

COMMENT

MAKING THE VRA GREAT AGAIN: ARIZONA DISCRIMINATORY VOTING RESTRICTIONS CANNOT STAND AFTER *BRNOVICH*

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The Voting Rights Act of 1965 was a sweeping piece of legislation that helped to secure the ideals of the Civil War amendments by enfranchising Black voters across the United States. The statute was unique in its creation of both proactive and retroactive requirements to prevent and strike down racially discriminatory legislation. After the Supreme Court invalidated several important sections of the Voting Rights Act in 2012, America was left with section 2, which allows plaintiffs to challenge voting regulations based on intent or result.

*In the case of *Brnovich v. Democratic National Committee*, decided in 2021, the Supreme Court further weakened the Voting Rights Act by misinterpreting section 2. *Brnovich* fails to lay out a clear test for courts to rely on going forward but introduces several factors in addition to those already used in section 2 claims. The Court then uses the totality of the circumstances analysis to uphold two Arizona voting policies that disenfranchise minority voters.*

This Comment argues that the Court incorrectly interprets the text of section 2, leading to flawed factors that fail to protect minority voters as required by the Voting Rights Act. Using the Court's own factors in the totality of the circumstances analysis, this Comment concludes that both Arizona voting

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restrictions violate section 2 under the results test. Additionally, this Comment argues that one of the restrictions was enacted with discriminatory intent in violation of the intent test of section 2 and the Fifteenth Amendment. This Comment concludes with an appeal to Congress to update and strengthen voting protections in the United States.

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INTRODUCTION

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

—Justice Black¹

Voting lines in Arizona stretched down the block, with hundreds of people waiting to cast a ballot.² The 2016 presidential primary was imminent and voters, determined to exercise their civic duty, waited for hours in line.³ The last vote was cast at 12:12 a.m., five hours after the polling location officially closed.⁴ Not everyone had the time to wait. One voter went to multiple polling places in an attempt to find a shorter line but eventually gave up, saying, “[t]his was the first time in my life I genuinely felt disenfranchised.”⁵

The 2016 primary was the first election since the Supreme Court limited the Voting Rights Act⁶ (VRA), and Arizona no longer needed approval from the federal government before making changes to their election laws that might harm minority voters.⁷ With the removal of that obstacle, officials in Arizona’s largest county, Maricopa County, reduced the number of polling locations by 70% in advance of the 2016 primary—a change that likely would have previously been

1. *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

2. Fernanda Santos, *Angry Arizona Voters Demand: Why Such Long Lines at Polling Sites?*, N.Y. TIMES (Mar. 24, 2016), <https://www.nytimes.com/2016/03/25/us/angry-arizona-voters-demand-why-such-long-lines-at-polling-sites.html> [<https://perma.cc/2JPG-B2U6>].

3. Zachary Roth, *With Weakened Voting Rights Act, Some Arizona Voters Wait Hours*, MSNBC (Mar. 23, 2016, 1:59 PM), <https://www.msnbc.com/msnbc/weakened-voting-rights-act-some-arizona-voters-wait-hours-msna820446> [<https://perma.cc/33JC-EP7A>].

4. Ari Berman, *There Were 5-Hour Lines to Vote in Arizona Because the Supreme Court Guttled the Voting Rights Act*, NATION (Mar. 23, 2016), <https://www.thenation.com/article/archive/there-were-five-hour-lines-to-vote-in-arizona-because-the-supreme-court-guttled-the-voting-rights-act> [<https://perma.cc/RND4-9G68>].

5. Roth, *supra* note 3.

6. Voting Rights Act of 1965, 52 U.S.C. § 10303.

7. Berman, *supra* note 4. The Supreme Court decision removed the proactive sections of the VRA that required certain states to obtain permission before passing legislation restricting voting rights, leaving only the sections allowing plaintiffs to bring remedial suits once restrictive voting legislation was already passed. *See infra* notes 35–46 and accompanying text (explaining the purpose and effect of these sections of the VRA).

blocked.⁸ The neighborhoods left without polling places were predominantly in Latino areas.⁹ With the protections of the VRA stripped, minorities now encounter increasing obstacles and longer lines to vote.

These difficulties faced by individual voters have a ripple effect through America. Swing states often decide the outcome of national elections.¹⁰ Arizona swung blue in 2020, becoming a key state in President Biden's eventual presidential victory, but it was a close call, with President Trump only 0.3% behind.¹¹ With such small margins, the impact of individual votes in Arizona on the overall determination appears magnified.¹² Long lines deter voters, disenfranchising them and causing them to lose their opportunity to be part of that impact. Maricopa County dominates Arizona politically, and minorities, particularly the Latino community, make up a large portion of the electorate there.¹³ Section 2—the only section of the VRA that remains

8. Berman, *supra* note 4 (stating that federal officials would have blocked the reduction in polling places under the previous interpretation of the VRA because minorities make up 40% of Maricopa County's population and the reduction would severely inconvenience these voters).

9. *Id.*

10. STACEY HUNTER HECHT & DAVID SCHULTZ, PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER ix (2015) (arguing that the 2016 presidential race will be decided by approximately ten swing states and that voters outside these states “might as well stay home on election day because their votes will matter little in the presidential race”); *see, e.g., How the White House Will Be Won: The 8 States That Will Decide the Election*, POLITICO (Oct. 14, 2020, 7:30 AM), <https://www.politico.com/news/2020/10/14/swing-states-2020-presidential-election-429160> [<https://perma.cc/M9E7-U2YJ>] (identifying and profiling eight swing states in the 2020 presidential race and forecasting how each state might vote).

11. Luis Ferré-Sadurní et al., *Biden Flips Arizona, Further Cementing His Presidential Victory*, N.Y. TIMES (Nov. 12, 2020), <https://www.nytimes.com/2020/11/12/us/biden-wins-arizona.html> [<https://perma.cc/6QX4-KFSV>]. That is a small margin compared to 2016 when Trump led by 3.5% and 2012 when Mitt Romney beat President Barack Obama by 9.1%. *Arizona Election Results 2020*, NBC (Feb. 10, 2020, 11:44 AM), <https://www.nbcnews.com/politics/2020-elections/arizona-results> [<https://perma.cc/LFC2-QX5F>].

12. *See Arizona Election Results 2020, supra* note 11 (providing statistics of the county voting breakdowns).

13. Nathaniel Rakich, *How Arizona Became a Swing State*, FIVETHIRTYEIGHT (June 29, 2020, 7:33 AM), <https://fivethirtyeight.com/features/how-arizona-became-a-swing-state> [<https://perma.cc/CY8X-3RWR>] (describing that Maricopa County accounts for 60% of the votes cast in Arizona and generally decides the outcome of state-wide elections); Courtney Vinopal, *How Mexican American Voters Helped Turn Arizona Blue*, PBS (Nov. 4, 2020, 1:21 PM), <https://www.pbs.org/newshour/politics/how-mexican-american-voters-helped-turn-arizona-blue> [<https://perma.cc/3GMT-73QD>] (noting that 66% of the Latino and Hispanic election demographic voted for President Biden, while only 33% voted for Trump).

in force—is supposed to protect voters against laws and voting practices that discriminate on the basis of race.¹⁴

However, the role of section 2 is now thrown into question after the Supreme Court announced its decision in *Brnovich v. Democratic National Committee*.¹⁵ Justice Alito, writing for the majority, concluded that these constitutional and statutory safeguards against discrimination in voting were insufficient to defeat two Arizona laws.¹⁶ The VRA may not provide the same protections it once did, but the Fifteenth Amendment remains, providing that “[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race [or] color.”¹⁷ By misconstruing the VRA, the Court in *Brnovich* removed one of the few remaining obstacles against the further disenfranchisement of minority voters in America. As a result of this decision, communities across the United States, like those in Maricopa County, could now see a dramatic increase in legislation harming access to voting.¹⁸

This Comment will examine how the two Arizona voting policies in question in *Brnovich* violate section 2 of the VRA when considered under the appropriate tests.¹⁹ Section 2 of the VRA should prohibit these regulations because they result in discrimination.²⁰ The Court failed to engage with the “results test” or “intent test,” which, when

14. 52 U.S.C. § 10301(a).

15. 141 S. Ct. 2321 (2021). Petitions for a writ of certiorari granted, Nos. 19-1257 and 19-1258. The cases below were consolidated. The cases were *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc), *rev’d sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) and *Ariz. Republican Party v. Democratic Nat’l Comm.*, 948 F.3d 989 (9th Cir. 2020).

16. *Brnovich*, 141 S. Ct. at 2330.

17. U.S. CONST. amend. XV, § 1.

18. Adam Liptak, *Supreme Court Upholds Arizona Voting Restrictions*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/us/politics/supreme-court-arizona-voting-restrictions.html> [<https://perma.cc/UG9D-JW5F>].

19. *But see Brnovich*, 141 S. Ct. at 2343–44 (stating that the Arizona regulations do not violate section 2).

20. Under the VRA, it is insufficient to merely show a disparate impact on minority voters. *See, e.g., Gonzalez v. Arizona*, 677 F.3d 383, 406–07 (9th Cir. 2012) (en banc) (concluding that a polling place provision did not have a statistically significant impact on Latino voters and lacked a causal link to any discriminatory result), *aff’d sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *see infra* Section I.B. (analyzing the two tests courts use to find a violation of section 2 of the VRA).

correctly applied, would have struck down these measures under one or both tests because they are discriminatory.²¹

Part I of this Comment introduces the VRA of 1965 and discusses the development of the “results test” and “intent test,” which help evaluate whether legislation is discriminatory and thus unconstitutional. It then focuses on two laws in Arizona—the Out of Precinct Policy (“OOP Policy”) and House Bill 2023 (“H.B. 2023”)—which deter minority communities from engaging in the voting process. Then this Part introduces *Brnovich*, which challenged the Arizona policies and summarizes the Court’s decision finding these policies constitutional.²²

Part II of this Comment argues that Arizona’s voting laws are discriminatory and thus unconstitutional. The Supreme Court wrongly decided *Brnovich* because, even using the guideposts set out in the majority opinion, the two voting restrictions violate section 2 of the VRA. Further, it failed to establish a clear standard for challenges to vote denial measures such as the OOP Policy and H.B. 2023. Lastly, this Comment argues that the failure to establish a clear standard to evaluate section 2 violations requires congressional action to rectify the problem and protect voting rights for all communities. Delineating the boundaries of section 2 would have served to protect minority voting rights by ensuring that challenges to discriminatory legislation can succeed based on uniform guidelines. As the landscape stands after *Brnovich*, however, the VRA has been brought to its knees and congressional action is needed to recreate vital protections against discriminatory voting practices.

I. BACKGROUND

The Civil War led to the official end of slavery, but it did not succeed in bringing racial equality to America.²³ The Fourteenth and Fifteenth Amendments provided empty promises of equal opportunity.²⁴

21. See *infra* Section I.B (discussing the two tests and the claims to which they apply).

22. *Brnovich*, 141 S. Ct. at 2343–44.

23. Brandon Haase, Note, *Guaranteeing the Right to Vote for Twenty-First Century America*, 43 J. LEGISLATION 240, 241 (2017).

24. The Fourteenth Amendment attempted to give former slaves the right to vote through a clause that “provided for the reduction of a state’s congressional representation if [B]lack were not given equal access to the ballot.” Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 202 (2015); U.S. CONST. amend. XIV, § 2.

Although there was a decade after the Civil War where Black representatives were elected to Congress and local offices, the presidential election of 1876 reversed that progress, replaced with tactics that disenfranchised Black voters.²⁵ Minorities faced the harsh reality of the Jim Crow era, where they were subject to literacy tests, poll taxes, and other devious measures designed to suppress and marginalize racial minorities.²⁶ The extreme reduction in Black registration and voting by the turn of the twentieth century illustrates the far-reaching effects of these voting restrictions.²⁷ Substantial change began with the sweeping impact of the VRA of 1965.

The VRA reaffirmed the prohibition on race-based voting exclusions. Because of the new protections in the VRA, in only ten years after its passage, Southern Black citizens such as those in Alabama were “registering and voting without hindrance.”²⁸ Although initially section 2 only applied if the measure was intentionally discriminatory (the “intent test”), the VRA was amended to include the “results test” after a law was upheld under the intent test despite leading to undeniably discriminatory voting practices.²⁹ However, discrimination

However, this clause had no effect on southern politics as “Confederate states were willing to risk having fewer . . . [r]epresentatives rather than allow [B]lack [people] to vote on the same basis as white [people].” Finkelman, *supra*, at 202. The Fifteenth Amendment was Congress’s response to “southern white resistance to [B]lack suffrage.” *Id.* However, the racial equality promised in the Fifteenth Amendment was not truly effectuated until the passage of the VRA. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2144 (2015).

25. The contested presidential election resulted in an unwritten agreement known as the “Compromise of 1877” where federal troops were removed from the South. KEVIN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 7–8 (2015). With them went the limited protection given to Black people who went to vote. *Id.* at 8.

26. Finkelman, *supra* note 24, at 183–84.

27. COLEMAN, *supra* note 25, at 10.

28. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 646–47 (2006) (noting that although Black Alabamians were not impeded in registering and voting, their participation made little difference in the “substance and structure of local governance”).

29. *See id.* at 647–48. In 1982, Congress amended section 2 of the VRA in response to the Supreme Court’s holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Katz et al., *supra* note 28, at 647. In Mobile, the Black electorate comprised approximately 33% of the city’s population, but no Black candidate had ever won a seat on the city commission. *Id.* Black residents filed a lawsuit challenging the electoral system and the

is still intertwined with voting in America through the pervasive voting regulations currently in place that discriminate against minorities.³⁰ Today, laws across the country are challenged under both the results test and the intent test, often in conjunction.³¹ Most recently, the Supreme Court spoke on the VRA in *Brnovich*, which evaluated two voting regulations in Arizona that implicate the VRA and the Fifteenth Amendment.³²

A. *History of the VRA of 1965*

The VRA was one of the most comprehensive pieces of civil rights legislation, in part because it included both judicial and administrative remedies to address rampant voter discrimination in the United States towards Black voters, particularly in the South.³³ Black voter registration and electoral participation rose as a result of the VRA, mitigating the virtual exclusion of Black voters from political

Supreme Court held that “neither the Constitution nor [s]ection 2 of the [VRA] prohibited electoral practices simply because they produced racially discriminatory results.” *Id.* (citing *Mobile*, 446 U.S. at 70).

30. See Vincent Marinaccio, *Protecting Voters’ Rights: The Aftermath of Shelby v. Holder*, 35 WHITTIER L. REV. 531, 542–43 (2014) (describing the influx of voting restrictions passed in the wake of *Shelby County*, including voter photo identification laws, the elimination of same-day voter registration, shortening early voting, and throwing out ballots cast at the wrong polling station).

31. See, e.g., *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (bringing a challenge under the intent test and results test in conjunction); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636 (6th Cir. 2016) (same). That is what happened in *Brnovich* as well. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc) (bringing a claim under the intent and results test), *rev’d sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

32. *Brnovich*, 141 S. Ct. at 2330.

33. Katz et al., *supra* note 28, at 646. Chief Justice Warren described the VRA as reflecting “Congress’[s] firm intention to rid the country of racial discrimination in voting.” *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966); see also Haase, *supra* note 23, at 241–42 (identifying “broadening the jurisdiction of the courts” and “granting a right of action to sue state governments for discriminatory voting practices” as judicial remedies, and the “coverage formula” and “pre-clearance” provisions administrative remedies).

participation in the South.³⁴ From its creation to 2013, Congress continuously expanded and reaffirmed the VRA.³⁵

President Johnson first drafted the VRA as a remedial measure to eliminate existing racial discrimination and prevent future discrimination in the electoral process.³⁶ Sections 2 and 3 focused on judicial remedies, providing a right of action against state governments for discriminatory voting practices and giving courts the authority to oversee the process.³⁷ The VRA banned the use of devices such as literacy tests, which had long prevented minority citizens from registering to vote and casting a ballot.³⁸

Sections 4 and 5—the administrative remedy sections—were unlike any prior voting legislation because they imposed stringent limitations on specific jurisdictions, known as “covered jurisdictions,” that had higher rates of discriminatory practices.³⁹ Section 4 deemed states “covered jurisdictions” where there was a discriminatory election law

34. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702–03 (2006) (reviewing the successes of the VRA in the wake of its passing). Ten years later, other minorities and non-native English speakers also benefitted when Congress amended the VRA in 1975 to protect specific language minorities by focusing on dilution practices. *Id.*

35. The provisions in section 4 banning literacy tests and section 5 imposing preclearance conditions on covered jurisdictions were originally enacted to last for five years and were extended in 1970 and 1975 for an additional ten years each, in 1982 for an additional nineteen years, and again in 2006. Pub. L. No. 109-246, 120 Stat. 577 (2006) (codified at 52 U.S.C. §§ 1971, 1973); Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 42 U.S.C. §§ 1971, 1973, 1973b); Pub. L. No. 94-73, tit. I 89 Stat. 400 (1975) (codified at 42 U.S.C. §§ 1973a, 1973b); Pub. L. No. 91-285, §§ 2-4, 84 Stat. 314, 315 (1970-1971) (codified at 42 U.S.C. §§ 1973, 1973b).

