

No. 18-15845

**In the United States Court of Appeals
for the Ninth Circuit**

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR
Hon. Douglas Rayes

PLAINTIFF-APPELLANTS' PETITION FOR REHEARING *EN BANC*

Attorneys for the Democratic National Committee; DSCC, a/k/a Democratic Senatorial Campaign Committee; and the Arizona Democratic Party:

Daniel C. Barr
Sarah R. Gonski
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
DBarr@perkinscoie.com
SGonski@perkinscoie.com

Joshua L. Kaul
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 294-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
Alexander G. Tischenko
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

INTRODUCTION

At issue in this case are two Arizona election procedures: (1) House Bill 2023 (“HB2023”), which criminalizes most ballot collection [and] serves no purpose aside from making voting more difficult, and keeping more African American, Hispanic, and Native American voters from the polls than white voters,” Doc. 52-1 (Thomas, C.J., dissenting) (“Dissent”) at 77; and (2) “Arizona’s policy of wholly discarding—rather than partially counting—votes cast out-of-precinct” (“the OOP Policy”), which “has a disproportionate effect on racial and ethnic minority groups.” Dissent at 77. The largely unrefuted evidence in this case overwhelmingly demonstrates that both practices violate § 2 of the Voting Rights Act (“VRA”), and unconstitutionally burden the right to vote guaranteed by the First and Fourteenth Amendments. HB2023 was further enacted with discriminatory intent in violation of the Fifteenth Amendment.

Nevertheless, in an opinion issued earlier this morning, a sharply divided panel of this Court affirmed the district court’s determination that HB2023 and Arizona’s OOP policy are in harmony with § 2 and the Constitution. In reaching that conclusion, the majority made several errors of law that cannot be reconciled with prior decisions of this Court—including an *en banc* decision issued just two years ago—other courts of appeals, and the Supreme Court. If not remedied by the *en banc*

court, these errors will fundamentally change the landscape of voting rights law in the Ninth Circuit.

LEGAL STANDARD

Rehearing en banc is merited where the proceeding (1) involves a question of exceptional importance, (2) conflicts with decisions from the Ninth Circuit or sister circuits, or (3) “substantially affects a rule of national application in which there is an overriding need for national uniformity.” 9th Cir. R. 35–1; Fed. R. App. P. 35(a)(1)-(2). “En banc rehearing would give all active judges an opportunity to hear a case where ... there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other ... judges of the court.” *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (citing *Comm’r v. Textile Mills Secs. Corp.*, 117 F.2d 62, 70 (3d Cir. 1940)). A conflict in panel opinions must be resolved by an *en banc* court. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 989 (1988).

ARGUMENT

This case meets every test for *en banc* consideration: it (1) implicates profoundly important issues; (2) conflicts with prior circuit law and law of sister circuits; and (3) affects a rule of national application for which there is an overriding need for uniformity. 9th Cir. R. 35–1; Fed. R. App. P. 35(a)(1)-(2).

First, this case undoubtedly presents issues of exceptional importance. “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.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The voting rights implicated here are precisely the type of “exceptional[ly] important” issues that merit *en banc* consideration. Fed. R. App. P. 35(b); Dissent at 101 (“A democracy functions only to the degree that it fosters participation”). This Court has a long history of granting *en banc* review to consider constitutional or Voting Rights Act challenges to state election laws,¹ and it should do so again here.

Second, the majority opinion rests on several significant errors of law that, if left standing, will profoundly change the landscape of voting rights law in the Ninth Circuit and will persist in conflict with several prior decisions of this Court—errors

¹ See *Pub. Integrity All., Inc. v. City of Tucson*, 820 F.3d 1075, 1076 (9th Cir. 2016) (granting rehearing *en banc* to consider whether Tucson election law violated Equal Protection Clause); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (giving *en banc* consideration to whether Washington’s felon disenfranchisement law violated Voting Rights Act); *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006) (granting rehearing *en banc* to consider whether school district recall petitions were subject to Voting Rights Act provision regarding translation of election materials); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (granting *en banc* review to consider equal protection challenge to use of “punch-card” balloting machines in California initiative and gubernatorial recall elections); *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (granting *en banc* review to equal protection challenge to California’s term limits for state officeholders); *Geary v. Renne*, 2 F.3d 989 (9th Cir. 1993) (granting rehearing *en banc* to consider facial constitutionality of California Elections Code).

which were further discussed in two *en banc* decisions issued just two years ago in this very case.² See *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366 (9th Cir. 2016); see also *Feldman v. Ariz. Sec’y of State’s Office*, 840 F.3d 1165, 1166 (9th Cir. 2016) (per curiam). For instance, the majority applies an overly deferential standard of review and appears to apply clear error review to mixed questions of law and fact, even though this Court has explained that it “retains the power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.” *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (citation omitted); see also Dissent at 88 (taking “no issue with the district court’s finding of fact” but disagreeing with “the application of law to the facts, and the conclusions drawn from them”); see also *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (reversing district court where court drew erroneous legal conclusions from facts and observing that “the court seems to have missed the forest in carefully surveying the many trees”). The majority also improperly applies an overly deferential standard of review to the district court’s application of the law to the facts by incorrectly casting the OOP Policy claim as a

² Because of the emergency nature of this motion, with the impending general election only 55 days away, the discussion here is necessarily abbreviated. Appellants respectfully rest on the Dissent for a fuller discussion of the errors evident in the majority opinion, and on their Opening and Reply briefs, Docs. 26 and 45, for a fuller discussion of the errors evident in the district court’s opinion.

challenge “to an electoral system, as opposed to a discrete election *rule*.” Dissent at 85 n.3.

The majority also erred in applying § 2 of the VRA. For example, it created and applied a novel requirement that an undefined, yet “substantial” number of minority voters must be burdened before § 2 is triggered, which conflicts with the plain language of the VRA and both the majority and dissenting opinions in *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). Dissent, at 82 n.1, 83-84. The majority also erred by taking precisely the type of narrow view of § 2’s causation requirement that was rejected in *Salt River, id.* at 595, and *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003). Dissent at 85-88. Similarly, the majority improperly credited the district court’s mischaracterization of the evidence regarding the Senate Factors, even though the mischaracterization stemmed in part from the district court’s disagreement with the VRA’s results test itself—which “was not on trial here.” Dissent at 97; *see also id.* at 89-97.

