of ballot  
22 collection fraud was presented to the legislature or at trial, Shooter's allegations and the  
23 LaFaro Video were successful in convincing H.B. 2023's proponents that ballot  
24 collection presented opportunities for fraud that did not exist for in-person voting, and

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26 <sup>19</sup> Shooter most recently was a member of the Arizona House of Representatives  
27 but served as a state senator during the relevant time period.

28 <sup>20</sup> Although the video referenced by various proponents of ballot collection  
limitations was not always identified as such, it is plain from their descriptions that they  
were describing the LaFaro video.

1 these proponents appear to have been sincere in their beliefs that this was a potential  
2 problem that needed to be addressed. (Ex. 17 at 11-13, 17-75, 83-84; Ex. 19 at 56-57;  
3 Ex. 21 at 11; Ex. 23 at 36; Tr. 1450, 1805, 1822-23.) Notably, H.B. 2023 found support  
4 among some minority officials and organizations. For example, the measure was  
5 supported by the Arizona Latino Republican Association for the Tucson Chapter, which  
6 expressed concerns that elderly people in the Latino community were being taken  
7 advantage of by ballot collectors. (Ex. 17 at 71-75.) Likewise, Michael Johnson, an  
8 African American who had served on the Phoenix City Council, strongly favored H.B.  
9 2023 and expressed concern about stories of ballot collectors misrepresenting themselves  
10 as election workers. (Ex. 17 at 45-50.) Further, although some Democratic lawmakers  
11 accused their Republican counterparts of harboring partisan or racially discriminatory  
12 motives, this view was not shared by all of H.B. 2023's opponents. (Tr. 697.) For  
13 example, Representative Fernandez testified that she has no reason to believe H.B. 2023  
14 was enacted with the intent to suppress Hispanic voting. (Tr. 83.)

15 As for departures from the normal legislative process, Plaintiffs cite two prior  
16 efforts to limit ballot collection as examples of procedural discrepancies. First, in 2011  
17 Arizona enacted S.B. 1412, which required any person who delivered more than ten early  
18 ballots to provide a copy of her photo identification to the receiving elections official. If  
19 a ballot collector could not produce a copy of her photo identification, the elections  
20 official was directed to record the information from whatever identification that the ballot  
21 collector had available. Within 60 days of each election, the Secretary of State was to  
22 compile a public statewide report listing the identities and personal information of all  
23 ballot collectors. (Ex. 2 at 16-19; Ex. 91 at 6-7.)

24 When S.B. 1412 became law, Arizona still was subject to § 5 preclearance.  
25 Accordingly, S.B. 1412 could not go into effect until the law had been precleared by the  
26 DOJ or a federal court. The Arizona Attorney General submitted the law for  
27 preclearance on April 26, 2011, and on June 27, 2011 the DOJ precleared all provisions  
28 except for the provision regulating ballot collection. (Ex. 41; Ex. 91 at 6-7.) As to that

1 provision, the DOJ stated that “the information sent [wa]s insufficient to enable us to  
2 determine that the proposed changes have neither the purpose nor will have the effect of  
3 denying or abridging the right to vote on account of race, color, or membership in a  
4 language minority group.” The DOJ asked for more information and stated that “if no  
5 response is received within sixty days of this request, the Attorney General may object to  
6 the proposed changes.” (Ex. 41.) Rather than respond to the DOJ’s request for more  
7 information, the Attorney General chose to voluntarily withdraw the ballot collection  
8 provision on July 28, 2011, rendering the law unenforceable. (Ex. 91 at 6-7; Ex. 42.)  
9 “Of 773 preclearance submissions this was one of only 6 that were fully or partially  
10 withdrawn in Arizona.” (Ex. 91 at 7.) Arizona formally repealed the law shortly  
11 thereafter. (Ex. 5.)