36. Katz et al., *supra* note 28, at 646.

37. Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 789 (2018). Additionally, under the “bail-in” process under section 3, any jurisdiction where a discriminatory intent claim prevails is automatically subject to the strict preclearance requirements in sections 4 and 5. *Id.*; *see infra* note 42 and accompanying text (discussing preclearance requirements).

38. Katz et al., *supra* note 28, at 646. Before the VRA, tactics such as grandfather clauses, literacy tests, and redistricting practices were widely used to suppress minority votes. *Id.* (stating that these measures successfully prevented Black voters from participating in elections for nearly a century). The standard outlined in the VRA applied to sections of the country where certain portions of the population were not registered to vote or had not voted in the 1964 presidential election. *See* 42 U.S.C. § 1973b(b) (2000) (as amended by Pub. L. No. 94-73, tit. I, § 101, tit. II, §§ 201-03, 206, 89 Stat. 400-02 (1975)) (making the ban permanent and nationwide).

39. Haase, *supra* note 23, at 242.

and less than 50% of the state's eligible voters were registered or voted in the previous presidential election.⁴⁰ It further prohibited such jurisdictions from applying commonly used voter suppression measures.⁴¹ Section 5 mandated covered jurisdictions to obtain federal preclearance before making any changes to their electoral rules in order to ensure the proposed changes were not discriminatory.⁴²

The courts initially enforced the VRA through the mechanisms in sections 4 and 5, which created categories of covered jurisdictions and imposed proactive measures to prevent passing discriminatory voting legislation.⁴³ However, in 2013, *Shelby County v. Holder*⁴⁴ dramatically altered application of the VRA by eliminating section 4—effectively precluding enforcement of section 5.⁴⁵ Section 5 technically remains, but states are not subject to the preclearance requirements unless they are held to be covered jurisdictions by section 4, which no longer exists.⁴⁶ Without the proactive and deterrent measure of sections 4 and 5, sections 2 and 3 remain the only mechanisms in the VRA for invalidating discriminatory voting laws.

In challenges brought under section 2 of the VRA prior to the amendments, litigants only succeeded in addressing discriminatory

40. *Id.*; Voting Rights Act of 1965 § 4, 52 U.S.C. § 10303.

41. Tokaji, *supra* note 34, at 703 (including “at-large elections, gerrymandered districts, majority-vote requirements, anti-single-shot laws, annexation of outlying areas with predominantly white populations, and replacement of elected officials with appointed officials”).

42. *See* Katz et al., *supra* note 28, at 646. To obtain preclearance, a jurisdiction would be required to submit a proposed change to the Department of Justice or to the U.S. District Court for the District of Columbia and show it “does not have the purpose [nor will have] the effect of denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973(c) (2000); Tokaji, *supra* note 34, at 703 (noting that the Supreme Court’s opinion in *Allen v. State Board of Elections* revitalized the previously sporadic enforcement of “preclearance” requirements under Section 5 of the VRA).

43. Haase, *supra* note 23, at 242; *see supra* notes 36–42 and accompanying text (analyzing sections 2 through 5 of the VRA and the various remedies and mechanisms they provide to eliminate and prevent discrimination in the voting process).

44. 570 U.S. 529 (2013).

45. *Id.* at 530; *see* Lang & Hebert, *supra* note 37, at 781. The Supreme Court held that section 4 of the VRA was unconstitutional because the formula for disparate treatment of the states was not updated in the 2006 amendment and no longer reflected the needs of the country. Lang & Hebert, *supra* note 37, at 781. The Court reasoned the current needs do not justify the burdens the VRA imposes. *Shelby County*, 570 U.S. at 553.

46. *See* Lang & Hebert, *supra* note 37, at 789–90. The Court stated Congress could construct a new formula based on current data to reinstate the preclearance requirements in section 5. *Shelby County*, 570 U.S. at 557.

policies where they could prove that the policy was passed with discriminatory intent.⁴⁷ In *City of Mobile v. Bolden*,⁴⁸ the Supreme Court unexpectedly upheld Mobile, Alabama's method of electing City Commissioners using the intent test, which effectively precluded Black candidates from winning.⁴⁹ The decision sparked anger in the civil rights community because it showed the intolerably high burden of proof placed on plaintiffs whose voting rights were being violated.⁵⁰ Congress responded by amending the language of the VRA in 1982:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.⁵¹

This provision thus created the results test.⁵² Under the results test, plaintiffs prevail when they show that members of protected classes have less opportunity than other members of the electorate to engage in the political process and to elect their choice of representatives.⁵³ The results test provides a mechanism for injured parties who cannot prove the discriminatory intent behind a law.⁵⁴

Under the results test, plaintiffs can bring claims against facially neutral policies that lead to discriminatory results.⁵⁵ Facially neutral laws that restrict minorities' right to vote are unlawful under the VRA because if the effect of a given law or policy is that minorities do not have an equal right to vote, it is irrelevant whether the measure is

47. Bill Montague, *The Voting Rights Act Today*, 74 A.B.A. J. 52, 55 (1988) (highlighting plaintiffs' litigation prior to the 1982 amendments).

48. 446 U.S. 55 (1980).

49. *Id.* at 74. The population was comprised of about one-third Black citizens, yet no Black candidates had been elected to the three-person city commission, which was chosen through city-wide at-large elections. Katz et al., *supra* note 28, at 647.

50. Montague, *supra* note 47, at 55.

51. 52 U.S.C. § 10301(a) (emphasis added); see Katz et al., *supra* note 28, at 648 (stating that as a consequence of *Mobile*, Congress added an explicit results test to the VRA).

52. A plaintiff must show that "based on the totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority]." See Katz et al., *supra* note 28, at 648 (quoting 42 U.S.C. § 1973(b) (2000)).

53. See *id.* at 648.

54. Tokaji, *supra* note 34, at 708.

55. Chisom v. Roemer, 501 U.S. 380, 394 (1991) (addressing whether the method of electing Louisiana Supreme Court Justices impermissibly dilutes minority voting strength in violation of the VRA).

neutrally applied over time.⁵⁶ Such policies are categorized as either vote dilution or vote denial measures.⁵⁷ Vote dilution policies use certain electoral structural schemes, which, when combined with historical social and economic conditions, serve to diminish the strength of minorities' votes.⁵⁸ For example, strategies such as gerrymandering seek to reduce electoral opportunities and make discrimination difficult to detect but can serve to effectively remove minorities from the political process.⁵⁹ Vote denial measures are systematic processes that prevent citizens from voting or having their votes counted, such as literacy tests, poll taxes, or bans on ballot collection.⁶⁰ Vote denial and vote dilution policies that would have

56. See *id.* at 408 (Scalia, J., dissenting) (posing a hypothetical of a neutral voter registration law that restricted Black voters' participation in the political process and thus violated section 2).

57. Tokaji, *supra* note 34, at 691; 29 C.J.S. *Elections* § 91 (2021) (defining vote dilution as a districting plan that “operates to cancel out or minimize the voting strength of racial groups” (emphasis added)). “Vote denial” refers to practices that prevent people from voting or having their votes counted.” Tokaji, *supra* note 34, at 691. Congress concentrated mostly on vote dilution because it was largely concerned with creating a risk of mandating proportional representation, which arises through vote dilution reform, not vote denial reform. Tokaji, *supra* note 34, at 708 (“The results test was a compromise, designed to extend [s]ection 2 beyond cases where discriminatory intent could be proven, without mandating proportional representation in vote dilution cases.”).

58. See David D. O'Donnell, *Wading into the “Serbian Bog” of Vote Dilution Claims Under Amended Section 2 of the Voting Rights Act: Making the Way Towards a Principled Approach to “Racially Polarized Voting”*, 65 *Miss. L.J.* 345, 351–52 (1995) (discussing how, although direct barriers to participation have been removed, vote dilution policies continue to reduce minority voters' opportunities to participate in the electoral process); Richard A. Walawender, *At-Large Elections and Vote Dilution: An Empirical Study*, 19 *U. MICH. J.L. REFORM* 1221, 1238 (1986) (finding that at-large electoral systems result in less representation of Black elected officials).

59. Howard M. Shapiro, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 *YALE L.J.* 189, 197 (1984); see *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1467 (M.D. Ala. 1988) (finding that gerrymandering in Baldwin County created rippling effects in the Black community, such as being unable to effectively participate in the political process of electing representatives that represent their interests to the Baldwin County Board of Education). *But see Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (holding that partisan gerrymandering claims cannot be decided by federal courts). Congress, not the courts, holds the power to address gerrymandering. *Id.* at 2507. Still, Chief Justice Roberts stated that “[o]ur conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.” *Id.*

60. Finkelman, *supra* note 24, at 205–06, 208.

been upheld under the intent test can be struck down under the results test.⁶¹

Invalidating discriminatory laws became increasingly difficult when Congress enacted the Help America Vote Act of 2002⁶² (HAVA), leading to an increase in legal vote denial measures.⁶³ The legislation aimed to reduce voter fraud by requiring states to enact centralized voter registration systems and minimum voter identification laws for mail-in voters.⁶⁴ In addition to HAVA's required changes, the statute also explicitly allowed states to enact stricter election regulations if they chose.⁶⁵ Proponents of stricter voter identification laws took immediate action, tightening laws surrounding voter identification, voter registration, and alternate methods of voting such as early or absentee voting.⁶⁶ Voter identification requirements, which constitute a large segment of the new wave of vote denial, "have a much greater potential to negatively impact minorities and lower-income voters" and do not successfully tackle fraud.⁶⁷

61. See Tokaji, *supra* note 34, at 719–20 (explaining that the results test "may serve as a prophylactic against intentional discrimination that might otherwise seep into the voting process undetected").

62. 52 U.S.C. § 21083.

63. Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 746 (2008) (noting that thirty-four states enacted stricter voter provisions than the minimum required by the Help America Vote Act, including stricter voter identification requirements for various groups of voters); Haase, *supra* note 23, at 244 ("The primary vote denial methods imposed after HAVA fell into three categories: election administration laws, changes to voting machines, and felony disenfranchisement.").

64. Langholz, *supra* note 63, at 745.

65. 52 U.S.C. § 21084 ("The requirements established by this subchapter are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election . . . administration requirements that are more strict than the requirements established . . ."). Even without the additional grant to pass stricter requirements, HAVA was a sweeping measure with forty-four states needing to make legislative or administrative changes to come into compliance. Langholz, *supra* note 63, at 747.

66. Langholz, *supra* note 63, at 748 ("By the end of 2007, thirty-four states had enacted voter-identification provisions stricter than the minimum required by HAVA.").

67. Haase, *supra* note 23, at 245; see also Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 73 (2014) (stating that there is no evidence to suggest that voter ID laws combat fraud or enhance voter confidence). One study examining who has identification found that in Texas, for example, 20.71% of Black people and 17.49% of Latino people did not have valid voter

B. Standards to Show Discrimination Under the VRA and the Fifteenth Amendment

A court can find a violation of section 2 of the VRA using one of two tests: the “results test” requires a plaintiff to show that voting legislation resulted in a disparate impact on minorities, and the “intent test” requires the plaintiff to show deliberate discrimination by the legislature.⁶⁸ This Section will elaborate on vote denial and vote dilution claims brought under the results test before *Brnovich*, as well as claims brought under the intent test. Fifteenth Amendment challenges are analyzed using the same factors as the intent test, so when a plaintiff prevails under the intent test, they automatically succeed under the Fifteenth Amendment as well.⁶⁹

1. The results test

The results test can be used for both vote denial and vote dilutions claims—it is a totality of the circumstances test; however, after *Brnovich*, there may be a distinction in how to examine vote denial claims as compared to vote dilution claims.⁷⁰ The totality of the circumstances

identification compared to only 10.85% of white people. Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 25 (2013); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 660 (2007) (stating that in Wisconsin, for example, the data suggests that a voter identification requirement would have a disparate demographic impact). Fear of voter fraud may be rooted in its historical prevalence “[f]rom Tammany Hall, the notorious New York City political machine of the nineteenth century, to Mayor Daley’s efforts in Chicago in the 1960 election.” Langholz, *supra* note 63, at 734. That fear is ongoing, and some say that combatting voter fraud is a sufficient state interest to validate voter identification laws. Hans A. Von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1150 (2019) (discussing the need for reform such as voter identification to protect against election fraud). However, some believe that fraud is a legitimate problem that can be addressed by requiring voter identification. Elizabeth Slattery, *Another Victory for Voter ID*, HERITAGE FOUND. (Aug. 15, 2012), <https://www.heritage.org/courts/commentary/another-victory-voter-id> [<https://perma.cc/VJD8-AGNC>].

68. Tokaji, *supra* note 34, at 704–05. Disparate impact occurs when a given law leads to a disproportionate result or effect for different races. Roger Clegg & Hans A. Von Spakovsky, *“Disparate Impact” and Section 2 of the Voting Rights Act*, 85.6 MISS L.J. 1357, 1362 (2017).

69. *Chisom v. Roemer*, 501 U.S. 380, 392 (1991).

70. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2333 (2021) (stating that Supreme Court jurisprudence of section 2 cases exhibits a “steady stream” of vote dilution cases while the Court has not previously considered vote denial cases). Despite

became the standard when Congress added the results test to section 2 of the VRA in 1982, and the Senate Report made clear that the test includes vote denial and vote dilution claims.⁷¹ Courts are to place a given voting restriction in the historical and social context, examining factors such as whether minorities have access to the electoral process and how responsive elected officials have been to the needs of minorities.⁷² The results test allows a party to prove the existence of voter discrimination without requiring the party to find specific proof of an intent to discriminate.⁷³

a. Vote dilution claims prior to Brnovich

Prior to *Brnovich*, the Supreme Court evaluated vote dilution claims under the results test by analyzing nine factors to determine whether a voting measure had discriminatory effects.⁷⁴ Accompanying the 1982 amendments to the VRA, the Senate Report identified these nine factors as typical indicia that a state was denying minorities “an equal opportunity to participate in the political processes and to elect

indicating that vote denial cases should be examined under a different lens than vote dilution cases, the Court declined to establish a test to govern vote denial claims. *Id.* at 2336 (“[A]s this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases.”); Tokaji, *supra* note 34, at 706–08 (providing data from a study categorizing section 2 lawsuits that included both vote dilution and vote denial claims although the majority were vote dilution); *supra* notes 57–61 and accompanying text (discussing the nuances of vote dilution and vote denial).

71. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 443–45 (2015) (examining how the Senate approached expanding section 2 of the VRA and the compromise that led to the totality of circumstances standard). Senator Dole proposed adding section 2(b) to the 1983 amendments to create the totality of the circumstances test. *Id.* at 444. At the time Congress was primarily focused on mandating proportional representation in vote dilution cases; however, the Senate Report states that section 2 prohibits “all voting rights discrimination,” including practices that “result in the denial of equal access to any phase of the electoral process for minority group members,” which includes both vote dilution and vote denial. *Id.* at 445 (citing S. REP. NO. 97-417, at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 207).

72. See *infra* note 75 and text accompanying notes 154–55 (listing respectively the Senate Factors and the *Brnovich* factors).

73. Haase, *supra* note 23, at 243. The 1982 amendment to the VRA clarified that to prove a violation of section 2 under the totality of the circumstances, a party must prove there has been a practice that *results* in the denial or abridgment of the right to vote of the member of a protected class. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. §§ 1973, 1973b).