The majority’s application of the *Anderson-Burdick* test also is at odds with Ninth Circuit precedent. For example, in assessing the burden on voters, the majority failed to consider the impact of the challenged practices on subgroups of voters, thus contradicting a two-year-old *en banc* decision that reiterated that “courts may consider not only a given law’s impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be

more severe.” *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (en banc); *see also* Dissent at 102. The majority also improperly recasts plaintiffs’ challenge to Arizona’s practice of discarding votes in races in which OOP voters are otherwise eligible to vote as a challenge to precinct-based voting as a whole. Dissent, at 99-101; *id.* at 99 (characterization of the discarding of OOP ballots as the natural “consequence” of Arizona’s precinct system is “semantics;” wholly discarding OOP ballots is not a fundamental requirement of—or even a logical corollary to—a precinct-based model.”); *id.* at 99-100 (“Arizona’s practice of discarding [OOP] ballots is exactly that—a practice. It can be changed.”). It thereby erroneously analyzed the burden imposed by, and the government’s interests in, precinct-based voting in general, rather than “the rule” at issue: *i.e.* discarding votes in races in which OOP voters are otherwise eligible to vote. 836 F.3d at 1024. Compounding these errors, the majority then overstates the government’s interest in both challenged laws, allowing the government to justify voter disenfranchisement with reasons that are “illogical and unsupported by the facts,” Dissent at 104, despite that *Public Integrity Alliance* reaffirmed the Ninth Circuit’s commitment to the *Anderson-Burdick* test, which requires the court to carefully consider the “*precise interests* put forward by the State...taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.” 836 F.3d at 1024.

The majority also erred in analyzing whether HB 2023 was enacted with racially discriminatory intent in violation of the Fifteenth Amendment. It describes the question as a “pure question of fact” meriting clear error review, Op. at 6, but the issue on appeal is not primarily one of the district court’s *factfinding* (which, in fact, overwhelmingly supports a finding of discriminatory intent, Dissent at 109-113), but rather the unsupported *legal* conclusions it drew from them. *See* Dissent at 111-13 (noting that the district court’s own factual findings are irreconcilable with its ultimate conclusion); *see also McCrory*, 831 F.3d at 204.

Third, the majority opinion creates uncertainty about a uniform law of national application by conflicting with decisions of other courts of appeals regarding applicable standards for evaluating voting rights claims under § 2 and the Constitution. *See, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), vacated, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Compared to these cases, the majority opinion imposes an exceedingly narrow vision of the “broad remedial purpose of ridding the country of racial discrimination in voting,” *Chisom*, 501 U.S. at 403 (quotation omitted), and the fundamental right to vote that the Supreme Court

has deemed both “precious” and “fundamental.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

If left undisturbed, the majority opinion will mark the Ninth Circuit as one of the unfriendliest circuits in the nation for voters—particularly minority voters. “Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed.” *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001). It would do a serious disservice to the worthy goals of the VRA and the First, Fourteenth, and Fifteenth Amendments of the Constitution to allow the majority opinion to stand as the new law of this circuit.

CONCLUSION

Given the critical issues in this case implicating the most fundamental of rights, the Court correctly determined at the preliminary injunction phase that this case merited—and still merits today—consideration by the *en banc* Court. *See Wesberry v. Sanders*, 376 U.S. 1, 17, (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined[.]”); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is “preservative of all rights”). Appellants respectfully requests that this Court grant a rehearing by the *en banc* court to consider these issues of profound constitutional importance and to correct legal errors evident in the majority opinion that, if left unchecked, will fundamentally alter the legal landscape for years to come.

RESPECTFULLY SUBMITTED this 12th day of September, 2018.

s/ Sarah R. Gonski

Daniel C. Barr (AZ# 010149)
Sarah R. Gonski (AZ# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias (WDC# 442007)
Bruce V. Spiva (WDC# 443754)
Elisabeth C. Frost (WDC# 1007632)
Amanda R. Callais (WDC# 1021944)
Alexander G. Tischenko (WDC#
263229)
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

Joshua L. Kaul (WI# 1067529)
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

*Attorneys for Plaintiffs the Democratic
National Committee; DSCC, aka
Democratic Senatorial Campaign
Committee; and the Arizona Democratic
Party*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Michelle DePass*

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) and Rule 32-2(b). The brief contains 2,071 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Sarah R. Gonski

No. 18-15845

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

Plaintiffs–Appellants,

v.

MICHELE REAGAN, in her official capacity as Secretary of State of
Arizona; MARK BRNOVICH, Attorney General, in his official
capacity as Arizona Attorney General,

Defendants–Appellees

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

Intervenor-Defendants-Appellees.

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

**AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION &
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF
REHEARING *EN BANC***

Dale Ho
American Civil Liberties Union
Foundation
125 Broad St.
New York, NY 10004
(212) 549-2693

Kathleen E. Brody
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, Arizona 85011
(602) 650-1854

Davin Rosborough*^o
Ceridwen Cherry^o
American Civil Liberties Union
Foundation
915 15th Street NW
Washington, DC 20005
(202) 675-2334

** Not admitted in the District of
Columbia; practice limited pursuant
to D.C. App. R. 49(c)(3).*

*^o Not yet admitted in the Ninth Circuit
Court of Appeals.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the American Civil Liberties Union and the American Civil Liberties Union of Arizona have no parent corporations. The organizations are not a subsidiary or affiliate of any publicly owned corporations, and no publicly held corporation holds ten percent of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI.....1

ARGUMENT3

 I. The Panel’s Requirement that a Challenged Voting Restriction Has Regularly Changed the Outcome of Elections Conflicts with the Decisions of the Fourth, Fifth, Sixth, and Seventh Circuits, and the Law of this Circuit, Regarding Vote Denial Claims under Section 2 of the VRA.....7

 II. The Panel’s Treatment of Vote Denial Claims as Subject to the Same Analytical Framework as Vote Dilution Claims is Contrary to the Decisions of the Fourth, Fifth, Sixth, and Seventh Circuits, and Misinterprets Supreme Court Precedent.....12

 III. The Panel’s Frequent-Election-Outcomes Requirement Ignores the Supreme Court’s Guidance that the VRA Should Be Interpreted Broadly, and Effectively Immunizes Vote Denial Practices from Section 2 Liability16

CONCLUSION.....19

TABLE OF AUTHORITIES

Cases

<i>Allen v. State Board of Elections</i> , 393 U.S. 544 (1969).....	3
<i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009).....	15
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	8, 13, 14, 16
<i>Farrakhan v. Gregoire</i> , 623 F.3d 990 (9th Cir. 2010)	1
<i>Feldman v. Ariz. Secretary of State’s Office</i> , 843 F.3d 366 (9th Cir. 2016)	<i>passim</i>
<i>Frank v. Walker</i> , 768 F.3d 744 (7th Cir. 2014)	<i>passim</i>
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014)	<i>passim</i>
<i>Lee v. Va. State Board of Elections</i> , 843 F.3d 592 (4th Cir. 2016)	11
<i>Mesa Verde Construction Co. v. N. Cal. District Council of Laborers</i> , 895 F.2d 516 (9th Cir. 1989)	9
<i>N.C. State Conference of NAACP v. McCrory</i> , 831 F.3d 204 (4th Cir. 2016)	11
<i>Obama for America v. Husted</i> , 697 F.3d 423 (6th Cir. 2012)	18
<i>Ohio Democratic Party v. Husted</i> , 834 F.3d 620 (6th Cir. 2016)	4, 8, 11, 16
<i>Ohio State Conf. of N.A.A.C.P. v. Husted</i> , 768 F.3d 524 (6th Cir. 2014)	2, 15