12 Second, Republican legislators again tried to restrict ballot collection in 2013 with  
13 the enactment of H.B. 2305, which banned partisan ballot collection and required other  
14 ballot collectors to complete an affidavit stating that they had returned the ballot.  
15 Violation of the law was a misdemeanor. H.B. 2305 was passed along nearly straight  
16 party lines in the waning hours of the legislative session. (Ex. 7; Ex. 91 at 7-10.) Shortly  
17 after its enactment, citizen groups organized a referendum effort and collected more than  
18 140,000 signatures to place H.B. 2305 on the ballot for a straight up-or-down vote. (Tr.  
19 1071-72; Ex. 91 at 11.) Had H.B. 2305 been repealed by referendum, the legislature  
20 could not have enacted related legislation except on a supermajority vote, and only to  
21 “further[] the purposes” of the referendum. Ariz. Const. art. 4, pt. 1, § 1(6)(C), (14).  
22 Rather than face a referendum, Republican legislators again repealed their own  
23 legislation along party lines. The bill’s primary sponsor, Secretary Reagan (who, at the  
24 time, was a State Senator), admitted that the legislature’s goal was to break the bill into  
25 smaller pieces and reintroduce individual provisions “a la carte.” (Ex. 91 at 11.)

26 Although the circumstances surrounding these prior bills are somewhat suspicious,  
27 these departures have less probative value because they involve different bills passed  
28 during different legislative sessions by a substantially different composition of

1 legislators. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1195 (11th Cir. 1999)  
2 (“[W]e fail to see how evidence of . . . a [city’s] prior refusal to annex [a housing  
3 project] standing alone establishes any intent, let alone a discriminatory one” for later  
4 annexation decision); *Kansas City, Mo. v. Fed. Pac. Elec. Co.*, 310 F.2d 271, 278 (8th  
5 Cir. 1962) (noting the “questionable import that the rejection of prior bills may have in  
6 determining congressional intent as to subsequently enacted legislation”).

7 Plaintiffs also claim that H.B. 2023 represents a substantive deviation from normal  
8 legislative processes because it differs from these prior bills. But the fact that different  
9 bills from different sponsors and different legislative sessions did not have the same  
10 substance is not alone surprising, nor is it particularly probative of discriminatory intent.  
11 Moreover, although Plaintiffs argue that the legislature made H.B. 2023 harsher than  
12 previous ballot collection bills by imposing felony penalties, they ignore that H.B. 2023  
13 in other respects is more lenient than its predecessors given its broad exceptions for  
14 family members, household members, and caregivers.

15 Finally, Plaintiffs highlight the law’s impact on minority voters. As previously  
16 noted, ballot collection was used as a GOTV strategy in mostly low-efficacy minority  
17 communities, though the Court cannot say how often voters used ballot collection, nor  
18 can it measure the degree or significance of any disparities in its usage. The legislature  
19 was aware that the law could impact GOTV efforts in low-efficacy minority  
20 communities; numerous democratic lawmakers speaking in opposition to the bill  
21 expressed concerns that it would adversely impact minority GOTV efforts. (Ex. 17 at 74;  
22 Ex. 19 at 17-18, 20, 35-37; Ex. 23 at 89-91; Ex. 25 at 27-28.) But this evidence shows  
23 only that the legislature enacted H.B. 2023 in spite of its impact on minority GOTV  
24 efforts, not because of that impact. Indeed, proponents of the bill seemed to view these  
25 concerns as less significant because of the minimal burdens associated with returning a  
26 mail ballot. (*See, e.g.*, Ex. 23 at 81-82.)

27 Based on the totality of the circumstances, Plaintiffs have not shown that the  
28 legislature enacted H.B. 2023 with the intent to suppress minority votes. Rather, some



1 individual legislators and proponents were motivated in part by partisan interests.  
2 Shooter, for example, first raised concerns about ballot collection after winning a close  
3 election. In addition to raising concerns about ballot collectors impersonating election  
4 workers, Johnson complained that ballot collection put candidates “who don’t have  
5 accessibility to large groups to go out and collect those ballots” at a disadvantage.  
6 Likewise, Richard Hopkins, a proponent of the bill and a 2014 Republican candidate for  
7 the Arizona House of Representatives, claimed that he lost his election because of “ballot  
8 harvesting.” (Ex. 17 at 17, 45-49.) In opposing ballot collection restrictions, Democratic  
9 Senator Steve Farley stated “[t]he problem we’re solving is that one party is better at  
10 collecting ballots than the other one.” (Ex. 25 at 35.)