74. Tokaji, *supra* note 34, at 706–07.

candidates of their choice.”⁷⁵ The factors are as follows: (1) history of discrimination; (2) the extent to which voting is racially polarized; (3) the existence of practices that may enhance the possibility for discrimination; (4) access to candidate slating processes; (5) whether the minority group is discriminated against in education, employment, and health; (6) whether campaigning includes racial appeals; (7) whether minority members have been elected in the jurisdiction; (8) whether public officials have been responsive to the needs of the minority group; and (9) whether the voting restrictions are based on tenuous policy decisions. These factors range from the history of official discrimination, to current racial and electoral setup, to the role of officials.⁷⁶ The Supreme Court established this approach in the seminal case of *Thornburg v. Gingles*⁷⁷ where a multimember districting scheme impaired the ability of Black voters to participate in the electoral process.⁷⁸ The Court used the Senate Report’s nine factors as a guide to evaluate the claim under the results test, finding that these types of claims warrant a totality of the circumstances evaluation.⁷⁹ The Senate Factors have created a large jurisprudence for vote dilution claims.⁸⁰

b. Vote denial claims prior to Brnovich

Comparatively, there has been little litigation surrounding vote denial claims, which has resulted in a lack of universally clear parameters for circuits to uniformly apply when determining whether there is discrimination.⁸¹ Despite the lack of litigation, lower courts

75. S. REP. 97-417, 28–29 (1982).

76. *Id.*; *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986).

77. 478 U.S. 30 (1986).

78. *Id.* at 47 (noting that voting districts with more than one elected representative “may ‘operate to minimize or cancel out the voting strength of racial [minorities in] the voting population’” (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (2016))).

79. *Id.* at 36–37.

80. A total of 322 lawsuits have been brought raising section 2 claims. Tokaji, *supra* note 34, at 708. Of those, “145 involved challenges to at-large districts, 110 challenged redistricting plans, and eleven challenged majority vote requirements—all of which can safely be characterized as vote dilution rather than vote denial cases.” *Id.* at 709.

81. The reason for the lack of extensive jurisprudence surrounding vote denial is that “Congress, especially the Senate, focused so intently on representation rather than participation.” *Id.* (“Only thirty-six cases challenged election procedures (such as registration practices, candidacy, or voting requirements), and another thirty-six challenged other practices (including annexations, felon disenfranchisement, and

that have addressed section 2 vote denial claims have relied on a two-part framework based on the language of section 2 and the Senate Factors, which have varied in use and interpretation across the circuits.⁸² The Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have addressed vote denial claims with the two-part framework, while other circuits either disagree with the Senate Factors or have not yet had the occasion to address a vote denial claim.⁸³ When applying the framework, the court must first determine whether the challenged standard, practice, or procedure imposes a discriminatory burden on members of a protected class.⁸⁴ Second, the court must determine whether the discriminatory burden is caused by or linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class “such that it

appointment practices). Some, but not all of these, would be characterized as vote denial cases.” *But see infra* Section II.A.1 (discussing the factors listed in *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2336 (2021), which lay out “guideposts” despite the Court “declin[ing] in these cases to announce a test to govern all VRA § 2 claims involving rules, like those at issue here”).

82. *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (adopting the two-step framework in the Fifth Circuit); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014) (employing the framework but expressing skepticism over the second step). Additionally, the Ninth Circuit indicated that it agreed with the two-part framework as “consistent with Supreme Court precedent, our own precedent, and with the text of § 2.” *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 379 (9th Cir. 2016). However, the plaintiff in that case failed to satisfy the first prong, so the court did not reach the second prong. *Id.* at 385.

83. *See supra* note 82 and accompanying text; *Veasey*, 830 F.3d at 254 (striking down a voter identification law); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 638 (6th Cir. 2016) (upholding an Ohio law after applying the two-step framework); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240, 248 (4th Cir. 2014) (applying the two-step framework to determine that the district court improperly denied the plaintiff’s request for a preliminary injunction as to same-day registration and out-of-precinct voting). The Eleventh Circuit did not expressly disavow the two-step vote denial framework, but it did reject applying the Senate Factors, stating that there was a “fundamental misalignment” between the factors and the specific case. *Greater Birmingham Ministries v. Sec’y of State for Ala.*, 966 F.3d 1202, 1235, 1238 (11th Cir. 2020) (“*Gingles* was a vote dilution case and this case involves vote denial, a fundamentally different claim.”), *vacated*, 992 F.3d 1299 (11th Cir. 2021).

84. A discriminatory burden means that “members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *League of Women Voters*, 769 F.3d at 240 (drawing language from section 2 of the VRA).

violates [s]ection 2.”⁸⁵ Circuits have weighed the Senate Factors differently in the second step, and jurisdictions that were considered covered jurisdictions under section 4 were more likely to emphasize the history of official discrimination such as Jim Crow laws, which show the overt racism that minorities faced.⁸⁶ As an example, the Fifth Circuit successfully applied the two-part framework to invalidate a discriminatory voter identification law in Texas that made it more difficult for minorities to vote because they faced a higher burden traveling and obtaining the necessary documents.⁸⁷

When weighing the Senate Factors in a totality of the circumstances analysis, courts rely more heavily on certain factors for vote denial claims including a history of official discrimination, the effects of discrimination on minorities’ access to voting in other areas, and the tenuousness of the justification for the regulation.⁸⁸ Additionally, across vote denial claims, the importance of different factors may vary.⁸⁹ While the results test for vote denial claims is still developing, the intent test is well established.⁹⁰

85. *Veasey*, 830 F.3d at 244 (citing *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986)); *see also League of Women Voters*, 769 F.3d at 240 (drawing language from the Senate Factors as applied in *Gingles*, 478 U.S. at 44–45).

86. Haase, *supra* note 23, at 250. By contrast, in non-covered jurisdictions, plaintiffs are often left to rely on less concrete examples including “general racial inequalities that contribute to socio-economic disparities in voting access.” *Id.* Additionally, private discrimination has served a more central role than official discrimination in vote denial cases within in non-covered jurisdictions. *See id.* at 255–56 (noting that official evidence of state discrimination serves a more central role in vote denial cases in covered jurisdictions); *see e.g., Frank*, 768 F.3d at 753 (holding that there was insufficient “official” discrimination to satisfy the second prong).

87. *See Veasey*, 830 F.3d at 254 (considering various factors that made the Texas identification law more burdensome on minorities).

88. *Id.* at 256–64 (using factors one, two, five, six, seven, eight, and nine to strike down a voter identification law); *Husted*, 768 F.3d at 555 (“We find Senate factors one, three, five, and nine particularly relevant to a vote denial claim.”), *vacated as moot*, 2014 WL 10384647 (2014).

89. For example, some states may have a more acute history of discrimination, making that factor particularly persuasive. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc), *rev’d sub nom.* *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

90. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (setting out the factors used by subsequent courts to determine whether discriminatory intent exists).

2. *The intent test*

Under the intent test, claims are analyzed through a two-step burden shifting process: if the plaintiff can show discrimination was a motivating factor, the burden shifts to the state.⁹¹ Courts analyze the totality of the circumstances guided by four enumerated factors: (1) historical background; (2) departure from normal legislative processes; (3) legislative history; and (4) disparate impact.⁹² If the plaintiff prevails, the burden then shifts to the state to show the law would have been enacted absent discriminatory intent.⁹³ Discriminatory intent is shown when a statute creates a clear pattern of discrimination that is inexplicable on any ground other than race.⁹⁴ In one case, an ordinance that effectively precluded only Chinese laundry owners from operating their businesses was invalidated under the intent test.⁹⁵ Marginalizing Chinese businesspeople was clearly the objective of the legislation—precisely the type of discrimination the intent test was designed to target.⁹⁶ A challenge in proving discriminatory intent is that a legislative body is a collection of individuals who each possess their own motivations for passing laws.⁹⁷ The “cat’s paw” doctrine, sometimes used in employment discrimination cases, imputes the animus of one person onto the

91. *Id.* at 270–71 n.21.

92. *See id.* at 266–68 (establishing the factors used in subsequent jurisprudence).

93. *Id.* at 270–71 n.21.

94. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating a law that discriminated against a particular group of people). An unusual example of how results can show intent is *Gomillion v. Lightfoot* where an Alabama law redefining the city boundaries was a device to disenfranchise Black people in violation of the Fifteenth Amendment. 364 U.S. 339, 347 (1960).

95. *Yick Wo*, 118 U.S. at 357–59, 374 (invalidating a city ordinance which made unlawful the running of a laundry “in a building constructed either of brick or stone,” which adversely affected 310 of the 320 laundries in San Francisco, 240 of which were owned by Chinese people).

96. *Id.* at 374.

97. *See* Lang & Hebert, *supra* note 37, at 784–85 (noting the scholarly debate over whether a collective body can possess intent). Chief Justice Roberts captured the complexity of determining legislative intent in a case about gerrymandering: “Let’s say you have 10 percent of the legislators say this is because of race—that’s their motive—10 percent say it’s because of partisanship, and 80 percent say nothing at all. What—what is the motive of that legislature?” Transcript of Oral Argument at 6, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504).

actions of others.⁹⁸ Discrimination does not need to be the only factor or the predominant factor in passing legislation; rather, it merely needs to be one motivating factor.⁹⁹

In sum, courts use a totality of the circumstances approach to analyze a vote dilution or vote denial measure challenged under the results test. The factors used to conduct the analysis may differ depending on the claim. A measure challenged under the intent test, however, is analyzed through a burden-shifting framework to determine if the legislation was deliberately discriminatory. Additionally, prevailing on a claim under the intent test of the VRA automatically implicates the Fifteenth Amendment because the two are coextensive.¹⁰⁰

C. *Restrictions on Arizona Voting Techniques*

Pursuant to the Elections Clause, states have the authority to regulate the “[t]he Times, Places and Manner of holding Elections for Senators and Representatives” by creating policies to regulate their

98. See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021); *infra* notes 327–28 and accompanying text (discussing the cat’s paw doctrine). The rationale behind the “cat’s paw” doctrine is that if one legislator has discriminatory intent but uses another line of reasoning to convince others to support him or her, the others are used as “cat’s paws” to promote discrimination. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1040 (9th Cir. 2020) (en banc), *rev’d sub nom. Brnovich.*, 141 S. Ct. 2321. The “cat’s paw” doctrine is based on Aesop’s fable where a “clever monkey induces a cat to use its paws to take chestnuts off of hot coals for the benefit of the monkey.” *Id.*; see also *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1281 (9th Cir. 2017) (“[T]he animus of a supervisor can affect an employment decision if the supervisor ‘influenced or participated in the decisionmaking process.’” (emphasis added) (quoting *Dominguez-Curry v. Nev. Transp. Dep’t.*, 424 F.3d 1027, 1039–40 (9th Cir. 2005))).

99. See *Lang & Hebert*, *supra* note 37, at 785. “The search for legislative purpose is often elusive enough . . . without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a ‘subordinate’ purpose may shift altogether the consensus of legislative judgment supporting the statute.” *McGinnis v. Royster*, 410 U.S. 263, 276–77 (1973); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (noting that a plaintiff need not rest their challenge solely on discriminatory intent and reasoning that it is rare that “a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one”).

100. See, e.g., *Hobbs*, 948 F.3d at 998 (bringing claims under the VRA and the Fifteenth Amendment); *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (asserting that the passage of the VRA provoked little debate in Congress because it was largely thought to be a “restatement of the Fifteenth Amendment”).

own elections.¹⁰¹ This Section examines two Arizona voting regulations that disproportionately affect minorities for both in-person and mail-in voting.¹⁰² The first is the Out of Precinct Policy (“OOP Policy”), which discards votes cast in person but outside of that voter’s precinct.¹⁰³ The second is the 2016 House Bill 2023 (“H.B. 2023”), which criminalizes third-party collection and delivery of another person’s ballot to a voting center.¹⁰⁴ Both of these regulations restrict voting and lead to votes not being counted—disproportionately minority votes.¹⁰⁵ They are vote denial measures because both the OOP Policy and H.B. 2023 prevent voters from accessing the ballot.¹⁰⁶

The majority of Arizona uses the precinct voting method, meaning that if voters do not vote in their assigned precinct, their ballots will be rejected pursuant to the OOP Policy.¹⁰⁷ The precinct method requires voters to vote at their specific preassigned precinct.¹⁰⁸ In precinct voting counties, voting outside of the precinct means the person’s ballot is discarded completely—even if the voter was legally eligible to

101. U.S. CONST. art. I, § 4, cl. 1.

102. ARIZ. REV. STAT. ANN. §§ 16-1005(H), 16-122 (2021).

103. § 16-122.

104. § 16-1005(H).

105. See *Hobbs*, 948 F.3d at 1004, 1006 (reviewing the district court’s findings that because of factors such as higher rates of residential mobility and lack of easy access to outgoing mail services, minority voters are more likely to vote out of their assigned precinct or rely on third-party ballot carriers, resulting in a disproportionate amount of uncounted and invalidated minority ballots under the OOP policy and H.B. 2023).

106. Other examples of vote denial measures are voter identification requirements and modification of registration procedures. Haase, *supra* note 23, at 244 (discussing how vote denial measures have changed over time to be racially neutral in construction while still leading to the same discriminatory results).

107. § 16-122. 90% of Arizona citizens live in a county that uses the precinct method. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 840 (D. Ariz.), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d sub nom. Hobbs*, 948 F.3d 989, *rev’d sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021). Counties must choose between the precinct method or the vote center method. Vote center means voters in the county can vote at any voting location. *Hobbs*, 948 F.3d at 999 (citing *Reagan*, 329 F. Supp. at 840).

108. *Reagan*, 329 F. Supp. 3d at 840. The purpose of the precinct-based system is to ensure that every voter receives a ballot reflecting only races in which the voter is eligible to vote. *Id.* This is important because elections involve many different overlapping jurisdictions, so it is necessary to ensure that the voter casts a vote for the correct races. *Id.*

vote for most of the individual issues.¹⁰⁹ Changes in polling locations contribute to the high rate of OOP ballots because many voters return to the locations where they voted in previous elections under the assumption they can vote there again.¹¹⁰ The placement of polling locations also contributes to OOP ballots because voters mistakenly believe they can vote at the nearest location.¹¹¹ In one instance, over forty voters showed up at the only polling place in the vicinity—a local elementary school within walking distance—only to find out that they were assigned to a different precinct fifteen minutes away by car.¹¹² The voters passed four other polling places, which they could not vote at, before they arrived at their assigned precinct.¹¹³ High resident mobility, which disproportionately impacts minorities, is another factor leading to OOP voting.¹¹⁴ Individual facing rent increases are likely to move to new apartments nearby and may be entirely unaware that they moved to a new precinct.¹¹⁵ Often, they may still live closer to their old precinct yet be assigned to vote somewhere further away.¹¹⁶

H.B. 2023 restricts early voting while the OOP policy criminalizes possession of another person's ballot, leading to invalidated ballots and uncounted votes.¹¹⁷ Early voting is statutorily permissible in

109. *Id.* For example, a voter's legal choice for president or governor would not be counted. Notably, Arizona is an extreme outlier in the number of OOP ballots it rejects, reaching eleven times the percentage of rejected OOP ballots as compared to the state of Washington, which is the second highest in rejections. *Hobbs*, 948 F.3d at 1000–01. Arizona rejected 38,335 total OOP casted ballots from 2008 to 2016, with 29,834 of those ballots casted during presidential general elections and 8,501 ballots casted in midterm general elections. *Id.* at 1000 (citing *Reagan*, 329 F. Supp. 3d at 858).

110. *Hobbs*, 948 F.3d at 1001–02 (citing *Reagan*, 329 F. Supp. 3d at 858). Polling locations are changed frequently between elections. *Id.* at 1001. Between 2006 and 2008, at least 43% of polling locations changed in Maricopa County, which includes Phoenix. *Id.* at 1002. Again between 2010 and 2012, approximately 40% of polling place locations were changed for a second time. *Id.* The OOP voting rate was 40% higher for voters whose polling places were changed. *Id.*

111. *Id.* at 1002–03.

112. *Id.* at 1002.

113. *Id.*

114. See Peverill Squire et al., *Residential Mobility and Voter Turnout*, 81 AM. POL. SCI. REV. 45, 61 (1987) (concluding that individuals who move have a lower voter turnout due to the “administrative burden of registration”).

115. *Id.*

116. *Id.*

117. Early voting is where the voter receives their ballot in the mail and mails it back or delivers it, whereas in-person voting takes place at a precinct or vote center on election day or during early-vote period. *Id.* at 999.