Shelby County v. Holder,
570 U.S. 529 (2013)..... 17, 18

Simmons v. Galvin,
575 F.3d 24 (1st Cir. 2009).....3, 15

Smith v. Salt River Project Agricultural Improvement & Power District,
109 F.3d 586 (9th Cir. 1997)12

Thornburg v. Gingles,
478 U.S. 30 (1986)..... 12, 15

Veasey v. Abbott,
830 F.3d 216, (5th Cir. 2016) *passim*

Statutes

52 U.S.C. § 10301 *passim*

Other Authorities

Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-
C.L. L. Rev. 439 (2015)..... 14, 15

Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the
Voting Rights Act*, 57 S.C. L. Rev. 689 (2006).....3

Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in
the U.S. Electorate, 1964-2004*, 69 J. Pol. 430 (2007)19

Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2
Vote Denial Claims*, 77 Ohio St. L.J. 763 (2016).....15

Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and
Democracy in America* (1996).....19

Rules

Fed. R. App. P. 356

Ninth Cir. R. 35-16

INTEREST OF AMICI¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Arizona is a statewide affiliate of the national ACLU, with thousands of members throughout the state. The ACLU Voting Rights Project has litigated more than 300 voting rights cases since 1965, including voting rights cases before this Court in which the ACLU served as an amicus, *e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

Amici have a significant interest in the outcome of this case and in other cases concerning laws that present unnecessary barriers to individuals exercising their fundamental right to vote. The ACLU and its affiliates have litigated vote denial claims under Section 2 of the Voting Rights Act throughout the country, including in North Carolina and Wisconsin. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735

¹ No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

(2015); *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014),
vacated in light of stay order, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1,
2014); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

Counsel for all parties have indicated that they consent to the filing of this
brief.

ARGUMENT

En banc review of the panel’s decision is necessary to maintain the uniformity of this Court’s decisions, and to prevent a circuit split on an issue of exceptional importance: the proper standard for vote denial claims under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (“Section 2”).

As the Supreme Court recognized more than 50 years ago, interference with the right to vote takes different forms: “the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). “[I]n voting rights parlance, ‘**vote denial**’ refers to practices that prevent people from voting or having their votes counted . . . ‘such as literacy tests, poll taxes, white primaries, and English-only ballots,’” while “**vote dilution** challenges involve ‘practices that diminish minorities’ political influence,’” such as at-large elections and redistricting plans that either weaken or keep minorities’ voting strength weak. *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (quoting Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691 (2006)) (emphasis added).

Every Court of Appeals that has articulated a test for vote denial challenges under the discriminatory results standard of Section 2 has employed a two-part framework, in which Plaintiffs must show: (1) that a challenged practice

“impose[s] a discriminatory burden” on voters of color, and (2) that the burden is “in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.” *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017) (internal quotation marks & citation omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (“*LWV NC*”), *cert. denied*, 135 S. Ct. 1735 (2015); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016) (“*ODP*”); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014); *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 367, 400 (9th Cir. 2016) (en banc), *stay granted*, 137 S. Ct. 446 (2016) (mem.).

With the exception of the panel decision in this case, every Circuit that has applied this two-part framework—including the Fourth, Fifth, Sixth, Seventh Circuits, and an *en banc* panel of this Court at an earlier stage of this case—has held that plaintiffs can establish the first prong by showing that a restriction on voting “places a disproportionate burden on the opportunities of minorities to vote.” *Feldman*, 843 F.3d at 401; *see also LWV NC*, 769 F.3d at 245; *ODP*, 834 F.3d at 627; *Frank*, 768 F.3d at 753. That requirement is consistent with the text of Section 2, which prohibits the “denial or *abridgement* of the right to vote,” and any practices that result in minority voters having “less opportunity” to participate in the political process, 52 U.S.C. § 10301.

But in this case, the panel majority imposed an additional requirement that is essentially impossible to satisfy in the vote denial context: that plaintiffs alleging denial of the right to vote in violation of Section 2 must demonstrate disenfranchisement of minority voters that is so widespread as to change multiple election “outcomes,” beyond “the mere loss of an occasional election,” slip. op. at 39, 42 (internal quotation marks and citation omitted). Apparently, according to the panel majority, restrictions that make voting substantially harder and fall disproportionately on minority voters, or that disenfranchise large numbers of voters of color, or that even change the outcome of “an occasional election,” fall outside the ambit of Section 2’s discriminatory results standard unless they are regularly responsible for changing election outcomes.

No other Circuit has adopted the panel’s frequent-elections-outcomes requirement, which runs counter to the text of Section 2 and would effectively foreclose relief in vote denial cases under Section 2’s discriminatory results standard. All other Circuits to have considered this issue—including a previous *en banc* panel in this case—have held that plaintiffs can satisfy the first step of the two-part framework for vote denial liability based solely on evidence of a disproportionate burden on minority voters, without evidence that the restriction frequently changes election outcomes.

The panel purported to borrow its frequent-elections-outcomes requirement from vote dilution case law, and asserted that its use in the vote denial context was compelled by Supreme Court precedent. *See slip op.* at 38–41. But that is incorrect, as the Supreme Court has never decided a Section 2 vote denial claim, let alone held that vote denial and vote dilution claims are subject to the same analytical framework.

Ultimately, the panel’s decision inflicts significant damage on minority voters’ ability to obtain relief for voting discrimination, likely rendering relief for vote denial practices unobtainable under Section 2’s results standard. Because the panel’s decision conflicts with a previous *en banc* decision of this Court, rehearing *en banc* “is necessary to ensure . . . uniformity of [this] court’s decisions,” Fed. R. App. P. 35(a)(1). Rehearing *en banc* is also appropriate because this case “presents a question of exceptional importance . . . involv[ing] an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals.” Fed. R. App. P. 35(a)(2), (b)(1)(B); *see also* Ninth Cir. R. 35-1 (direct conflict with another court of appeals “is an appropriate ground for petitioning for rehearing *en banc*”).

THE PANEL’S REQUIREMENT THAT A CHALLENGED VOTING RESTRICTION HAS REGULARLY CHANGED THE OUTCOME OF ELECTIONS CONFLICTS WITH THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, AND SEVENTH CIRCUITS, AND THE LAW OF THIS CIRCUIT, REGARDING VOTE DENIAL CLAIMS UNDER SECTION 2 OF THE VRA

In requiring plaintiffs bringing vote denial claims under Section 2’s results standard “to show that the state election practice has some material effect on elections and their outcomes” that goes beyond “the mere loss of an occasional election,” slip. op. at 39, 42 (internal citation and quotation marks omitted), the panel majority directly contradicted rulings of every Court of Appeals that has articulated a Section 2 vote denial framework, including a decision of an *en banc* panel at an earlier stage of this case.