11 But partisan motives are not necessarily racial in nature, even though racially  
12 polarized voting can sometimes blur the lines. Importantly, both the Fifteenth  
13 Amendment and § 2 of the VRA—upon which Plaintiffs’ intentional discrimination  
14 claims are based—address racial discrimination, not partisan discrimination. That some  
15 legislators and proponents harbored partisan interests, rather than racially discriminatory  
16 motives, is consistent with Arizona’s history of advancing partisan objectives with the  
17 unintended consequence of ignoring minority interests. (Ex. 90 at 8.)

18 Moreover, partisan motives did not permeate the entire legislative process.  
19 Instead, many proponents acted to advance facially important interests in bringing early  
20 mail ballot security in line with in-person voting security, notwithstanding the lack of  
21 direct evidence that ballot collection fraud was occurring. Though Plaintiffs might  
22 disagree with the manner in which the legislature chose to address its concerns about  
23 early ballot security, “the propriety of doing so is perfectly clear,” and the legislature  
24 need not wait until a problem occurs to take proactive steps it deems appropriate.  
25 *Crawford*, 553 U.S. at 196; *see also Lee*, 188 F. Supp. 3d at 609.

26 The Court therefore finds that the legislature that enacted H.B. 2023 was not  
27 motivated by a desire to suppress minority voters. The legislature was motivated by a  
28 misinformed belief that ballot collection fraud was occurring, but a sincere belief that

1 mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting.  
2 Some proponents also harbored partisan motives. But, in the end, the legislature acted in  
3 spite of opponents' concerns that the law would prohibit an effective GOTV strategy in  
4 low-efficacy minority communities, not because it intended to suppress those votes.

## 5 **VIII. CONCLUSION**

6 Plaintiffs have not carried their burden to show that the challenged election  
7 practices severely and unjustifiably burden voting and associational rights, disparately  
8 impact minority voters such that they have less opportunity than their non-minority  
9 counterparts to meaningfully participate in the political process, or that Arizona was  
10 motivated by a desire to suppress minority turnout when it placed limits on who may  
11 collect early mail ballots. Plaintiffs have raised fair concerns about the wisdom of H.B.  
12 2023 and Arizona's treatment of OOP ballots as matters of public policy. The Court,  
13 however, is not charged with second-guessing the prudence of Arizona's laws. The  
14 Court's authority extends only to determining whether, in exercising its constitutional  
15 authority to regulate the times, places, and manner of elections, Arizona has acted within  
16 permissible constitutional and statutory bounds. In exercising this duty, the Court also is  
17 constrained by decisions of the Supreme Court, including those standing for the  
18 proposition that legislatures may act prophylactically rather than upon specific evidence  
19 of a documented problem, and those finding that prevention of voter fraud and  
20 preservation of public confidence in election integrity are important state interests. *See*  
21 *Purcell*, 549 U.S. at 4; *Crawford*, 553 U.S. at 195; *Munro*, 479 U.S. at 194-95; *Eu*, 489  
22 U.S. at 231. Based on a careful review of the evidence and governing case law, the Court  
23 concludes that the challenged provisions contravene neither the Constitution nor the  
24 VRA. Therefore,

25 **IT IS ORDERED** as follows:

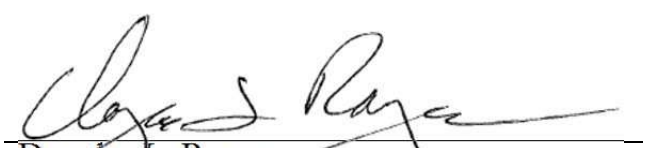
26 1. Defendants' oral motion for judgment on partial findings (Doc. 384) is  
27 **DENIED** as moot.

28 2. The Court finds in favor of Defendants and against Plaintiffs on all claims.

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3. The Clerk of the Court shall enter judgment accordingly and terminate this case.

Dated this 8th day of May, 2018.

  
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Douglas L. Rayes  
United States District Judge