Arizona pursuant to Arizona Revised Statute section 16-541.¹¹⁸ Before H.B. 2023, Arizona had no prohibition on third parties delivering ballots.¹¹⁹ Democrats used ballot collection by third parties as a get-out-the-vote (“GOTV”) strategy, particularly in “low-efficacy minority communities” to increase political participation.¹²⁰ H.B. 2023 was passed in 2016 to limit who may possess a voter’s ballot, regardless of whether the ballot was filled out, and makes it a class six felony for a person to knowingly collect voted or unvoted ballots from another person.¹²¹ Accordingly, voters may not use unauthorized third parties to carry their ballots. Minorities, who often vote for Democrats in Arizona,¹²² were more likely than non-minorities to use ballot collection services.¹²³ Reasons that voters use third-party ballot

118. Voters do not need an excuse to engage in early voting in place of voting on the day of the election, and Arizona voters have the option of voting by mail or in person during the twenty-seven days before an election. ARIZ. REV. STAT. ANN. § 16-541 (2021) (authorizing qualified electors to vote early); § 16-426 (permitting the distribution of early ballots twenty-seven days before an election year) Early voting by mail has become the most popular form of voting, accounting for approximately 80% of all ballots in the 2016 election. Democratic Nat’l Comm. v. Reagan, 329 F. Supp. 3d 824, 839 (D. Ariz.), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d sub nom.* Democratic Nat’l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020) (en banc), *rev’d sub nom.* Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321 (2021). Additionally, voters have the option of subscribing to the Permanent Early Voter List (“PEVL”), which allows them to automatically receive an early ballot no later than the first of the twenty-seven-day period of early voting. *Id.*

119. Since 1997, the law said that “[o]nly the elector may be in possession of that elector’s *unvoted* early ballot”; however, it did not address who could possess the ballot after it had been filled out. ARIZ. REV. STAT. ANN. § 16-542(D) (2019) (emphasis added).

120. *Reagan*, 329 F. Supp. 3d at 879.

121. ARIZ. REV. STAT. ANN. § 16-1005(H) (2016). Officials who are legally allowed to transmit U.S. mail are “deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.” *Id.* Additionally, the ballot harvesting proscription does not apply for elections held by certain taxing districts, nor does it apply to family members, household members, or caregivers of the voter. § 16-1005(I).

122. See Alec Tyson, *The 2018 Midterm Vote: Divisions by Race, Gender, Education*, PEW RSCH. CTR. (Nov. 8, 2018), <https://www.pewresearch.org/fact-tank/2018/11/08/the-2018-midterm-vote-divisions-by-race-gender-education> [<https://perma.cc/5EJ4-UY2K>] (detailing how minorities voted prominently for Democratic candidates in the 2018 midterm election for House of Representatives seats).

123. *Hobbs*, 948 F.3d at 1005. There is also research that estimates the populations that likely would be most impacted by ballot collection restrictions in Arizona’s non-metropolitan counties. *Reagan*, 329 F. Supp. 3d at 835 (detailing how Latino, Native

collecting services include lack of access to mail, time restraints because of multiple jobs, lack of childcare, and unfamiliarity with the voting process, all of which disproportionately affect minorities.¹²⁴ One Maricopa County Democratic Party organizer saw 1,200 to 1,500 early ballots that third-party volunteers collected and turned in, “including hundreds of ballots from a heavily Hispanic neighborhood in one state legislative district alone.”¹²⁵ Minority voters are more affected by the ballot collection restriction than other voters.¹²⁶ For example, the vast majority of Native Americans living on reservations do not have mail service at home.¹²⁷ In San Luis, a majority Latino community, “a major highway separates” thousands of residents from the nearest post office.¹²⁸ Without reliable mail services or transportation, many minority voters prefer to entrust their ballots to a volunteer.¹²⁹ One

American, and Black voters used OOP ballots more often than non-minority voters in the 2012 election in Maricopa County: “the rate of OOP voting was ‘131 percent higher for Hispanic [people], 74 percent higher for [Black] Americans and 39 percent higher for Native Americans than white [people].’”). Outside of the counties Maricopa and Pima, 80% of Latino people and 18% of Native Americans have home mail service while about 86% of non-Latino white people have the service. *Id.* at 836 (the Court determined the research results were insightful and useful but only provided the information moderate weight in its analysis due to its limitations).

124. See Caitlin Huey-Burns, *What Is Ballot Harvesting, Where Is It Allowed and Should You Hand Your Ballot to a Stranger?*, CBS NEWS (Sept. 1, 2020, 12:17 PM), <https://www.cbsnews.com/news/ballot-harvesting-collection-absentee-voting-explained-rules> [https://perma.cc/C663-PHTN] (detailing that ballot harvesting supporters argue it helps expand voting access for senior citizens, disabled voters, low-income, Native Americans, and other historically disenfranchised populations).

125. *Hobbs*, 948 F.3d at 1005. Other witnesses testified to thousands of ballots collected across various elections between 2012 and 2014. *Id.*

126. Cornell William Clayton & Michael Ritter, *Supreme Court Blunts Voting Rights in Arizona—and Potentially Nationwide—in Controversial Ruling*, CONVERSATION (July 1, 2021, 2:53 PM), <https://theconversation.com/supreme-court-blunts-voting-rights-in-arizona-and-potentially-nationwide-in-controversial-ruling-163764> (explaining that the Democratic National Committee argues the Arizona rule harms minority voters disproportionately). “[U]nder the totality of the circumstances H.B. 2023 causes minority voters to have less opportunity to participate in the political process than non-minority voters, and that the law was passed with the intent to suppress minority voters.” *Reagan*, 329 F.3d at 833.

127. Sam Levine, *Arizona Republicans Discriminated Against Minority Voters, Court Rules*, GUARDIAN (Jan. 27, 2020, 3:35 PM), <https://www.theguardian.com/us-news/2020/jan/27/arizona-republicans-intentionally-discriminated-against-minority-voters-court-rules> [https://perma.cc/CLK2-ZUDN] (finding that only 18% of registered Native American voters have mail service at home).

128. *Id.*

129. *Id.*

ballot collection volunteer expressed her frustration with H.B. 2023 because it restricted her ability to spread the message that “voting is the most fundamental right in a democratic society and that (she is) committed to helping qualified electors exercise their right to vote.”¹³⁰ Additionally, Arizona’s history of discrimination against these minorities fits into a pattern of political, social, and economic discrimination in areas outside voting such as “school segregation, educational funding and programming, equal pay and the right to work, and immigration.”¹³¹

H.B. 2023 and the OOP Policy result in voter disenfranchisement because the restrictions cause ballots to be invalidated.¹³² H.B. 2023 hinders mail-in voters who have limited access to travel or mail from submitting their ballots.¹³³ The OOP Policy leads to ballots being discarded when voters simply mistake their polling location, which is common due to the frequently changing station locations.¹³⁴ Voting regulations are within the purview of state authority, but when the regulations disproportionately affect minority voters, they must be examined to determine whether they have the purpose or effect of discrimination.

D. *The Procedural History of Brnovich*

Given the wide-ranging impact of OOP Policy and HB 2023, especially on minority voters, the Democratic National Committee (DNC) challenged both of these laws and sued Arizona.¹³⁵ In its briefs for *Brnovich*, the DNC, Respondents, argued that both of the

130. Daniel Perle, *Appeals Court Rejects Latest Challenge to State’s ‘Ballot Harvesting’ Law*, CRONKITE NEWS (Oct. 31, 2018), <https://cronkitenews.azpbs.org/2018/10/31/appeals-court-rejects-latest-challenge-to-states-ballot-harvesting-law> [https://perma.cc/6RSL-WASY].

131. Levine, *supra* note 127 (stating that Arizona has a lengthy history of voter discrimination and until 2013, the state was required to submit all voting changes to the federal government under the VRA for approval).

132. Democratic Nat’l Comm. v. Hobbs, 948 F.3d 989, 1042–43 (9th Cir. 2020) (en banc), *rev’d sub nom.* Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321 (2021).

133. See ARIZ. REV. STAT. ANN. § 16-1005(H) (2016). See Clayton & Ritter, *supra* note 126 (highlighting that the Tohono O’odham Reservation, which has an area larger than Rhode Island and Delaware, has one post office and no home delivery, requiring the voters to rely on friends or GOTV volunteers to deliver their ballots to polling stations).

134. *Hobbs*, 948 F.3d at 1000–01.

135. Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321, 2350 (2021); see also *supra* Section I.C (discussing the OOP Policy and H.B. 2023).

restrictions violated the VRA results test because there is a disparate impact on minority populations including Native American, Latino, and Black citizens that is the product of current or historical conditions of discrimination.¹³⁶ Petitioners Arizona Republican Party and Mark Brnovich argued that under the plain language of section 2, the Arizona regulations are “neutral and equally applied time, place, and manner regulations” and thus do not implicate section 2 of the VRA.¹³⁷ They contend that because voting was “equally open” to all voters and did not deny or abridge the right to vote, it is irrelevant whether “minorities might not proportionally take advantage of this equal opportunity.”¹³⁸ They drew a distinction between the regulations at issue and voting qualifications that disparately strip minorities of eligibility to vote, such as limiting voting to only college graduates, and regulations that unequally burden minorities’ opportunities to vote, such as numerous polling places in white suburbs and very few in Black neighborhoods, all of which would violate section 2.¹³⁹ The DNC also brought a claim using the intent test, arguing that H.B. 2023 “was enacted with discriminatory intent” in violation of both section 2 of the VRA and the Fifteenth Amendment of the Constitution.¹⁴⁰ Petitioners asserted that combatting fraud was a valid justification to pass H.B. 2023, and the DNC incorrectly conflated partisan motives with racial ones.¹⁴¹

The district court found in favor of Arizona, and the Ninth Circuit affirmed in a three-judge panel decision.¹⁴² The case was then heard

136. Respondents’ Brief in Opposition to Petitions for Writ of Certiorari at 5, 11–12, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257, 19-1258) (citing district court findings that due to the effects of historical discrimination, such as lower education levels, less access to reliable transportation, and higher rates of residential mobility, the restrictions disproportionately affect minority voters).

137. Petition for Writ of Certiorari at 14, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257, 19-1258).

138. *Id.* at 17 (emphasis omitted).

139. *Id.* at 13.

140. *Hobbs*, 948 F.3d at 998.

141. Petition for Writ of Certiorari at 17–20, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257, 19-1258).

142. *Hobbs*, 948 F.3d at 998. The district court found that the OOP Policy and H.B. 2023 did not violate the First and Fourteenth Amendments because Arizona’s regulatory interests justified the burden placed on the voters. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 855–56 (D. Ariz. 2018), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d sub nom. Hobbs*, 948 F.3d 989, *rev’d sub nom. Brnovich*, 141 S. Ct. 2321.

en banc before the Ninth Circuit, resulting in a reversal.¹⁴³ The Ninth Circuit held that the DNC prevailed on its claims regarding section 2 of the VRA and the Fifteenth Amendment.¹⁴⁴ The court reasoned that the OOP Policy and H.B. 2023 violate the two-step vote denial results test by imposing a disparate burden on minorities because they vote out of precinct and use third-party ballot collection services at significantly higher rates.¹⁴⁵ The court then found that the disparate impact had a legally significant relationship to the “social and historical conditions” affecting minority voters.¹⁴⁶ Lastly, the court found that H.B. 2023 violated the intent test of section 2 of the VRA and the Fifteenth Amendment because it was enacted with discriminatory intent.¹⁴⁷

The Ninth Circuit used section 2 of the VRA to protect the rights of minority citizens in Arizona, whose ability to participate in the political process has been targeted for well over a century.¹⁴⁸ The en banc opinion states that, “Arizona has repeatedly targeted its [Native American], Hispanic, and [Black] citizens, limiting or eliminating their ability to vote and to participate in the political process.”¹⁴⁹ Upon the Ninth Circuit’s ruling in favor of the DNC, Arizona Democratic Party Executive Director Herschel Fink highlighted the importance of the decision, stating “[t]his takes an undue burden off of working families and people of color, making it easier for them to exercise their

Additionally, the court found that the law and policy were not in violation of section 2 because the DNC failed to show that minority voters were denied an equal opportunity to participate in the election process. *Id.* at 867. Lastly, the district court held that H.B. 2023 did not violate the Fifteenth Amendment or intent test under section 2 because the DNC did not carry its burden to show that the law was enacted with discriminatory intent. *Id.* at 878–79, 882. *Reagan*, 329 F. Supp. 3d at 882–83 (summarizing the holdings of the district court).

143. *Hobbs*, 948 F.3d at 1046.

144. *Id.* at 999. The court did not reach the First and Fourteenth Amendment claims. *Id.*

145. *Id.* at 1032–33 (the district court recognized that the Democratic Party and community advocacy groups use third-party ballot collection on low-efficacy voters who disproportionately tend to be minorities while there no evidence was provided that white voters significantly relied on third-party ballot collection).

146. *Id.* at 1032.

147. *Id.* at 999, 1040 (discussing how one senator lobbied to pass H.B. 2023 using false and race-based allegations of fraud).

148. *Id.* at 999.

149. *Id.* at 998.

right to vote.”¹⁵⁰ The Supreme Court granted certiorari on October 2, 2020 and consolidated *Brnovich v. Democratic National Committee* with *Arizona Republican Party v. Democratic National Committee*.¹⁵¹

E. Summary of Supreme Court Holding in Brnovich

Brnovich was the first case in which the Supreme Court directly addressed vote denial regulations.¹⁵² Rather than announce a clear test for courts to use in analyzing vote denial claims under section 2, the Court asserted as a threshold matter that it was declining to announce a test, instead making clear that its factors are guideposts for the specific case at issue.¹⁵³ The Court established five new factors that guided its decision to uphold H.B. 2023 and the OOP Policy under the results test.¹⁵⁴ They are (1) “the size of the burden imposed by a challenged voting rule,” (2) “the degree to which a voting rule departs from what was standard practice when [section] 2 was amended,” (3) the size of the disparities resulting from the impact of the rule on a minority group, (4) the alternate opportunities provided by a state’s voting system, and (5) “the strength of the state interests served by [the] . . . rule.”¹⁵⁵ For the OOP Policy, the Court relied on factors one, three, four, and five to show that locating and traveling to the correct precinct fell within the acceptable burdens of voting and was justified by the “small racial disparity” and strength of the state interests.¹⁵⁶ The

150. Bob Christie & Jacques Billeaud, *Appeals Court Throws Out Arizona Ballot Harvesting Law*, ASSOCIATED PRESS, (Jan. 28, 2020), <https://apnews.com/article/d6b75b7a1c2da695d756cb4e864cd2b8>.

151. Petitioner Arizona Republican Party and Petitioner Mark Brnovich filed separate petitions for a writ of certiorari on April 27, 2020. Petition for Writ of Certiorari at 1, *Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (No. 19-1258); Petition for Writ of Certiorari at 1, *Brnovich.*, 141 S. Ct. 2321 (2021) (No. 19-1257). On July 1, 2020, Respondent Katie Hobbs and Respondents DNC et al. filed briefs in opposition to the writs of certiorari. Brief of Arizona Secretary of State Katie Hobbs in Opposition to Certiorari at 1, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257, 19-1258); Respondents’ Brief in Opposition to Petitions for Writ of Certiorari at 1, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257). July 28, 2020, Petitioner Mark Brnovich filed his reply and on July 29, 2020, Petitioner Arizona Republican Party filed its reply. Reply Brief in Support of Certiorari at 1, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257); Reply Brief in Support of Petition for a Writ of Certiorari at 1, *Brnovich*, 141 S. Ct. 2321 (No. 19-1258).

152. *Brnovich*, 141 S. Ct. at 2330.

153. *Id.* at 2336.

154. *Id.* at 2340.

155. *Id.* at 2338–40.

156. *Id.* at 2343–46.

Court used similar reasoning for H.B. 2023 regarding the usual burdens of voting, and additionally stated that the plaintiffs failed to show a disparate burden but even if they had, the State's interests in preventing fraud would have been sufficient to uphold the bill.¹⁵⁷

Additionally, the Court indicated that certain Senate Factors are inapplicable to a vote denial case like *Brnovich* because those factors "grew out of and were designed for use in vote-dilution cases."¹⁵⁸ The majority stated that the factors concerning districting and election procedures (factors three and four) as well as racially polarized voting (factor two), racially-tinged campaign appeals (factor six), and the election of minority-group candidates (factor seven) only pertain to vote dilution cases.¹⁵⁹ The Court further noted that the factors regarding discrimination that minorities suffered in the past (factor one) and the effects of that discrimination (factor five) are relevant for neutral time, place, and manner cases.¹⁶⁰ The Court noted that while the Senate Factors may not be useful in vote denial cases, they should not be disregarded entirely because the analysis of these types of claims is still a "totality of the circumstances" evaluation.¹⁶¹ Additionally, the majority did not address the remaining two Senate Factors of whether public officials have been responsive to the needs of the minority group (factor eight), and whether the voting restrictions are based on tenuous policy decisions (factor nine).¹⁶² While the opinion does not specifically disavow the two-part framework used by lower courts in previous vote denial cases, it essentially eliminates it by including disparate impact as one of the five enumerated factors rather than

157. *Id.* at 2346–48.