Section 2 of the VRA prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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” 52 U.S.C. § 10301(a). Subsection 2(b) provides that a violation of Section 2’s prohibition on discriminatory results “is established if . . . [minority voters] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” 52 U.S.C. § 10301(b). The Supreme Court has explained that “[a]ny abridgment of the opportunity of members of a protected class to participate in the political

process *inevitably* impairs their ability to influence the outcome of an election.”

Chisom v. Roemer, 501 U.S. 380, 397 (1991) (emphasis added).

The Fourth, Fifth, Sixth, and Seventh Circuits—as well as a previous *en banc* panel in this case—have employed a two-part framework for assessing vote denial claims under Section 2:

[1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning 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, [and]

[2] [T]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

Veasey, 830 F.3d at 244 (alterations in original) (internal quotation marks and citation omitted); *see also LWV NC*, 769 F.3d at 240; *ODP*, 834 F.3d at 637; *Frank*, 768 F.3d at 754–55; *Feldman*, 843 F.3d at 400; *also id.* at 367 (adopting Chief Judge Thomas’s dissent from the panel opinion, which employed the two-part framework for vote denial liability).

As applied by every Circuit to have considered the appropriate framework for vote denial liability (other than the panel here), “[t]he first part of this two-part framework inquires about the nature of the burden imposed and whether it creates a disparate effect” on minority voters. *Veasey*, 830 F.3d at 244; *see also LWV NC*, 769 F.3d at 245; *ODP*, 834 F.3d at 627; *Frank*, 768 F.3d at 752–53; *Feldman*, 843

F.3d at 400-01. In applying this prong, the *Feldman en banc* panel held at an earlier stage of this case that “[t]he relevant question is whether the challenged practice, viewed in the totality of the circumstances, places a disproportionate burden on the opportunities of minorities to vote.” *Feldman*, 843 F.3d at 401; *see also Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 895 F.2d 516, 518 (9th Cir. 1989) (explaining *en banc* decision is “law of th[e] circuit”).

Here, however, the panel majority held that, for purposes of satisfying the first step in the two-part inquiry, it is “not enough that the burden of the challenged practice falls more heavily on minority voters.” Slip op. at 42. Instead, it held that plaintiffs must also show that a challenged law disproportionately imposes burdens on minority voters that are so severe and widespread that the law regularly affects election “outcomes,” beyond “the mere loss of an occasional election,” *id.* at 39, 42 (internal quotation marks and citation omitted). In other words, it is not enough to show that the law has made voting more difficult for minorities, has disproportionately disenfranchised minority voters, or even that it has changed the outcome of a “mere” single election; rather, plaintiffs must demonstrate that a challenged voting restriction has disenfranchised so many minority voters as to regularly tip the outcome of elections. In a footnote, the panel majority asserted that this rule was “consistent with the two-step framework adopted by the Fourth, Fifth, and Sixth Circuits.” *Id.* at 42 n.19.

But no other Court of Appeals has come close to adopting such an onerous requirement for vote denial liability. Instead, all other Circuits to have considered this question have held that the first prong of the two-part framework for vote denial liability is satisfied where a restriction on voting imposes significant and disproportionate burdens on minority voters, without requiring a showing that the practices challenged had affected multiple (or any) election outcomes.

For example, the *en banc* Fifth Circuit found that Texas’s restrictive voter identification requirements imposed a “discriminatory burden” based on evidence that African-American and Hispanic voters are “more likely than their Anglo peers to lack [one of the forms of] ID,” and are overrepresented among poor voters, who had particular difficulty with “the cost of underlying documents necessary to obtain an [ID card]” (more than \$80 for one plaintiff), and the logistical hurdles of obtaining ID in Texas (“a 60-mile roundtrip to the nearest [ID office] for some plaintiffs). *See Veasey*, 830 F.3d at 250–55. The *en banc* Fifth Circuit did not require evidence that Texas’s identification requirements affected election “outcomes,” slip op. at 39. *See also LWV NC*, 769 F.3d at 243, 245; *Feldman*, 843 F.3d at 400–01.

Even where Courts of Appeals have rejected Section 2 vote denial claims, they have done so by finding that the challenged practice did not impose a significant burden on voting rights, rather than a failure to show changed election

“outcomes.” Slip. op. at 39. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (rejecting Section 2 claim because Virginia provided free IDs, giving “every voter an equal opportunity to vote”); *ODP*, 834 F.3d at 639–40 (holding plaintiffs failed to “meet their burden of establishing that [early voting reduction] results in a racially disparate impact”); *Frank*, 768 F.3d at 755 (rejecting claim because “everyone has the same opportunity to get a qualifying photo ID” in Wisconsin).²

All of these rulings focus the first step of the two-part framework on whether a law disproportionately burdens minority voters, and flow from the text of Section 2, which states that a violation occurs where voters of color have “less opportunity” to participate in the political process, 52 U.S.C. § 10301(b)—not that minority voters have “no” such opportunity. The statute prohibits not only the “denial” of the right to vote; rather “Section 2 also explicitly prohibit[s]

² Although there is some disagreement amongst other Circuits as to whether a reduction in minority turnout is necessary to establish a “discriminatory burden”—*compare Veasey*, 830 F.3d at 260 and *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016) (holding that no turnout evidence is necessary) *with ODP*, 834 F.3d at 639 and *Frank*, 768 F.3d at 747 (assuming that the burdensome nature of a voting restriction will manifest itself in reduced turnout)—no court other than the panel here has gone so far to suggest that plaintiffs bringing a vote denial claim must show that the challenged restrictions reduces minority turnout so much so as to have an effect on multiple election “outcomes.” Slip op. at 39.

abridgement of the right to vote.” *Veasey*, 830 F.3d at 253.³ The panel majority’s frequent-elections-outcomes rule, by contrast, departs from the plain text of the statute, and runs directly contrary to the weight of Circuit precedent.

THE PANEL’S TREATMENT OF VOTE DENIAL CLAIMS AS SUBJECT TO THE SAME ANALYTICAL FRAMEWORK AS VOTE DILUTION CLAIMS IS CONTRARY TO THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, AND SEVENTH CIRCUITS, AND MISINTERPRETS SUPREME COURT PRECEDENT

In applying a frequent-election-outcomes requirement in this case, the panel majority improperly imported a requirement from vote dilution case law into the vote denial context, a doctrinal leap that no other Circuit has made, and one that is not compelled by Supreme Court precedent.

The panel majority correctly noted that the Supreme Court’s seminal Section 2 vote dilution case, *Thornburg v. Gingles*, 478 U.S. 30 (1986), held that plaintiffs bringing a vote dilution claim must show that, as a result of a practice such as an at-large electoral scheme, the majority will “*usually* be able to defeat

³ Although the panel majority asserted that its election “outcomes” requirement was necessary because “a bare statistical showing of disproportionate impact” is insufficient to establish liability under Section 2, slip. op. at 40 (quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)), that objection ignores the fact that a disproportionate burden constitutes only the first part of the two-step framework for vote denial liability; plaintiffs must also satisfy the second step, *i.e.*, that the disproportionate burden is “caused by or linked to social and historical conditions that have or currently produce discrimination,” *Veasey*, 830 F.3d at 244.

candidates supported by a . . . minority group.” Slip. Op. at 40 (quoting *Gingles*, 478 U.S. at 48–49). But the panel majority erred by applying this requirement in the vote denial context, based on its assertion that “[t]he Supreme Court flatly rejected” the notion that vote denial and vote dilution claims are subject to different analytical frameworks under Section 2. *Id.* at 38 (citing *Chisom*, 501 U.S. at 397).

No other Circuit has reached that conclusion, likely because the case on which the panel majority relied—*Chisom*, a more than 25-year-old vote dilution case—says no such thing. There, Louisiana argued that Section 2 applied to the denial of the right to vote in judicial elections, but not to the dilution of minority voting strength in such elections. *See id.* at 396–97. The Supreme Court rejected that contention, holding that Section 2 “does not create two separate and distinct rights” that apply to different *categories* of electoral practices. Slip Op. at 38 (quoting *Chisom*, 501 U.S. at 397–98). But in so holding, *Chisom* did not purport to address the framework for vote denial claims under Section 2, admonishing that its decision was “limited in character” and involved “only the *scope* of the coverage of § 2 of the Voting Rights Act as amended in 1982”—namely, the question whether Section 2 applies to vote dilution in judicial elections (the Court ruled it does)—and not “any question concerning the *elements* that must be proved to establish a violation of the Act.” 501 U.S. at 390 (emphasis added).

To be sure, the panel majority correctly recited *Chisom*'s statement that all Section 2 claims "must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice." Slip op. at 38 (quoting *Chisom*, 501 U.S. at 398). But this does not mean that vote denial plaintiffs must show a frequent effect on election outcomes. In fact, *Chisom* suggests the opposite, holding that "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process *inevitably impairs their ability to influence the outcome of an election.*" *Chisom*, 501 U.S. at 397 (emphasis added). Thus, in the vote denial context, evidence that a voting restriction substantially and disproportionately interferes with minority voters' right to participate in an election *a fortiori* establishes that minority voters "have less opportunity . . . to elect representatives of their choice" for purposes of establishing Section 2 liability. 52 U.S.C. § 10301(b).

At bottom, the panel majority's frequent-elections-outcomes requirement misapprehends the fundamental differences between vote dilution and vote denial cases. Vote dilution claims "implicat[e] the value of representation: a group's members being able to aggregate their votes to elect candidates of their choice." Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 442 (2015). The fundamental harm alleged is the frustration of a minority group's ability to aggregate sufficient voting strength to elect its preferred

candidates—and, as such, evidence of election outcomes is a necessary aspect of a vote dilution claim. Vote dilution plaintiffs must also establish various preconditions, including that a group of minority voters “is sufficiently large and geographically compact to constitute a majority in a single-member district.” *Gingles*, 478 U.S. at 49–51, which is necessary to show that an existing electoral arrangement that weakens the voting power of a minority group could be replaced by an alternative arrangement that would enable the group to elect its preferred candidates. See *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009).

Vote denial claims, by contrast, “implicate the value of participation: specifically, being able to register, vote, and have one’s vote counted.” Tokaji, *supra*, at 12. As Professor Karlan (who successfully argued *Chisom*) has explained, an “essential feature” of vote denial claims “is that they are wholly outcome-independent”—it “is no answer to a citizen’s claim that she was improperly prevented from casting her ballot that the candidates she prefers are unlikely to win.” Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 Ohio St. L.J. 763, 769–70 (2016). Thus, as the First Circuit has recognized, the question whether minority voters could constitute a majority in a single-member district is “of little use in vote denial cases.” *Simmons*, 575 F.3d at 42 n.24; see also *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 556 (6th Cir. 2014) (“vote denial claims inherently provide a clear,

workable benchmark under the challenged law or practice, how do minorities fare in their ability ‘to participate in the political process’ as compared to other groups of voters?”). Other Circuits have thus not imposed vote dilution requirements in the vote denial context, recognizing that a different framework must be employed for analyzing vote denial claims under Section 2. *See Veasey*, 830 F.3d at 244; *see also LWV NC*, 759 F.3d at 239; *ODP*, 834 F.3d at 636-37; *Frank*, 768 F.3d at 755.

THE PANEL’S FREQUENT-ELECTION-OUTCOMES REQUIREMENT IGNORES THE SUPREME COURT’S GUIDANCE THAT THE VRA SHOULD BE INTERPRETED BROADLY, AND EFFECTIVELY IMMUNIZES VOTE DENIAL PRACTICES FROM SECTION 2 LIABILITY

The panel majority also ignored the Supreme Court’s directive that the VRA should be interpreted to provide “the broadest possible scope in combating racial discrimination.” *Chisom*, 501 U.S. at 403 (internal quotation marks and citation omitted). Under the panel majority’s rule, Section 2 is only triggered in the vote denial context if a restriction disenfranchises so many minority voters as to regularly change the outcome of elections. That requirement would eviscerate Section 2 in the vote denial context.

For example, as the panel majority acknowledged, its rule would effectively immunize any restrictions on voting from Section 2 liability in jurisdictions with minority populations “so small that they would on no hypothesis be able *to elect*

their own candidate.” Slip. op. at 39 (internal quotation marks and citation omitted). No other Circuit has adopted a rule permitting disenfranchisement of minority voters wherever they are insufficiently numerous to play a decisive role in elections; indeed, the Fourth Circuit expressly rejected the notion that the number of minority voters affected is always dispositive of a Section 2 vote denial claim. *See LWV NC*, 769 F.3d at 244 (rejecting the district court’s holding that claim was unlikely to succeed on the merits “because ‘so few voters’” were affected).

An additional consequence of the panel majority’s frequent-elections-outcomes requirement is that plaintiffs can only successfully prove vote denial *after* a challenged practice has gone into effect and disenfranchised so many minority voters as to change the results of multiple elections, effectively prohibiting all pre-enforcement vote denial challenges. Notably, the relative paucity of Section 2 vote denial case law until recently is due in large measure to “the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions,” *LWV NC*, 769 F.3d at 239, in states including Arizona. The Supreme Court’s ruling immobilizing the preclearance regime, *Shelby County v. Holder*, 570 U.S. 529 (2013), was based in part on the understanding that, under Section 2, plaintiffs may still bring pre-election challenges to “block voting laws from going into effect.”

Id. at 537. But the panel majority’s rule perversely prohibits preenforcement relief for vote denial claims under Section 2.

It is precisely for this reason that the *en banc* Fifth Circuit, and the *en banc Feldman* panel in this case, rejected any requirement that vote denial plaintiffs quantify the turnout effects of a challenged restriction. *See Veasey*, 830 F.3d at 260 (“Requiring a showing of lower turnout also presents problems for pre-election challenges to voting laws, when no such data is yet available.”); *Feldman*, 843 F.3d at 401 (noting that “quantitative measurement of the effect of a rule on the voting behavior of different demographic populations must necessarily occur after the election,” and that a requirement of such a showing would prevent “successful pre-election challenge of the burdens placed on minority voting opportunity.”). Given that “[a] restriction on the fundamental right to vote . . . constitutes irreparable injury” that cannot be compensated after the fact, *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012), the panel majority’s rule prohibiting pre-enforcement challenges would effectively leave minority voters without an effective remedy for disenfranchisement until it is too late.