158. *Id.* at 2340. *But see supra* note 81 (discussing how the Senate Factors were meant to apply to both vote denial and vote dilution cases).

159. *Brnovich*, 141 S. Ct. at 2340. The factors that the Court explicitly mentions as being unhelpful in a vote denial analysis are (2) the extent to which voting is racially polarized, (3) the existence of practices that may enhance the possibility for discrimination, (4) access to candidate slating processes, (6) whether campaigning includes racial appeals, and (7) whether minority members have been elected in the jurisdiction. *Id.*; *see also* S. REP. NO. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207.

160. *Brnovich*, 141 S. Ct. at 2340. These factors are factors (1) history of discrimination and (5) whether the minority group is discriminated against in education, employment, and health. S. REP. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207.

161. *Brnovich*, 141 S. Ct. at 2340.

162. *Id.*

applying it as the first step.¹⁶³ Moreover, the two-part framework is similar to the “disparate-impact model employed in Title VII and Fair Housing Act cases,” which the Court stated is not useful in vote denial claims.¹⁶⁴ Regarding the claim of intentional discrimination for H.B. 2023, the Court held that it failed under the intent test because there was no evidence of intentional discrimination shown in the District Court evidentiary findings.¹⁶⁵

Justice Kagan wrote for the dissent, joined by Justices Breyer and Sotomayor.¹⁶⁶ Going through the history of voting rights discrimination in the United States, the dissent noted that since *Shelby County*, “a further generation of voter suppression laws” has emerged.¹⁶⁷ The dissent first analyzed the text of section 2 to show how it can combat discrimination.¹⁶⁸

The next section of the dissent analyzed the majority opinion by drawing out flaws from the new factors and stating that they are “at odds with [s]ection 2 itself.”¹⁶⁹ Regarding factor one—the usual burdens that voting imposes—the dissent pointed out that the text of section 2 does not recognize whether a burden is large or small, instead it targets any election rule that results in disparate voting opportunities.¹⁷⁰ Additionally, the dissent questioned how a judge would be able to determine whether a given voting regulation was a mere inconvenience or whether it rose to the level of voter

163. *Id.* at 2339–41 (setting out disparate impact as factor three); *see supra* Section I.B.1.b (presenting examples of lower courts applying the two-step framework to vote denial claims under section 2 that will no longer be used going forward).

164. *Brnovich*, 141 S. Ct. at 2340–41.

165. *Id.* at 2349–50. The Court also explicitly rejects the “cat’s paw” doctrine as it applies to legislative bodies, reasoning that it rests on the agency relationship between an employer and employee. *Id.* at 2350. Since legislators are not the agents of the bill’s sponsors, the “cat’s paw” doctrine is not a viable theory within the legislative context. *Id.*

166. *Id.* at 2350 (Kagan, J., dissenting).

167. *Id.* at 2354.

168. *Id.* at 2357 (stating that section 2’s essential import is for courts to “strike down voting rules that contribute to a racial disparity in the opportunity to vote, taking all relevant circumstances into account”).

169. *Id.* at 2361–66. The dissent does not disavow factor three—the size of a disparity. Justice Kagan notes that differences that are not statistically significant do not meet the legal threshold when addressing disparate impact. *Id.* at 2358 n.4 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011)).

170. *Id.* at 2362. The dissent points out that the VRA was created to focus on subtle as well as overt discrimination, noting that one of the subtle ways to suppress minority voting is to impose mere inconveniences that deter minority votes. *Id.*

suppression.¹⁷¹ Next, the dissent argued against factor four, stating that the existence of alternate opportunities to vote are essentially irrelevant because section 2 only cares about whether the political processes are equally open to voters of all races.¹⁷² The House Report on section 2 directly addresses this point, stating that an election system would violate section 2 if minority citizens had a lesser opportunity than white citizens to use absentee ballots, for example.¹⁷³ In addressing factor two, the history and commonality factor, the dissent stated that “[t]he 1982 state of the world is no part of the [s]ection 2 test.”¹⁷⁴ The dissent addressed factor five—the state interests—by attacking the majority’s dismissal of the need for the closest possible fit between means and end.¹⁷⁵ It pointed out that while voter fraud and voter intimidation are certainly important state interests, Congress knew that those interests are easy to assert “groundlessly or pretextually in voting discrimination cases.”¹⁷⁶ A necessity test combats that by preventing election officials from circumventing section 2’s command not to discriminate.¹⁷⁷ The dissent implicitly addressed factor three throughout its discussion of the other factors by asserting that any voting restriction resulting in a racial disparity falls within the scope of section 2, which addresses any political process that is not equally open to voters of all races.¹⁷⁸

Lastly, the dissent analyzed H.B. 2023 and the OOP Policy under a straightforward application of section 2’s text, considering the totality of the circumstances. The dissent found that “both ‘result in’ members of some races having ‘less opportunity than other members of the electorate to participate in the political process and to elect a representative of their choice.’”¹⁷⁹ The dissent finds in accordance with the Ninth Circuit that the regulations should be invalidated under

171. *Id.* at 2363 (“[J]udges lack an objective way to decide which voting obstacles are ‘mere’ and which are not.”).

172. *Id.*

173. *Id.* (citing H.R. REP. NO. 97-227, at 31, n.106 (1981)).

174. *Id.* at 2363–64 (“Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber.”).

175. *Id.* at 2364.

176. *Id.* at 2365.

177. *Id.*

178. *Id.* at 2361–63.

179. *Id.* at 2366.

section 2 and concludes that the majority disregarded section 2 as written by Congress, overstepping its role as a judiciary.¹⁸⁰

II. ANALYSIS

Arizona's OOP Policy and H.B. 2023 should have been invalidated under the results test of section 2 of the VRA because the *Brnovich* factors and the Senate factors require a finding that the Arizona laws have a discriminatory impact based on the totality of the circumstances.¹⁸¹ The factors set out by *Brnovich*—"the size of the burden imposed," the size of disparities on minority groups, and strength of the state's interest—support invalidating the Arizona policies.¹⁸² Additionally, among the Senate Factors, the history of discrimination, effects of discrimination in other areas, and the tenuousness of the justification for the challenged voting practices provide the strongest support for the conclusion that the policy and law are invalid.¹⁸³ Furthermore, H.B. 2023 is also invalid under the intent test of section 2, which is coextensive with a violation of the Fifteenth Amendment.¹⁸⁴ Under the two-step, burden-shifting framework of the intent test, discrimination was a motivating factor in the enactment of H.B. 2023, which prohibited minorities from relying on third parties to cast their votes, and the bill would not have been enacted without that discriminatory intent.¹⁸⁵

This Part first evaluates the *Brnovich* factors, noting how they change the considerations in the totality of the circumstances test and discussing weaknesses in the factors themselves. Next, this Part evaluates the OOP Policy and H.B. 2023 under the results test of the VRA as modified by *Brnovich*, finding that both measures cause

180. *Id.* at 2372–73 (“Maybe some think that vote suppression is a relic of history . . . [b]ut Congress gets to make that call . . . [b]ecause it has not done so, this Court’s duty is to apply the law as it is written.”).

181. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir. 2020) (en banc), *rev’d sub nom. Brnovich*, 141 S. Ct. 2321; *see also Brnovich*, 141 S. Ct. at 2336, 2338 (listing five “guideposts” to use in the analysis).

182. *Brnovich*, 141 S. Ct. at 2338–40.

183. Factors three and four are not addressed because the OOP Policy implicates neither “unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group” nor the “candidate slating process.” *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (quoting S. REP. NO. 97-417, at 28–29 (1982)).

184. *See Chisom v. Roemer*, 501 U.S. 380, 392–93 (1991).

185. *Hobbs*, 948 F.3d at 1042.

discrimination in violation of the results test. The Part then turns to the intent test, finding that Arizona enacted H.B. 2023 with discriminatory intent in violation of the intent test and the Fifteenth Amendment. *Brnovich* incorrectly interpreted the VRA of 1965, leading to a set of flawed factors and a result that did not invalidate discriminatory legislation.

A. *Section 2 Results Test: Totality of the Circumstances as Re-Defined by Brnovich*

The results test of section 2 targets facially neutral legislation that leads to discrimination in violation of the VRA.¹⁸⁶ The test implements a totality of the circumstances analysis based primarily on the factors listed in *Brnovich*, and, to a lesser extent, the Senate Factors, to determine whether the statistical disparity is linked to social and historical conditions of discrimination.¹⁸⁷ The recent *Brnovich* decision shifted the emphasis on what to consider in determining whether a voting regulation has discriminatory results, eliminating the two-step framework in favor of solely using a totality of the circumstances analysis.¹⁸⁸ This Section shows how the OOP Policy and H.B. 2023 are unlawful vote denial measures when analyzed using the framework laid out in *Brnovich*. Both the OOP Policy and H.B. 2023 are thus invalid under the VRA because they disparately impact minority voters and are sufficiently linked to social and historical conditions of discrimination in Arizona.

1. *Analysis of the Brnovich factors*

The majority in *Brnovich* presents a non-exhaustive list of five factors to be used in the totality of the circumstances test required by section 2.¹⁸⁹ The Court made clear that any circumstance that has a logical relationship to equality in voting rights can be considered.¹⁹⁰ This Section will analyze each factor in turn.

The first factor, which examines the burden imposed by a challenged voting rule, is problematic because it fails to define what

186. Tokaji, *supra* note 34, at 708.

187. *Veasey v. Abbott*, 830 F.3d 216, 245 & n.35 (5th Cir. 2016); *see Brnovich*, 141 S. Ct. at 2338–40.

188. The majority eliminates the first step, requiring a threshold showing of a disparate impact because it reasons that disparate impact is but one of the factors that should be considered in the totality of the circumstances. *Brnovich*, 141 S. Ct. at 2341.

189. *Id.* at 2338–40.

190. *Id.* at 2338.

exactly a “mere inconvenience” or “usual burden” is and does not account for the fact that what is reasonable for one voter may be much more difficult for another.¹⁹¹ While established jurisprudence makes clear that some level of burden in voting is acceptable, this factor fails to clarify the threshold or how judges should make that determination.¹⁹² When Congress enacted the VRA, its goal was to eradicate “subtle, as well as [] obvious” voter suppression.¹⁹³ A regulation that exceeds an acceptable burden is certainly a form of subtle voter suppression and without a way to delineate that standard, judges will be left with enormous discretion to decide for themselves.

Second, the majority’s contention that “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982” is deeply flawed because it suggests that we should preserve the standards acceptable decades ago.¹⁹⁴ It undermines the purpose of section 2, which was meant to disrupt the status quo by eradicating discriminatory voting rules that were present at the time.¹⁹⁵ Not only does this factor force a court to measure a current law against an outdated standard practice, but it also invalidates the rationale of Senate Factors that consider changes over time, including the history of discrimination and the ways in which officials have responded to the needs of minorities.¹⁹⁶

Third, the majority’s reliance on the size of any disparities in a law’s impact on members of different racial or ethnic groups is correct in part. However, the opinion fails to provide adequate detail regarding a threshold where a disparity becomes unacceptable.¹⁹⁷ Logistically, it is true that there is a correlation between the number of votes being suppressed and the urgency in rectifying the situation. The majority correctly states that when there are small differences, they “should not

191. *Id.* at 2363; *Brnovich*, 141 S. Ct. at 2342 (Kagan, J., dissenting).

192. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008); *see also* *Storer v. Brown*, 415 U.S. 724, 730 (1974) (noting that as a practical matter, regulations are necessary to ensure fair and honest elections and prevent chaos from consuming democratic processes).

193. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).

194. *Brnovich*, 141 S. Ct. at 2338.

195. *Id.* at 2363–64 (Kagan, J., dissenting) (citing *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000)) (asserting that if the status quo abridges the right to vote, it must be changed).

196. See S. REP. NO. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207.

197. *Brnovich*, 141 S. Ct. at 2339.

be artificially magnified.”¹⁹⁸ However, where the percentage is drawn from drastically changes the conclusion. The concurring and dissenting opinions in the case of *Crawford v. Marion County Election Board*,¹⁹⁹ which is about a voter ID law, are illustrative of the need to frame statistics carefully.²⁰⁰ *Crawford* addresses the burden that a voting regulation imposes on voters.²⁰¹ Justice Scalia looked at the percentage of voters burdened among the general population, which made the burden seem very small proportionally.²⁰² By contrast, Justice Breyer examined the percentage of voters burdened within the subgroup that could be affected, namely, “those eligibles voters who lack a driver’s license or other statutorily valid form of photo ID.”²⁰³ That number is much larger. This example seeks to show that in *Brnovich*, the majority’s benchmark of size of the disparity is important but incomplete because it does not specify what the disparity should be measured against. Measuring the number of voters actually burdened against the number of voters who could be affected would accurately portray the impact of the laws.

The fourth factor the majority considers is “the opportunities provided by a State’s entire system of voting when assessing the burden imposed by [the] challenged provision,” which disregards the statutory goals of the VRA in targeting every process that diminishes political openness to different races regardless of other opportunities to vote.²⁰⁴ While true that when there are more ways to vote, there are more possibilities a given voter will find one way that works for them, this factor does not take into consideration the requirements of the VRA, which states that political processes in a state to be “equally open” to voters of all races.²⁰⁵ The House Report on section 2, as reiterated by the dissent in *Brnovich*, explains that “an election system would violate [s]ection 2 if minority citizens had a lesser opportunity than white citizens to use absentee ballots.”²⁰⁶ To use the Arizona voting restrictions as an example, the very fact that they make voting less

198. *Id.*

199. 553 U.S. 181 (2008).

200. *Id.* at 185.

201. *Id.* at 197.

202. *Id.* at 205, 209 (Scalia, J., concurring).

203. *Id.* at 237 (Breyer, J., dissenting).

204. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2339 (2021).

205. *Id.* at 2363 (Kagan, J., dissenting); 52 U.S.C. § 10301(b).

206. *Brnovich*, 141 S. Ct. at 2363 (Kagan, J., dissenting) (citing H.R. REP. NO. 97-227, at 31, n.105 (1981)).

accessible to minority voters than to white voters means that the minority voters have “less opportunity than other members of the electorate to participate in the political process.”²⁰⁷

The fifth and final factor—the strength of the state interests served by a challenged voting rule—is similarly flawed because the VRA does not create a balancing test, but rather it asks the question of whether a voting restriction on its own is discriminatory.²⁰⁸ The majority uses prevention of voter fraud as an example of a legitimate state interest that would support a given voting regulation.²⁰⁹ Allowing a state interest to weigh in the consideration is at odds with precedent, which provides that a discriminatory voting regulation must be invalidated, no matter how persuasive the state interest is, if a less biased law would not significantly impair the interest.²¹⁰ Taking the Court’s example, if the concern is voter fraud and there is a potential law that is less biased, a court should not give weight to the state justification when determining whether the current law is discriminatory.²¹¹

These five factors are replete with both flawed reasoning and incomplete guidance for judges to follow, but the majority has set them out as precedent for deciding future vote denial cases. Therefore, they must be considered in the totality of the circumstances test along with any other factor that has logical bearing on a voting law’s equal openness and equal opportunity.²¹²

2. *Arizona’s OOP Policy analyzed using the totality of the circumstances under the results test*

Under the results test, even as modified by *Brnovich*, Arizona’s OOP Policy violates section 2 of the VRA. This Section shows that the policy of discarding out of precinct ballots disparately leads to minorities’ votes not being counted and illustrates that under the totality of the circumstances standard, the OOP Policy is unconstitutional. Of the *Brnovich* factors, the size of the burden imposed, the size of the resulting disparities, and the strength of the state interests support invalidating the OOP Policy. Additionally, several Senate Factors are

207. § 10301(b); *Brnovich*, 141 S. Ct. at 2363 (Kagan, J., dissenting).

208. *Brnovich*, 141 S. Ct. at 2339 (majority opinion).

209. *Id.* at 2340.

210. *Id.* at 2364 (Kagan, J., dissenting) (citing *Houston Laws.’ Assn. v. Att’y Gen. of Tex.*, 501 U.S. 419, 428 (1991)).

211. *Id.*

212. *See id.* at 2338 (majority opinion) (acknowledging that *Brnovich* factors are not an exhaustive list of circumstances to consider in relation to a particular voting law).

important to provide a complete context.²¹³ Together, these factors show that the OOP Policy resulted in racial discrimination. Therefore, the law should have been invalidated on the grounds that it does not comply with the standards set forth in the VRA.²¹⁴

Factor one of the *Brnovich* factors weighs in favor of invalidating the OOP Policy because the effort of locating and traveling to the correct precinct is a substantial burden. This is tied to the Senate Factor that addresses the effects of discrimination in other areas on minorities' access to voting, which was listed in *Brnovich* as one that is relevant to vote denial cases.²¹⁵ Findings in the district court show “[r]acial disparities between minorities and non-minorities in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona.”²¹⁶ For example, “minority voters in Arizona have disproportionately higher rates of residential mobility.”²¹⁷ The high residential mobility of minorities makes it more difficult for them to cast their votes in the correct precinct, which supports the conclusion that the OOP Policy has a discriminatory result.²¹⁸ *Brnovich* discounts this by arguing in the pertinent part that even if voters go to the wrong precinct on election day, there are poll workers there who are trained to redirect voters to the correct precinct.²¹⁹ However, if someone were

213. See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (noting that a voting law's interaction with social and historical conditions is essential to section 2 claims). The history of discrimination in Arizona (factor one), the effects of discrimination on minorities' access to voting in other areas (factor five), and how tenuous the justification for the OOP Policy is (factor nine) are the most pertinent factors, given the nature of the claim. See *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1033 (9th Cir. 2020) (en banc), *rev'd sub nom. Brnovich*, 141 S. Ct. 2321. Additionally, the other factors provide “helpful background context.” *Id.* (quoting *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 555 (6th Cir. 2014)).

214. See 52 U.S.C. § 10301.

215. Minorities clearly “bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” *Gingles*, 478 U.S. at 37 (quoting S. REP. NO. 97-417, at 29 (1982)); *Brnovich*, 141 S. Ct. at 2340.

216. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 876 (D. Ariz.), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *rev'd sub nom. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc), *rev'd sub nom. Brnovich*, 141 S. Ct. 2321.

217. *Id.* at 872.

218. The statistics from the 2012 and 2016 elections show that OOP voting is concentrated in densely populated precincts that are disproportionately populated with minority renters who move frequently. *Hobbs*, 948 F.3d at 1004.

219. *Brnovich*, 141 S. Ct. at 2344.

to wait in line for many hours, as was the case in 2016, the voter would not even talk to the polling director until they reached the front of the line.

Factor three, the size of the disparity, is important because it places a bare statistic in the proper historical context, thus serving to strengthen the statistical showing of discrimination.²²⁰ The OOP Policy is a facially neutral law because it does not specifically target a group of people; however, it disproportionately causes minority voters' ballots to be discarded.²²¹ Minorities vote out of precinct at significantly higher rates based on the statistics from the 2012 and 2016 elections, which show that OOP voting is concentrated in densely populated precincts that are disproportionately populated with minority renters who move frequently.²²² For example, in Pima County, the 2012 general election showed that "the rate of OOP ballots was 123 percent higher for Hispanic voters, 47 percent higher for [Native American] voters, and 37 percent higher for [Black] voters," as compared to white voters.²²³ In Maricopa County in 2016, the rate of OOP ballots was "twice as high for [Hispanic] voters, 86 percent higher for [Black] voters, and 73 percent higher for Native American [voters]."²²⁴ This shows that in context, there is a substantial racial disparity.

Factor five, the strength of the state interests, is similar to the Senate Factor that addresses the tenuousness of the justification for the challenged voting practice.²²⁵ This factor is particularly persuasive because Arizona lacked a strong state interest tied to the OOP Policy. Arizona defends the OOP Policy on the ground that discarding OOP

220. *Hobbs*, 948 F.3d at 1012. "[A] bare statistical showing of disproportionate *impact* on a racial minority" is insufficient because section 2 requires a "causal connection between the challenged voting" restriction and the resulting statistic. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997).

221. *See supra* notes 59–61 and accompanying text (stating that the results test shows that facially neutral laws can be discriminatory). *But see* Brief for State Petitioners at 16, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257) (disagreeing that these regulations violate section 2); *supra* notes 145–47 and accompanying text (summarizing that the OOP Policy imposed a disparate burden on minority voters who are more likely to use third-party ballot collection services and vote out of precinct).

222. *Hobbs*, 948 F.3d at 1004.

223. *Id.*

224. *Id.* (quoting *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 840 (D. Ariz.), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *rev'd sub nom. Hobbs*, 948 F.3d 989, *rev'd sub nom. Brnovich*, 141 S. Ct. 2321).

225. *See Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (citing S. REP. NO. 97-417, at 29 (1982)).

ballots better allocates resources and personnel while ensuring that every person votes for the correct issues.²²⁶ While perhaps reasonable in the abstract, the justification is undermined by the fact that counting OOP ballots would be “administratively feasible” in practice, as found by the district court.²²⁷ The integrity of the precinct-based system could remain intact even if the state counted or partially counted the OOP ballots.²²⁸ For example, if a voter walks to the nearest polling place that is not in their assigned precinct, the state could count their vote for president and governor but strike their votes in the local races specific to that precinct.²²⁹ That way, voters could still exercise their right to participate in the political process. Additionally, the “only plausible justification”²³⁰ would have been if counting OOP ballots were costly and delayed elections, which was not mentioned by the district court.²³¹ Taken together, these factors provide an adequate link from the disparate impact on minorities to the social and historical conditions of discrimination in Arizona.²³²

Factors two and four are not particularly persuasive in showing that the OOP Policy is discriminatory; however, neither the standard practices in 1982 nor alternate voting methods are important to show that a given regulation is discriminatory.²³³ The question of whether the OOP Policy unequally affects minority citizens’ opportunity to cast a vote is unaffected by the standard practices in 1982.²³⁴ Because the OOP Policy makes voting less accessible to minority voters than to white voters, minorities by definition have “less opportunity than other

226. *Hobbs*, 948 F.3d at 1030.

227. *Hobbs*, 948 F.3d at 1031 (stating that the only plausible justification for the OOP policy would be the delay and expense of counting OOP ballots).

228. *Id.*

229. See Complaint at 8, ¶ 31, *League of Women Voters of Ariz. v. Reagan*, No. 2:18-cv-02620-DMF (D. Ariz. Aug. 18, 2018) (stating that the OOP Policy disenfranchises voters by not counting their votes in races for which they are eligible to vote).

230. *Hobbs*, 948 F.3d at 1031.

231. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 860 (D. Ariz. 2018), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d sub nom. Hobbs*, 948 F.3d 989, *rev’d sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

232. See *Hobbs*, 948 F.3d at 1032 (holding that the district court erred in holding that under the totality of the circumstances, the Senate Factors did not weigh in favor of the plaintiff).

233. See *supra* notes 90–91 (noting that other factors, not including factors two and four, are more persuasive and relevant to vote denial claims).

234. The majority does not address how the OOP Policy differs from the standard practices in 1982 when applying the factors to the policy in *Brnovich*. *Brnovich*, 141 S. Ct. at 2343–46.

members of the electorate to participate in the political process”²³⁵ Therefore, while there may be a myriad of other ways to cast a vote, minorities are hindered by this policy.

In addition to the *Brnovich* factors, certain Senate Factors are needed to complete the totality of the circumstances analysis, namely, the history of discrimination, effects of discrimination in other areas, and the tenuousness of the justification for the challenged voting practices, some of which are discussed above as coextensive with the *Brnovich* factors.²³⁶ Because *Brnovich* left open the possibility to consider any relevant factor, a court can still weigh these factors into its analysis.²³⁷ Arizona has a long history of racial discrimination, dating back to “Manifest Destiny” and continuing through literacy tests.²³⁸ Notably, the majority lists this factor as one of the Senate Factors that relevant in a vote denial claim.²³⁹ The Department of Justice recognized this discrimination by issuing a total of thirty-two preclearance objections to proposed Arizona election procedures.²⁴⁰ For context regarding which states were subject to preclearance requirements, only nine states were fully covered jurisdictions, with an additional seven states

235. 52 U.S.C. § 10301(b); see *Brnovich*, 141 S. Ct. at 2363 (Kagan, J., dissenting) (explaining how a state that offers multiple ways to vote can still violate section 2 if any of the methods is less available to non-white voters than to white voters).

236. *Brnovich*, 141 S. Ct. at 2338 (“[A]ny circumstance that has a logical bearing on whether voting is ‘equally open’ and affords equal ‘opportunity’ may be considered.”); see *supra* notes 91–92 and accompanying text (explaining that certain factors are more persuasive in vote denial claims); see also *supra* notes 216–18 (discussing the link between *Brnovich* factor one and the effects of discrimination in other areas on minorities’ access to voting); *supra* notes 227–32 (discussing the link between *Brnovich* factor five and the tenuousness of the state’s justification).

237. *Id.* at 2338.

238. *Hobbs*, 948 F.3d at 1017–26 (describing how early Arizona politicians passed discriminatory laws that stemmed from their belief that “Anglos [would] triumph in Arizona over the earlier Native American and Hispanic civilizations”) (citation omitted); Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 332 (2011) (“American history was dominated by a slow but steady advance of American interests and empire across the continent under the principles of the Doctrine [of Discovery] . . . ‘Manifest Destiny’ is the phrase coined in 1845 to describe this predestined and divinely inspired expansion.”).

239. See *Brnovich*, 141 S. Ct. at 2340 (recognizing the value of considering historical discrimination and its persisting effects even if other factors are more directly relevant).

240. Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act* 61, https://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf [<https://perma.cc/J93H-4BCX>].

that had covered counties or townships.²⁴¹ Arizona being included in the small portion of the country that was subject to preclearance requirements shows the significance the Department of Justice needing to issue preclearance objections.

Senate Factors like racial polarization, racial appeals in political campaigns, elections of minorities to political offices, and responsiveness of elected officials to minority needs also add support that the OOP policy is discriminatory.²⁴² Arizona's voting patterns are racially polarized.²⁴³ The 2016 exit polls showed polarized voting along racial lines, and the Arizona Independent Redistricting Commission found that "at least one congressional district and five legislative districts clearly exhibited racially polarized voting."²⁴⁴ Additionally, racial appeals in political campaigns have often been used in Arizona.²⁴⁵ In one instance, a white candidate asserted that he "looked like a governor," as opposed to his opponent, who was Latino.²⁴⁶ In the 2014 gubernatorial race, candidate Andrew Thomas "ran an advertisement describing himself as 'the only candidate who has stopped illegal immigration'" and included a crossed out Mexican flag image.²⁴⁷ Additionally, a state superintendent campaign included a white candidate describing himself as "one of us" while opposing bilingual education and speaking out against an influential Latino civil rights organization.²⁴⁸ Another political video opposing third-party ballot collection depicted a Latino man, "characterized as a 'thug,'" stuffing the ballot box.²⁴⁹ The plethora of examples shows the

241. *Id.* at 51 n.19. The states covered in their entirety were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The partially covered states were California, Florida, New York, North Carolina, South Dakota, Michigan, and New Hampshire. *Id.*

242. *Brnovich*, 141 S. Ct. at 2340.

243. *See Exit Polls: Arizona President*, CNN (Nov. 11, 2016, 7:31 AM), <https://www.cnn.com/election/2016/results/exit-polls/arizona/president> [<https://perma.cc/XWE5-BSB8>] (reporting that 54% of white Arizona voters cast ballots for President Trump in the 2016 presidential election, whereas only 31% of "Latin[x]" voters did the same); *Hobbs*, 948 F.3d at 1026.

244. *Hobbs*, 948 F.3d at 1027.

245. *Id.* at 1028 (citing the district court's finding).

246. *Id.* In that race, the white candidate's opponent's name was Raul Castro. *Id.* In the same race, a newspaper published a picture of Fidel Castro with a headline that read "Running for governor of Arizona," in reference to candidate Raul Castro. *Id.*

247. *Id.* at 1029.

248. *See id.* at 1028–29 (describing the campaign of John Huppenthal, who was running for State Superintendent of Public Education).

249. *Id.* at 1029.

entrenchment of race-based messaging in political campaigns in Arizona.

The low number of minorities in public office is also one of the Senate Factors that contributes to the results test analysis.²⁵⁰ In Arizona, minorities hold only 25% of public offices, despite comprising 44% of the population.²⁵¹ Additionally, no Native American or Black candidate has ever been elected to serve Arizona in the House of Representatives, and no Native American, Black, or Latino candidate has ever represented Arizona in the United States Senate. Among statewide offices, only two people of minority status have been elected in Arizona since the passage of the VRA, and no Native American candidate has ever been elected.²⁵²

Lastly, officials' lack of responsiveness to the needs of minorities is telling.²⁵³ Arizona's lack of public funding to services that minorities depend on, such as children's health care insurance and public education, indicate that Arizona has significantly underserved its minority population.²⁵⁴ This reflects the national statistics showing that the largest beneficiaries of poverty-reduction programs are white people, despite Black and Latino people having higher rates of poverty.²⁵⁵

The OOP Policy is invalid under the VRA because the policy causes inequality in voting opportunities between white and minority

250. *Id.*; Factor seven of the Senate Factors asks whether minority members have been elected in the jurisdiction. S. REP. NO. 97-417, at 28–29 (1982).

251. *Hobbs*, 948 F.3d at 1029.

252. *Id.*

253. *Id.* at 1029–30. Lack of responsiveness to minority needs is factor eight of the Senate Factors. S. REP. NO. 97-417, at 28–29 (1982).

254. Forty-six states have better health insurance coverage for children than Arizona, which was the last state to join the Children's Health Insurance Program. *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 740 (9th Cir. 2018) (Thomas, C.J., dissenting), *rev'd sub nom. Hobbs*, 948 F.3d 989, *rev'd sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). Additionally, Arizona's public schools are ranked fiftieth in per pupil spending. *Id.*

254. See Respondents' Brief in Opposition to Petitions for Writ of Certiorari at 10, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257) (explaining that Native American, Latino, and Black people are over-represented among OOP voters).

255. Tracy Jan, *The Biggest Beneficiaries of the Government Safety Net: Working-Class Whites*, WASH. POST (Feb. 16, 2017), <https://www.washingtonpost.com/news/work/wp/2017/02/16/the-biggest-beneficiaries-of-the-government-safety-net-working-class-whites> [<https://perma.cc/BTJ3-VLUK>].

communities.²⁵⁶ The totality of the circumstances as guided by the *Brnovich* factors and secondarily by the relevant Senate Factors show that the disparate impact of the OOP Policy on minority voters is linked to the social and historical conditions of discrimination.²⁵⁷ The majority in *Brnovich* reached a different conclusion. Now that the law has been upheld by the Supreme Court, Arizona must find a way to protect the voters whose ballots are thrown out due to confusing and often-changing precincts.²⁵⁸ Countywide vote centers are the alternate option to the precinct method in Arizona, and they allow voters anywhere in the county to cast their votes, thus diminishing the need for voters to vote in a pre-assigned precinct.²⁵⁹ The precinct method is still widely used in Arizona, but counties are increasingly switching to vote centers.²⁶⁰ If this trend continues, the OOP Policy will be increasingly irrelevant and minority voters will be protected from a law that curtails their ability to engage with the electoral process.

3. *Arizona's H.B. 2023 analyzed using the totality of the circumstances under the results test*

This Section will demonstrate that Arizona's H.B. 2023 unlawfully prohibits third-party ballot collection under section 2 of the VRA as correctly interpreted.²⁶¹ An analysis of the *Brnovich* factors and the same Senate Factors as used for the OOP Policy show that H.B. 2023 feeds a political process that is not equally open to minorities.²⁶² Specifically, of the *Brnovich* factors, the size of the burden imposed (factor one), the size of the disparities (factor three), and the strength of the state interests (factor five) support a finding that H.B. 2023 is

256. See Respondents' Brief in Opposition to Petitions for Writ of Certiorari at 10, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257) (explaining that Native American, Latino, and Black people are over-represented among OOP voters).

257. Senate Factors one, two, five, six, seven, eight, and nine are all used to support the link. *Hobbs*, 948 F.3d at 1032.

258. See *supra* notes 110–16 and accompanying text (discussing frequent changes in precinct locations and high residential mobility as contributing to high rate of OOP ballots).

259. See *supra* note 107 and accompanying text (noting that the majority of Arizona counties use precinct voting).

260. *Brnovich*, 141 S. Ct. at 2367 (2021) (Kagan, J., dissenting) (“Arizona counties have increasingly abandoned precinct-based voting . . . so the out-of-precinct rule has fewer votes to operate on”).

261. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1037 (9th Cir. 2020) (en banc), *rev'd sub nom. Brnovich*, 141 S. Ct. 2321.