Indeed, the panel majority’s frequent-elections-outcomes rule may leave minority voters without any vote denial remedy *at all*. It is difficult—if not impossible—to assess whether a voting restriction has reduced turnout levels so as to have altered election outcomes. As the Fifth Circuit has explained, turnout rates

may not reflect the true impact of a restriction on voting: “[a]n election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason. That does not mean the voters kept away were any less disenfranchised.” *Veasey*, 830 F.3d at 260. By contrast, in a vote dilution case, vote totals from past elections can simply be recalculated along different district lines, to determine whether, if previous elections had been held in differently-configured districts, the outcomes would have been different. But there is no analogous exercise through which to measure the ballots that were *not* cast due to a voting restriction challenged in a vote denial case. Given the many factors that affect turnout rates,⁴ establishing that a particular voting restriction was outcome-determinative in multiple elections, is an all-but-impossible exercise. The panel majority’s rule imposing such a requirement would likely render Section 2 relief for vote denial unobtainable.

CONCLUSION

The panel majority’s decision conflicts with the decisions of other Circuits concerning the Section 2 vote denial framework, contradicts law of this Circuit, and ignores the Supreme Court’s guidance on applying the VRA. This is an issue

⁴ See, e.g., Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 177-88 (1996); Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964-2004*, 69 J. Pol. 430 (2007).

of exceptional importance, as the panel's vote denial standard is essentially impossible to satisfy. The Court should grant the motion for rehearing *en banc*.

Dated: September 24, 2018

Respectfully submitted,

/s/ Dale E. Ho

Dale Ho
American Civil Liberties Union
Foundation
125 Broad St.
New York, NY 10004
(212) 549-2693
dho@aclu.org

Davin Rosborough*^o
Ceridwen Cherry^o
American Civil Liberties Union
Foundation
915 15th Street NW
Washington, DC 20005
(202) 675-2334

Kathleen E. Brody
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, Arizona 85011
(602) 650-1854

** Not admitted in the District of
Columbia; practice limited pursuant to
D.C. App. R. 49(c)(3).*

*^o Not yet admitted in the Ninth Circuit
Court of Appeals.*

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

This document complies with the word limit of Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,197 words.

Dated: September 24, 2018

/s/ Dale E. Ho

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing through the Court's CM/ECF system upon all counsel registered with that system.

Dated: September 24, 2018

/s/ Dale E. Ho

No. 18-15845

**In the United States Court of Appeals
for the Ninth Circuit**

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR
Hon. Douglas Rayes

**PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING *EN BANC* OF
THEIR EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

Attorneys for the Democratic National Committee; DSCC, a/k/a Democratic Senatorial Campaign Committee; The Arizona Democratic Party:

Daniel C. Barr
Sarah R. Gonski
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
DBarr@perkinscoie.com
SGonski@perkinscoie.com

Joshua L. Kaul
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 294-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
Alexander G. Tischenko
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

INTRODUCTION

Absent an injunction pending consideration of Plaintiffs’ Petition for Rehearing *En Banc*, two practices that burden Arizona voters—Arizona’s criminalization of most forms of ballot collection (“HB2023”) and its refusal to partially count ballots cast out of precinct (“OOP”)—will remain in effect for the 2018 general election. Plaintiffs therefore certify that an injunction pending an *en banc* court’s consideration and resolution of this appeal is necessary to prevent irreparable harm to them, their members and constituencies, and thousands of other Arizona voters. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“LOWV”) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury. ... [O]nce the election occurs, there can be no do-over and no redress.”); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986).

Plaintiffs filed an emergency motion for injunction pending appeal on May 25, 2018. Doc. 17. On September 12, a three-judge panel denied the motion as moot in its decision affirming the district court. Doc. 52 at 16 n.6. Later that same day, Plaintiffs petitioned for rehearing *en banc*. Doc. 53. On September 25, the three-judge panel issued an order directing the State to file a response within 21 days, on October 17. Because it is unlikely that an *en banc* panel, if it takes jurisdiction, would have time to render a decision before the November 6, 2018

general election, Plaintiffs now petition for rehearing *en banc* of their emergency motion for injunction pending appeal, for reasons set forth in Plaintiffs’ motions at Docs. 17 (attached for the Court’s convenience as Exhibit A) and 21 (Exhibit B), and in the dissenting opinion filed by Chief Judge Thomas (the “Dissent”) (Exhibit C).

Legal Standard

To obtain an injunction pending appeal, Plaintiffs must demonstrate either (1) “a probability of success on the merits and the possibility of irreparable injury,” or (2) “that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

Argument

Likelihood of success on the merits. HB 2023 and Arizona’s policy of discarding OOP ballots (the “OOP Policy”) violate the United States Constitution and Section 2 of the Voting Rights Act. In concluding otherwise, the district court and the Panel made several errors of law and fact, which are discussed in detail in Plaintiffs’ merits briefing, *see* Doc. 26; Doc. 45, and the Dissent. For the reasons set forth in Plaintiffs’ briefing, the Dissent, and the *Amicus Curiae* brief submitted by the American Civil Liberties Union in support of Plaintiffs’ Petition for Rehearing *En Banc*, Doc. 54, Plaintiffs are likely to succeed on the merits.

Irreparable Harm. “Courts routinely deem restrictions on fundamental voting rights irreparable injury,” because “once the election occurs, there can be no do-over and no redress.” *LOWV*, 769 F.3d at 247. Unless this Court issues an injunction pending appeal, precisely such irreparable injury will result—Plaintiffs

and voters across Arizona will be harmed in the upcoming 2018 general election by HB 2023 and Arizona's OOP Policy.

Balance of the equities. “The public interest and the balance of the equities favor prevent[ing] the violation of a party’s constitutional rights.” *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 920 (9th Cir. 2016) (citation and quotation marks omitted). The State has no interest in enforcing unconstitutional laws. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Further, complying with an injunction will have a limited impact on the State. The State is not even enforcing HB 2023, so there will be virtually no cost to complying with a ruling that enjoins its enforcement. *See Feldman v. Arizona Sec’y of State’s Office*, 843 F.3d 366, 368 (9th Cir. 2016) (“*Feldman III*”). And the administrative burden of counting OOP ballots is far outweighed by a voter’s interest in ensuring that the ballot that he or she cast is counted.

Purcell does not bar relief. *Purcell v. Gonzalez* poses no obstacle to an injunction against the challenged practices. 549 U.S. 1 (2006). Rather, *Purcell* urged courts to take careful account of considerations unique to the election context before intervening, such as whether the change is likely to confuse voters or to create insurmountable administrative burdens on election officials. *See* 549 U.S. at 4.

Here, the general election is still 40 days away, leaving time for voters and election officials to be informed of the change and to adjust. Indeed, as the *en banc* Court in *Feldman III* correctly noted, the only effect of enjoining HB 2023 is on

third party ballot collectors, whose efforts to collect legitimate ballots will not be subject to criminal penalties. 843 F.3d at 368. No one else in the electoral process is affected. *Id.* HB 2023 is not enforced by county election administrators. ER 37 (Op.), Doc. 27-1, at 44. Similarly, requiring election administrators to partially count OOP ballots for races which the voter is otherwise eligible is—as the district court correctly found—“administratively feasible.” ER 47 (Op.). In order to implement the injunction, the State could simply take its existing ballot duplication procedures, which it already uses to process some provisional ballots, and apply those procedures to OOP provisional ballots. *See id.*; *see also* Doc. 27-1, at 47 (discussing State’s existing duplication procedure). Moreover, those procedures would not need to be implemented within 40 days; they occur only *after* the election takes place, during the almost three-week period during which counties canvass the results of the election. Ariz. Rev. Stat. 16-642.

Under similarly time-sensitive circumstances, other federal courts have not hesitated to grant relief. *See U.S. Students Ass’n Found v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. Oct. 13, 2008) (granting preliminary injunction 22 days before 2016 general election to halt practice of canceling voter registrations under certain circumstances), *stay of the preliminary injunction denied by* 546 F.3d 373 (6th Cir. 2008); *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016) (granting preliminary injunction 22 days before 2016 general election to permit voters opportunity to cure signature mismatch on absentee ballots); *Fla. Democratic Party v. Scott*, No. 4:16CV626-MW/CAS, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016) (granting preliminary injunction motion 27

days before 2016 general election to extend voter registration deadline); *Bryanton v. Johnson*, 902 F. Supp. 2d 983 (E.D. Mich. 2012) (granting preliminary injunction motion 27 days before 2012 general election to enjoin inclusion of a citizenship question on a voter application form); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004) (granting preliminary injunction 16 days before 2004 general election requiring Michigan to count out-of-precinct ballots).

CONCLUSION

For the reasons discussed in Plaintiffs' briefing and the Dissent (Exs. A, B, and C), Plaintiffs have established a probability of success on the merits, that irreparable harm will occur absent an injunction, and that the balance of hardships tips sharply in their favor. The Court should therefore grant this motion pursuant to Federal Rule of Appellate Procedure 8 and Circuit Rule 27-3 and enter an order enjoining HB2023 and Arizona's policy of entirely rejecting OOP ballots pending an *en banc* panel's consideration and decision on Plaintiffs' petition for rehearing *en banc*.

RESPECTFULLY SUBMITTED this 26th day of September, 2018.

s/ Bruce V. Spiva

Daniel C. Barr (AZ# 010149)
Sarah R. Gonski (AZ# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias (WDC# 442007)
Bruce V. Spiva (WDC# 443754)
Elisabeth C. Frost (WDC# 1007632)
Amanda R. Callais (WDC# 1021944)
Alexander G. Tischenko (WDC#
263229)
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

Joshua L. Kaul (WI# 1067529)
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 294-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

*Attorneys for Plaintiffs the Democratic
National Committee; DSCC, aka
Democratic Senatorial Campaign
Committee; The Arizona Democratic
Party*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 26, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Daniel R. Graziano

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) and Rule 32-2(b). The brief contains 1,264 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Sarah R. Gonski

No. 18-15845

**In the United States Court of Appeals
for the Ninth Circuit**

DEMOCRATIC NATIONAL COMMITTEE, *ET AL.*,

Plaintiffs-Appellants,

v.

MICHELE REAGAN, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the
District of Arizona, (Rayes, J.)
Case No. CV-16-01065

BRIEF IN OPPOSITION TO REHEARING EN BANC

Dominic E. Draye
Solicitor General
Andrew G. Pappas
Kara M. Karlson
Karen J. Hartman-Tellez
Joseph E. La Rue
Office of the Attorney General
2005 North Central Ave.
Phoenix, AZ 85004
(602) 542-3333

October 16, 2018

TABLE OF CONTENTS

INTRODUCTION..... 1

ARGUMENT 3

I. Plaintiffs’ Eight Assignments of Error Are Mistaken and
Prove that they Seek a Retrial..... 3

II. The Panel’s Holding Is Consistent with the Supreme Court
and Every Other Court of Appeals. 10

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct 2305 (2018)9

Chisom v. Roemer,
501 U.S. 380 (1991) 3, 4, 11, 12

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) passim

Farrakhan v. Washington,
338 F.3d 1009 (9th Cir. 2003) 5

Gonzalez v. Arizona,
485 F.3d 1041 (9th Cir. 2007) 2

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) 4, 5, 6, 9

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 11, 12

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 15

Ne. Ohio Coal. for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016) 15, 16

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016) 14

Ohio State Conference of the NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014) 14

Ortiz v. City of Phila. Office of City Comm’rs Voter Registration Div.,
28 F.3d 306 (3d Cir. 1994)..... 11

Pub. Integrity All., Inc. v. City of Tucson,
836 F.3d 1019 (9th Cir. 2016) 9

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 3, 9

Sandusky Cty. Democratic Party v. Blackwell,
387 F.3d 565 (6th Cir. 2004) 8

Smith v. Salt River Project Agric. Improvement & Power Dist.,
109 F.3d 586 (9th Cir. 1997) 4, 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 12

Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016) 13

Statutes

52 U.S.C. § 10301(a) 1, 5

52 U.S.C. § 10301(b) 1, 4

Rules

Fed. R. App. P. 35(a) 10

INTRODUCTION

After a 10-day trial featuring the testimony of dozens of witnesses, the district court, Judge Douglas L. Reyes, correctly concluded that Plaintiffs failed to prove any of their claims against a pair of Arizona elections regulations. In an 83-page opinion replete with factual findings, the district court rebuffed a constitutional claim under the Fourteenth Amendment because the burden imposed by these laws is minimal and the State's interest in the integrity of its elections is long-established. ER19–49. On similar findings, the court held that the same minimal burdens do not “result[] in the denial or abridgement” of voting rights. 52 U.S.C. § 10301(a); ER56–67. Alternatively, even assuming a cognizable burden exists, neither of the contested provisions under “the totality of the circumstances” makes Arizona elections “not equally open to participation” by minority voters. 52 U.S.C. § 10301(b); ER67–74. Finally, Judge Reyes found that Arizona's legislature did not enact H.B. 2023 with discriminatory intent. ER76–77, 81.¹

¹ Plaintiffs have not alleged discriminatory intent with respect to the State's requirement that voters cast ballots in their own precincts.