262. *Id.* at 1037 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

invalid under section 2. Several Senate Factors including the history of discrimination add support.

Again, the *Brnovich* factors support a finding that H.B. 2023 is discriminatory, contrary to what the majority found. The size of the burden imposed (factor one) is large, which is shown through evidence examining the effects of discrimination in other areas on minorities' access to voting.²⁶³ Because members of minority communities are less likely to own a vehicle and are more likely to rely on public transportation, the “bizarre placement” of polling locations acutely impacts minorities.²⁶⁴ Additionally, minorities face higher rates of inflexible work hours and are more likely to rely on income from hourly wages, making it difficult to find time to vote, especially when it takes hours to wait in line.²⁶⁵ The lack of access to reliable mail is a large concern particularly for Native Americans and Latino people who are more likely to give their ballots to a volunteer as a result.²⁶⁶ These circumstances stem from a history of discrimination and have the effect of making it more difficult to vote without the use of third-party collection system.²⁶⁷

263. This factor was listed in *Brnovich* as one that is relevant to vote denial cases. *Brnovich*, 141 S. Ct. at 2340; see Sarina Viji, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, A.B.A.: HUMAN RIGHTS MAG. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout [https://perma.cc/U596-MDHM] (citing voter ID laws, discriminatory polling place distribution, lack of translation to native languages, and illiteracy rates as factors that limit minorities' access to the political process).

264. See Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s> [https://perma.cc/6NWL-TTLF] (explaining that minorities are more likely to use public transit); see also *Hobbs*, 948 F.3d at 1002 (relying on expert Dr. Rodden's commentary on polling locations).

265. *Hobbs*, 948 F.3d at 1028, 1034; see also Lonnie Golden, *Limited Access: Disparities in Flexible Work Schedules and Work-at-Home*, 29 J. FAM. & ECON. ISSUES 86, 92 (2008) (citing the disparities in flexible work schedules for minorities); *Characteristics of Minimum Wage Workers, 2020*, BUREAU LAB. STAT. REP. 1091 (2021) (explaining that while 2% of Black Americans make below minimum wage, only 1% of white Americans do); Roth, *supra* note 3 (discussing the increase of voting wait times in Maricopa County, Arizona).

266. *Supra* notes 126–29 and accompanying text (noting that many Native Americans living on reservations do not have access to mail services at home and in one Arizona Latino community, a major highway separates residents from the closest post office).

267. In urban neighborhoods, minorities frequently have unsecure mailboxes and face mail theft. Rich Shapiro, *Is Mail Theft Surging in the U.S.? Postal Service Inspectors Don't Know*, NAT'L BROAD. CO. (Sept. 27, 2020, 6:00 AM), <https://www.nbcnews.com/news/us->

Factor three is the size of the disparity, which, when placed in the correct context, is telling as to its importance in the analysis. Before H.B. 2023 was enacted, third parties collected minority ballots at a rate disproportionate to white voters.²⁶⁸ Numerous witnesses presented evidence showing that thousands of early ballots were collected from minority voters by third parties.²⁶⁹ These accounts undermine the district court's contention that this evidence was "circumstantial and anecdotal" and therefore insufficient to establish a disparity under section 2.²⁷⁰ Minority voters cast thousands of ballots using third-party ballot collection before H.B. 2023 was enacted, meaning that those voters no longer have available the method of voting they relied upon.²⁷¹ The district court's comparison of the number of minority ballots that third parties collected to the number of all ballots cast without the assistance of a third-party is overbroad.²⁷² Instead, the more accurate comparison is the number of ballots cast by minorities using

news/mail-theft-surg-ing-u-s-postal-service-inspectors-don-t-n1241179 [https://perma.cc/4ZVJ-Y6TB] (stating that mail theft is largely dictated by "geography and population density" with criminals in large cities targeting collection boxes that amass large amounts of mail and communities with low income). This, in combination with the lack of transportation and lack of flexibility in work hours and childcare, makes it more difficult for minorities to return early ballots without the assistance of third parties. *Hobbs*, 948 F.3d at 1034; see Golden, *supra* note 265, at 92 (citing that minorities have less access to flexible work schedules); Anderson, *supra* note 264 (explaining that minorities are more likely to use public transit). Additionally, rural, minority voters "disproportionately lack access to outgoing mail." *Hobbs*, 948 F.3d at 1034 (holding that the district court agreed in its assessment that this factor strongly weighed in favor of the DNC).

268. *Arizona Ballot Collection and Out-of-Precinct Ballots*, DEMOCRACY DOCKET (Feb. 18, 2021), <https://www.democracydocket.com/news/arizona-ballot-collection-and-out-of-precinct-ballots> [https://perma.cc/48YN-8Q95] (noting that ballot collection among Latino and Native American communities was popular due to activist support in collection and limited access to mailboxes or post offices on reservations, respectively). There is no evidence that white voters significantly relied on ballot collection by third parties. *Hobbs*, 948 F.3d at 1032.

269. *Hobbs*, 948 F.3d at 1033 (noting that the evidence came from individuals who had acted as third-party ballot collectors and supervisors as well as those who had witnessed ballot collection by others).

270. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 868 (D. Ariz. 2018), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *rev'd sub nom. Hobbs*, 948 F.3d 989, *rev'd sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

271. *Hobbs*, 948 F.3d at 1005.

272. *Reagan*, 329 F. Supp. 3d at 870–71 (stating that because most voters do not use ballot collection services, "it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities").

third parties as compared to white voters who used third-party ballot collection.²⁷³ Moreover, the district court's ratio does not take into account the thousands of minority voters who did in fact previously use third-party ballot collection when it was an option.²⁷⁴ The disparity presented highlights the "denial or abridgement of the right" of Native American, Latino, and Black citizens "to vote 'on account of race or color.'"²⁷⁵

The fifth factor, the state's justification, weighs against the state because the link between enacting H.B. 2023 and the justifications of preventing voter fraud, as well as increasing public confidence in elections, is tenuous.²⁷⁶ Neither of the two justifications set forth for H.B. 2023 support its enactment.²⁷⁷ The first justification is the need to combat voter fraud.²⁷⁸ However, third-party ballot collection existed for many years before H.B. 2023 without any evidence linking the practice to voter fraud.²⁷⁹ Moreover, the text of H.B. 2023 specifically prohibits *non*-fraudulent ballot collection, which subverts the assertion that it was created to combat fraud.²⁸⁰ A second justification set forth is that banning ballot collection improves and maintains public confidence, which is based on the Commission on Federal Election Reform's recommendation to ban third-party ballot collection; however, this recommendation is based on a fraud case in a different state.²⁸¹ Furthermore, the results test's fact-specific requirement undermines

273. See *Hobbs*, 948 F.3d at 1033 ("[T]he number of ballots collected by third parties from minority voters surpasses any de minimis number.").

274. See *id.* at 1032 (establishing that a large number of early ballots were collected from minority voters by third parties).

275. *Id.* at 1032 (quoting 52 U.S.C. § 10301(a)).

276. See *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (citing S. REP. NO. 97-417, at 28-29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 207); see also *Hobbs*, 948 F.3d at 1035-37.

277. *Hobbs*, 948 F.3d at 1035.

278. *Id.*

279. Additionally, ballot collection-related fraud was already criminalized in Arizona, and those laws are still in effect. ARIZ. REV. STAT. ANN. § 16-1005(A)-(F) (2021); *Hobbs*, 948 F.3d at 1035-36.

280. *Hobbs*, 948 F.3d at 1036.

281. *Id.* at 1036-37. The facts present in the North Carolina case are not parallel to Arizona where "third-party ballot collection has had a long and honorable history." *Id.* See generally Alan Blinder, *Election Fraud in North Carolina Leads to New Charges for Republican Operative*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html> [https://perma.cc/NAE3-GHUG] (describing the election fraud in North Carolina).

the argument because in the context of Arizona, third-party ballot collection has been lawfully relied on without evidence of fraud.²⁸²

The standard practices in 1982 (factor two) and alternate voting methods (factor four) are largely unpersuasive to show that H.B. 2023 is or is not discriminatory due to the flaws in the factors themselves.²⁸³

As with the OOP Policy, several Senate Factors, coupled with the *Brnovich* factors, complete the totality of the circumstances analysis for H.B. 2023.²⁸⁴ For the Senate Factor regarding the history of discrimination—one of the factors that the Court indicated has import on vote denial cases—the development of H.B. 2023 stems from the same history of racial discrimination in voting as laid out above.²⁸⁵ Arizona’s preclearance restrictions when section 5 was still in force highlight the discriminatory history. When Arizona was still under the section 5 preclearance requirements, it withdrew a request to pass a similar ballot collection ban, likely because that provision “had the purpose or would have the effect of denying minorities the right to vote.”²⁸⁶

Additionally, Senate Factors like the election of minorities to political offices and the number of minorities elected to political office provide secondary support to the law’s unconstitutionality. Regarding polarized voting patterns, H.B. 2023 emerged in the context of racially polarized voting.²⁸⁷ Former Arizona State Senator Don Shooter noted in a deposition that he was motivated to pass S.B. 1412—the predecessor to H.B. 2023—to eliminate ballot collecting in part because the Democrats relied on it as a GOTV strategy.²⁸⁸ In other

282. *Hobbs*, 948 F.3d at 1036–37; see *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986) (quoting *White v. Regester*, 412 U.S. 755, 769–70 (1973)) (requiring an “intensely local appraisal”).

283. See *supra* notes 233–35 and accompanying text about the OOP Policy and these factors.

284. The same Senate Factors used to analyze the OOP Policy provide the requisite support to show that H.B. 2023 is invalid under the results test. *Id.* at 1033–34 (“[M]uch of our analysis of the Senate Factors for Arizona’s OOP policy applies with equal force to the factors for H.B. 2023.”).

285. See *supra* text accompanying notes 238–40 (presenting Arizona’s discriminatory history).

286. *Hobbs*, 948 F.3d at 1034 (stating that S.B. 1412 had a provision found to intentionally target Latino voters).

287. *Id.*

288. Moreover, S.B. 1412 was introduced following a “close, racially polarized election.” *Id.* at 1034; *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 879

words, legislators voted for H.B. 2023 when Senator Shooter’s motivation behind H.B. 2023 was specifically to undermine a GOTV method used by Democrats to target minority voters, who overwhelmingly vote for democratic candidates.²⁸⁹ The existence of racial appeals in political campaigns also suggest that H.B. 2023 is discriminatory.²⁹⁰ Evidence presented at the district court showed that Senator Shooter’s allegations, in combination with a political video, sought to convince the electorate that ballot collection would lead to fraud.²⁹¹ As discussed previously, the factor addressing officials’ responsiveness to the needs of minorities suggest H.B. 2023 is invalid under section 2, as the same disturbing examples apply in both analyses.²⁹² Regarding the number of minorities in public office, there is no clear-cut connection between H.B. 2023 and the election of minorities.²⁹³ However, the bill is “likely to have a pronounced effect in rural counties with significant American Indian and Hispanic populations who disproportionately lack reliable mail and transportation services, and where a smaller number of votes can have a significant impact on election outcomes.”²⁹⁴ The effect is less widespread—and therefore, this factor does not weigh as heavily in the totality analysis—but in rural counties, there is a connection between lack of ballot connection and the election of minorities to public office.²⁹⁵ Therefore, the analysis of these factors shows that under the totality of the circumstances, H.B. 2023 leads to minority citizens having “less opportunity than other members of the electorate to

(D. Ariz.) (citing Tr. 1061-63, 1200, 1687-88, 2158-62; Ex. 89 at 24; Ex. 91 at 52-55; Ex. 92 at 2-10; Ex. 93 at 2; Shooter Dep. at 117:5-16), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d sub nom. Hobbs*, 948 F.3d 989, *rev’d sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2349 (2021); *supra* note 120 and accompanying text.

289. *Reagan*, 329 F. Supp. 3d at 879.

290. *Hobbs*, 948 F.3d at 1035 (noting that the district court also assessed this factor to be in favor of the DNC).

291. *Id.*; *see infra* notes 314–21 and accompanying text (discussing the fraud allegations).

292. *See supra* notes 181–83 and accompanying text (discussing how H.B. 2023 is invalid under section 2).

293. When a voter casts an OOP vote, some votes may be improper for local elections, but their votes for statewide or national office are never improperly cast. *Hobbs*, 948 F.3d at 1029. Therefore, there is a direct connection to disenfranchising minority votes for public office. *Id.* at 1035. Alternately, H.B. 2023 does not have a similar direct connection to elected officials. *Id.*

294. *Hobbs*, 948 F.3d at 1035.

295. *Id.*

participate in the political process and to elect representatives of their choice,”²⁹⁶ In sum, both the OOP Policy and H.B. 2023 are unlawful based on the recent factors set out in *Brnovich* with additional support from relevant Senate Factors.

B. The Intent Test Applied to Arizona’s OOP Policy and H.B. 2023

The intent test is a two-step burden-shifting framework that was developed at the inception of the VRA to invalidate legislation that was enacted based on discriminatory intent.²⁹⁷ *Brnovich* analyzed the claim of intentional discrimination under this familiar standard.²⁹⁸ This Section discusses how the OOP Policy does not violate the intent test due to lack of evidence showing that it was enacted with discriminatory intent. By contrast, there is sufficient evidence to prove that H.B. 2023 was enacted with discriminatory intent in violation of section 2, despite *Brnovich* drawing the opposite conclusion.

Under the two-step intent test, first, the plaintiff has the initial burden of proving that racial discrimination was a substantial or motivating factor behind the enactment of the law.²⁹⁹ Second, defendants have the opportunity to demonstrate that the law would have been enacted without that factor.³⁰⁰ The intent test of the VRA is the same test used to invalidate legislation under the Fifteenth Amendment of the Constitution; therefore, when a plaintiff prevails under the intent test of section 2, they automatically prevail under the Fifteenth Amendment as well.³⁰¹ Under the intent test only H.B. 2023 should have been invalidated because there is sufficient evidence to show that the bill was enacted with discriminatory intent. The OOP Policy would fail under the intent test due to the lack of evidence bringing to light any discriminatory intent during the passage of the law.

296. 52 U.S.C. § 10301(b).

297. *Supra* notes 91–93 and accompanying text.

298. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2349 (2021) (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977)).

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

300. *Id.*

301. *See Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (citing H.R. REP. NO. 89-439, at 23 (1965)) (stating that section 2 was considered coextensive with the standards of the Fifteenth Amendment from its inception).

1. *Arizona's OOP Policy analyzed under the intent test*

The OOP Policy does not satisfy the intent test because there is insufficient evidence to show that the policy was enacted with discriminatory intent. The *Brnovich* decision did not address whether the OOP Policy was enacted with discriminatory intent because the DNC correctly recognized that there is insufficient evidence to show that the policy was passed with discriminatory intent.³⁰² The lack of evidence surrounding the passage of the OOP Policy means it fails the ultimate question under the intent test, which is whether the legislature passed the law “because of,” and not “in spite of,” its discriminatory effect.³⁰³ Regardless, the results test and the intent test both implicate section 2; therefore, the OOP Policy remains unlawful because it satisfies the results test.³⁰⁴

2. *Arizona's H.B. 2023 analyzed under the intent test*

This Section analyzes the third-party ballot collecting prohibition of H.B. 2023 under the two-step framework, finding the ballot collecting restrictions imposed by H.B. 2023 should have been found unlawful under section 2's test for intentional discrimination.³⁰⁵ Additionally, because the intent test is considered coextensive with the standards in the Fifteenth Amendment, H.B. 2023 necessarily violates the Fifteenth Amendment as well.³⁰⁶ First, racial discrimination was a factor in enacting the law, and second, there is insufficient evidence to demonstrate that the law would have been enacted absent discriminatory intent.³⁰⁷ Therefore, *Brnovich* reached the incorrect conclusion in finding that H.B. 2023 is lawful under section 2 of the VRA and the Fifteenth Amendment.³⁰⁸

302. *Brnovich*, 141 S. Ct. at 2348 (addressing only H.B. 2023 with regard to the intent test).

303. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

304. *See Thornburg v. Gingles*, 478 U.S. 30, 44 n.8 (1986) (stating that plaintiffs may prevail on either test to succeed on a section 2 claim).

305. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (establishing the four guiding factors for the intent test); *supra* notes 91–93 and accompanying text (explaining the factors).

306. *See supra* note 100 and accompanying text (discussing the coextensive nature of the VRA and Fifteenth Amendment); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1042 (9th Cir. 2020) (en banc), *rev'd sub nom. Brnovich*, 141 S. Ct. 2321.

307. *Hobbs*, 948 F.3d at 1042.

308. *Id.*; *Brnovich*, 141 S. Ct. at 2350.

Under step one of the burden-shifting framework, the totality of the circumstances, as guided by the four factors from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,³⁰⁹ shows that intentional discrimination motivated the enactment of H.B. 2023.³¹⁰ *Brnovich* discusses the standard for the intent test stemming from *Arlington Heights*, but the majority does not address each factor, yet because the majority concludes that there is no discriminatory intent, he does not proceed to the second step.³¹¹ *Brnovich* used the *Arlington Heights* factors but reached the conclusion that H.B. 2023 was not enacted with discriminatory intent.³¹² However, proper application of the factors shows that part one of the two-step test is satisfied.

First, Arizona legislature's historical background shows longtime engagement in racial discrimination, disenfranchisement, and voter suppression.³¹³ Moreover, the specific history of H.B. 2023 reveals discriminatory purpose.³¹⁴ Senator Shooter led efforts to restrict third-party ballot collection, where he alleged third-party ballot fraud and alluded to the "racially-tinged" LaFaro video.³¹⁵ This factor weighs in favor of showing that H.B. 2023 was enacted with discriminatory intent.³¹⁶ *Brnovich* incorrectly agreed with the district court, stating that although Senator Shooter's allegations of ballot fraud were

309. 429 U.S. 252 (1977).

310. The four factors used in the totality of the circumstances analysis are (1) the historical background; (2) the sequence of events leading to enactment, including any substantive or procedural departures from the normal legislative process; (3) the relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group. *Vill. of Arlington Heights*, 429 U.S. at 266–68; *see supra* notes 91–93 and accompanying text (listing factors).

311. *Brnovich*, 141 S. Ct. at 2348–49.

312. *Id.* at 2349 (considering the historical background, sequence of events leading to HB 2023's enactment, departures from the normal legislative process, relevant legislative history, and the law's impact on different racial groups to conclude the Arizona legislature did not enact H.B. 2023 with discriminatory intent).

313. *Hobbs*, 948 F.3d at 1039; *see also supra* notes 238–40 and accompanying text (discussing the discriminatory history in Arizona).

314. *Hobbs*, 948 F.3d at 1039.

315. Senator Shooter supported H.B. 2023 because he believed that it would cut down on third-party ballot fraud; however, there was no direct evidence presented of ballot fraud, and Senator Shooter appeared to rely on a video depicting a Latino man stuffing ballots into a ballot box. *Id.*; *see* Selwyn Duke, *Vote Fraud? Video Shows Man Stuffing Hundreds of Ballots into Ballot Box*, NEW AM. (Oct. 22, 2014), <https://thenewamerican.com/vote-fraud-video-shows-man-stuffing-hundreds-of-ballots-into-ballot-box> [https://perma.cc/29LZ-APT3] (showing the racially tinged LaFaro video with a transcript of the audio).

316. *Hobbs*, 948 F.3d at 1039–40.

unfounded, they were only relevant insofar as they sparked a debate in the legislature, which is what led to the passage of H.B. 2023.³¹⁷ That position discounts the race-based video that Senator Shooter alluded to, which is a relevant factor in the history of the bill.

Second, H.B. 2023 was enacted largely in response to Senator Shooter's false allegations of ballot collection fraud, which seem to be connected to his "desire to eliminate what had become an effective Democratic GOTV strategy."³¹⁸ Senator Shooter's "unfounded and often far-fetched allegations of ballot collection fraud . . . spurred a larger debate in the legislature about the security of early mail voting as compared to in-person voting" eventually culminating in the passage of H.B. 2023.³¹⁹ This context weighs heavily in favor of showing that discriminatory intent played a part in the enactment of H.B. 2023.³²⁰ *Brnovich* discounts it by reasoning that the debate stemming out of Senator Shooter's allegations was serious and sincere.³²¹

Third, the relevant legislative history also relates to the LaFaro video and Senator Shooter's allegations of fraud in third party ballot collection.³²² H.B. 2023 received support in the legislature because "Shooter's allegations and the LaFaro video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting[.]"³²³ Even if the legislators who supported H.B. 2023 did so based on a sincere, non-race-based belief that they needed to address fraud in third-party ballot collection, they are not attenuated from Senator Shooter's discriminatory intent.³²⁴ The *Brnovich* majority disagreed, stating that there is "no evidence that the legislature as a whole was imbued with racial motives."³²⁵ However, the standard to show discriminatory intent is not that the whole legislature needs racial

317. *Brnovich*, 141 S. Ct. at 2349; *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 879 (D. Ariz.), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *rev'd sub nom. Hobbs*, 948 F.3d 989, *rev'd sub nom. Brnovich*, 141 S. Ct. 2321.

318. *Reagan*, 329 F. Supp. 3d at 879.

319. *Id.* at 880.

320. *Hobbs*, 948 F.3d at 1039.

321. *Brnovich*, 141 S. Ct. at 2349.

322. *Hobbs*, 948 F.3d at 1039–40.

323. *Reagan*, 329 F. Supp. 3d at 880.

324. Essentially, the argument states that the discriminatory intent from Senator Shooter and the video are attenuated by the fact that Senator Shooter's stated intention was to combat ballot collection fraud, and therefore, cannot be attributed to the legislators. *Hobbs*, 948 F.3d at 1040; *Reagan*, 329 F. Supp. 3d at 880.

325. *Brnovich*, 141 S. Ct. at 2349–50.

motivations but rather that racial discrimination was one of the motivating factors.³²⁶ *Brnovich* also disavowed use of the “cat’s paw” doctrine, which would impute the animus of Senator Shooter and the video onto legislators, even if the legislators themselves may not have their own independent racial motivations.³²⁷ However, even taking the “cat’s paw” doctrine out of the analysis Senator Shooter’s discriminatory intentions alone show that race was one of the motivating factors in passing the bill. Therefore, H.B. 2023 fails under the intent test.³²⁸

Fourth, to show a disparate impact, there is “uncontested evidence” showing that H.B. 2023 has an adverse and disparate impact on Native American, Latino, and Black voters.³²⁹ The legislature was aware of the impact of H.B. 2023 on “low-efficacy minority communities.”³³⁰ *Brnovich* failed to address this factor whatsoever, merely relying on the district court, which also does not directly address the effect on minority voters. These four factors guide the totality of the circumstances analysis to show that racial discrimination was one of the motivating factors behind passage of H.B. 2023, meaning that part one of the test is satisfied.³³¹

Next, the burden shifts to Arizona to show that H.B. 2023 would have been enacted without racial discrimination.³³² Because *Brnovich* found that the totality of the circumstances showed no discriminatory intent, it did not reach this part of the analysis. The fact that the majority of H.B. 2023’s supporters were “sincere in their belief that ballot collection increased the risk of early voting fraud” is undermined by

326. See *supra* note 99 (discussing the weight of the intent needed to prevail).

327. Even if the legislators held a good-faith belief about H.B. 20203, it does not show a lack of discriminatory intent. Instead, the well-meaning legislators were used as “cat’s paws,” meaning that they were convinced by the false and race-based allegations of fraud, and thereby used to serve the discriminatory purposes of Senator Shooter. *Hobbs*, 948 F.3d at 1041. See *supra* notes 98–99 and accompanying text (explaining the “cat’s paw” doctrine); *Brnovich*, 141 S. Ct. at 2350.

328. See *Hobbs*, 948 F.3d at 1041 (holding that discriminatory intent was a motivation in passing H.B. 2023).

329. *Id.*

330. *Id.* (quoting *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 881 (D. Ariz.), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d sub nom. Hobbs*, 948 F.3d 989, *rev’d sub nom. Brnovich*, 141 S. Ct. 2321).

331. *Id.*

332. *Id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (describing how the burden shifts to the defendant to show that the measure would have been enacted absent discriminatory intent).

the acknowledgment that there was a “lack of direct evidence supporting their concerns.”³³³ The legislature was motivated to pass H.B. 2023 by a “misinformed belief that ballot collection fraud was occurring.”³³⁴ Publicized legislative beliefs like this lead to the widespread concern among voters—particularly Republicans—that voter fraud has a large impact on elections nationwide.³³⁵ Prior to H.B. 2023, voting fraud was already a crime, which weakens the justification that H.B. 2023 was needed to combat voter fraud.³³⁶ Therefore, it is clear that H.B. 2023 would not have been enacted absent Senator Shooter and the LaFaro video creating false beliefs based about race, which the legislature then acted on.³³⁷

H.B. 2023 satisfies step one because it was enacted in part because of racial discrimination. It further satisfies step two because there is insufficient evidence that the law would have been enacted absent that discrimination. *Brnovich* was incorrect in its conclusion because H.B. 2023 violates the intent test of section 2 of the VRA and the Fifteenth Amendment.³³⁸

333. *Reagan*, 329 F. Supp. 3d at 879. Voter fraud is not currently a widespread problem and evidence does not suggest that it will become a problem. Brendan Nyhan, *Voter Fraud Is Rare, But Myth Is Widespread*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html> [<https://perma.cc/72HX-R7WR>].

334. *Reagan*, 329 F. Supp. 3d at 882.

335. Vera Bergengruen, *How Republicans Are Selling the Myth of Rampant Voter Fraud*, TIME (Oct. 22, 2020), <https://time.com/5902728/voter-fraud-2020-2> [<https://web.archive.org/web/20210922194549/https://time.com/5902728/voter-fraud-2020-2>] (“Republicans have spent decades searching for and cataloging purported cases of voter fraud in a push to justify stricter voting laws . . .”); see also Lang & Hebert, *supra* note 37, at 784 (“Legislators have promoted a myth of widespread voter fraud, stoking mistrust in our electoral system.”).

336. *Hobbs*, 948 F.3d at 1003. Additionally, a similar Arizona Senate Bill from 2011 tried to restrict ballot harvesting. See S.B. 1412, 50th Leg., 1st Reg. Sess. (engrossed), § 3(D) (Ariz. 2011). However, that provision was struck down by the Department of Justice under the preclearance restrictions of section 5 of VRA, suggesting that H.B. 2023 may also have been struck down under section 5. Thomas Horne, *Effect of Shelby County on Withdrawn Preclearance Submissions*, (Aug. 29, 2013), <https://www.azag.gov/opinions/i13-008-r13-013> [<https://perma.cc/5CJ3-2BPQ>].

337. *Hobbs*, 948 F.3d at 1042.

338. See *id.* (stating that violating the intent test necessarily implicates the Fifteenth Amendment).

C. *Congressional Responsibility to Fill the Gap in Voting Protections*

The Supreme Court in *Brnovich* failed to uphold the aspirations of the VRA, so it is now up to Congress to protect voting rights in the United States. After *Brnovich*, proving that a voting regulation is discriminatory will be more difficult because the opinion does not lay out a clear test and also because the OOP Policy and H.B. 2023 are now examples of permissible voting laws. There is an assault on voting rights in the United States.³³⁹ As of March 2021, more than 360 bills to restrict voting access were passed in forty-seven states.³⁴⁰ The For the People Act was the first attempt this year at comprehensive voting legislation, and it included measures that would “thwart virtually every vote suppression bill currently pending in the states.”³⁴¹ However, after passing in the House of Representatives in March 2021, the bill was blocked by Republicans in the Senate in June using a filibuster.³⁴² In August, Democrats introduced another piece of voting rights legislation, known as the John R. Lewis Voting Rights Advancement Act.³⁴³ House leaders say that the bill would restore the full force of the VRA and combat the influx of voting restrictions currently pending in many states.³⁴⁴ The bill passed in the House and now awaits a vote in the Senate, which is evenly divided.³⁴⁵

While Congress attempts to make strides toward this important legislation, it is unlikely to pass in the Senate with the filibuster still in place. Therefore, the responsibility falls on the voters to elect

339. Wendy R. Weiser et al., *Congress Must Pass the ‘For the People Act’*, BRENNAN CTR. FOR JUST. 1 (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/congress-must-pass-people-act> [<https://perma.cc/4TX9-PLKE>].

340. *Id.* at 1–2.

341. *Id.* at 2.

342. Nicholas Fandos, *Republicans Block Voting Rights Bill, Dealing Blow to Biden and Democrats*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/us/politics/filibuster-voting-rights.html> [<https://perma.cc/9AUX-4F68>].

343. The bill is named for John Lewis, the iconic civil rights leader who passed away last year. Juana Summers, *The House Has Passed A Bill to Restore the Voting Rights Act*, NPR (Aug. 24, 2021, 7:15 PM), <https://www.npr.org/2021/08/24/1030746011/house-passes-john-lewis-voting-rights-act> [<https://perma.cc/Z552-QLD2>].

344. Nicholas Fandos, *House Democrats Introduce a Bill to Beef up the Voting Rights Act*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/us/politics/house-democrats-voting-rights-john-lewis.html> [<https://perma.cc/3MMA-2RZX>] (explaining the John R. Lewis Voting Rights Advancement Act would make it more difficult for states to restrict voting access).

345. In the House, the representatives voted along party lines with 219 Democrats in favor and all 212 Republicans opposed. Summers, *supra* note 343.

representatives in 2022 that will support passing voting rights legislation. Because of the plethora of suppressive voting rights legislation pending in the states, voters that would typically support those candidates may find it more difficult to vote. Therefore, it is imperative for individual voters to support their fellow citizens and ensure that everyone that wants to vote is able to do so.

CONCLUSION

Much has changed since the VRA drew attention to the fight against racial discrimination in voting, but electoral discrimination remains an ongoing battle that is far from finished. Discrimination is unquestionably present in voting procedures across the country, and it is for that reason that the VRA and Constitution must be used to their full extent to stop discriminatory laws from undermining the strength of minority voices.³⁴⁶ Two days before Independence Day in 2021, the Supreme Court issued a decision that is fundamentally at odds with the lofty ideals of the United States that every citizen deserves an equal opportunity to vote.³⁴⁷ Arizona's OOP Policy and H.B. 2023 both violate section 2 of the VRA under the results test, which bans discrimination against racial minorities. These policies curtail minorities' opportunity to engage in the political process. Additionally, H.B. 2023 violates the intent test of section 2 and the Fifteenth Amendment because discriminatory intent was a motivating factor in enacting the legislation. Rather than striking these down, *Brnovich* upheld both the OOP Policy and H.B. 2023, establishing a dangerous precedent that will lead to more laws like the Arizona restrictions that disenfranchise minority voters.

The Supreme Court incorrectly decided *Brnovich*. This case highlights the importance of using section 2 to invalidate discriminatory laws, particularly to clarify the jurisprudence

346. See Hayden Johnson, Note, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEO. L.J. 449, 460 (2019) (stating that the section 2 results test is "urgently needed during a time of rising voter suppression"); Evan Tsen Lee, *The Trouble with City of Boerne, and Why It Matters for the Fifteenth Amendment as Well*, 90 DENV. U. L. REV. 483, 502 (2012) (noting that because race discrimination is the most suspect kind of state action, Congressional acts pursuant to the Fourteenth and Fifteenth Amendments should be given the "widest berth possible").

347. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

surrounding vote denial claims. The Court's ruling ignores both of those needs. First, the Court incorrectly interprets section 2, departing from the text of the statute and misconstruing the protections it is meant to enshrine. Second, the Court does not establish a clear test but adds five additional guideposts while diminishing, but not eliminating, the usage of the Senate Factors by ultimately concluding that the analysis requires the totality of the circumstances. By applying the Senate Factors to find the out of precinct policy and the third-party ballot collecting procedure unlawful, the Supreme Court would have delineated a basis for circuits to evaluate voting regulations that deny minorities equal opportunity to vote.³⁴⁸ Applying the additional factors set out by the majority to the analysis, the Court should have come out on the side of invalidating the Arizona regulations. After *Shelby County* stripped the VRA, section 2 alone remained as a barrier against racially discriminatory voting legislation.³⁴⁹ Now that barrier stands weakened, if not broken, in the face of sweeping voting legislation throughout the country that tightens restrictions. With the strength of the VRA seemingly a relic of the past, Congress must step up to bat. It is the legislature's job to respond to the needs of its constituents, and citizens need a law to combat discrimination in voting and protect the voices of minorities across the country, ensuring their right to equal representation and preventing voter disenfranchisement across the nation.

348. See Haase, *supra* note 23, at 262 (noting that courts came to different conclusions despite similar claims against similar laws).

349. See *id.* (“[P]laintiffs seeking to challenge laws implicating access to the vote must rely for protection on Section 2 of the VRA.”).