On appeal, Plaintiffs sought a retrial of these “intense[ly] factual inquir[ies].” *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (first alteration in original); Op. 6. The panel majority declined the invitation to reweigh the evidence. Op. 67. In a thorough opinion, the Court held that Judge Rayes did not commit clear error in finding that Arizona’s regulations impose “only a de minimis burden” that falls well below the burden upheld by the Supreme Court in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). Op. 24. The Court also affirmed the district court’s finding—based on Plaintiffs’ anecdotal evidence—that Arizona’s laws do not “cause a meaningful inequality in the electoral opportunities of minorities as compared to nonminorities.” Op. 44 (quoting ER89).

Now, Plaintiffs renew their request for a retrial, this time before the en banc Court. Although the Court engaged in en banc review at the preliminary-injunction stage two years ago, the intervening trial and Judge Rayes’s extensive factual findings make the current appeal unworthy of the Court’s en banc consideration.

ARGUMENT

I. Plaintiffs' Eight Assignments of Error Are Mistaken and Prove that they Seek a Retrial.

In the span of a few pages, Plaintiffs allege *eight* errors by the panel. Most are factual disagreements; none warrants rehearing en banc.

Standard of Review. Plaintiffs assert that the panel applied “an overly deferential standard of review” because it “*appears* to apply clear error review to mixed questions of law and fact.” Pet. 6 (emphasis added). Plaintiffs offer no example of this error. For its part, the panel correctly stated the post-trial standard of review, Op. 16–17, and only once rejected an assertion that something (discriminatory intent) was a mixed question of law and fact, Op. 49 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (“It is not a question of law and not a mixed question of law and fact.”)).

Number of Voters. Plaintiffs allege that the panel erred in requiring that a “substantial” number of minority voters must be burdened” before a law will be stricken under Section 2 of the Voting Rights Act. Pet. 7 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)). They never say *where* the panel committed this alleged error, and their ar-

gument to the panel relied extensively on “the *dissent* in *Chisom*.” Op. 47 n.22 (emphasis added). But the panel was “bound by the majority, which rejected this argument.” *Id.* The panel’s discussion of *Chisom* thus focuses on the Supreme Court’s majority holding that Section 2 does not split into separate claims for (a) denial/abridgment of voting rights and (b) inability to elect preferred candidates. Op. 37–39; *Chisom*, 501 U.S. at 396–97. Following *Chisom* and the text of Section 2, plaintiffs must establish an abridgment of voting rights that results in “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b). This Court already has held that the alternative—“a bare statistical showing of disproportionate impact on a racial minority”—does not suffice for a claim under Section 2. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997); *see also Gonzalez v. Arizona (Gonzalez II)*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (same).

Here, the district court found, and the panel affirmed, that Plaintiffs failed to show that Arizona’s electoral process was not equally open to minority voters as defined in Section 2. ER63, 89; Op. 44, 75.

Causation. Section 2 asks whether the “standard, practice, or procedure . . . results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 52 U.S.C. § 10301(a). One of the reasons that Judge Rayes found Plaintiffs’ evidence unconvincing under Section 2 is that it revealed that other variables (*e.g.*, residential mobility, changes in polling places, and other unchallenged election practices) were the actual causes of out-of-precinct voting. ER42–45. The panel affirmed based on precedent interpreting the “results in” language to require more than “a bare statistical showing of disproportionate impact,” *Salt River*, 109 F.3d at 595, or a mere “statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity,” *Gonzalez II*, 677 F.3d at 405.

Plaintiffs ignore the Court’s en banc decision in *Gonzalez* and instead cite the earlier decision in *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003). *Farrakhan* concerned the applicability of the “totality of the circumstances” test, which is a legal point that no one disputes and indeed illustrates the intensely factual nature of a Section 2 analysis.

Senate Factors. Next, Plaintiffs fault Judge Rayes’s alleged “mischaracterization of the evidence regarding the Senate Factors.” Pet. 7. Again, it is unclear what they have in mind because Plaintiffs never explain the alleged error. But this kind of evidence-weighting is a quintessential factual determination that appellate courts review for clear error. As this Court has explained, “the district court’s findings of fact [include] its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2.” *Gonzalez*, 677 F.3d at 406. That is precisely the inquiry that the Senate Factors address, and Plaintiffs provide no reason to think that Judge Rayes clearly erred.

In any event, the panel had no need to address the Senate Factor evidence to affirm; those factors are relevant only at the *second* step of the Section 2 framework. Op. 42, 45. The panel thus recognized that “because the district court correctly determined that H.B. 2023 does not satisfy step one of the § 2 analysis, we need not evaluate the district court’s analysis of these factors in detail.” Op. 45 n.20 (finding no clear error and declining to reweigh Senate Factor evidence).

Subgroups. Plaintiffs further assert that the panel “failed to consider the impact of the challenged practices on subgroups of voters.”

Pet. 7. On the contrary, both the panel and the district court expressly considered subgroups, when the evidence allowed, and followed the Supreme Court’s analysis in *Crawford* for doing so. Op. 62–64. Judge Rayes, for example, focused on the small fraction of Arizona voters who (a) vote in person and (b) live in a county that has not adopted the vote-center model. ER45. For that subgroup, he found that the “the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens traditionally associated with voting.” ER45–46; Op. 63. Judge Rayes’s factual finding was not clearly erroneous, and the panel was correct to affirm it. In fact, even Plaintiffs do not assert that this analysis was incorrect; they simply deny that it occurred. Pet. 7.

Precinct-Based Voting. Again without citation, Plaintiffs accuse the panel of “recast[ing]” their allegation that Arizona cannot constitutionally require in-person voters to vote in their geographic precincts as “a challenge to precinct-based voting as a whole.” Pet. 8. The gist of this objection appears to be that Judge Rayes somehow erred in finding a minimal burden on voters and an important government interest in voters casting ballots in their own precincts. *Id.* Neither of these was

clear error. Op. 64–67. Judge Rayes found that “the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens.” ER 45.

On the other side of the scale are the State’s interests in encouraging voters to cast ballots in down-ballot races, avoiding misdirection from persons seeking to manipulate down-ballot races, and managing administrative costs. ER 45–46; Op. 67–70 (citing *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004)). Judge Rayes also explained, and the panel agreed, that the State cannot fully capture these benefits without enforcing precinct-based voting. ER 48; Op. 68–70. The district court’s assessment of how burdensome it is to vote in one’s own precinct and the State’s interest in maintaining and enforcing that requirement is not clearly erroneous, and the panel was correct to affirm it.

State Interest. The final two assignments of error are particularly bald attempts to reverse factual findings. The first involves the State’s interest in its election regulations, which Plaintiffs call “unsupported by the facts.” Pet. 8 (quoting Dissent 104). There is little to say on this point, except that Judge Rayes did not clearly err. The interests

he found are settled by a pair of en banc decisions already on the books. *Gonzalez II* recognized a State's interest in "detering and detecting voter fraud . . . and safeguarding voter confidence." 677 F.3d at 410. Likewise, the Court has "repeatedly upheld as 'not severe' restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016); *see also Crawford*, 553 U.S. at 197 (noting the same state interests).

Discriminatory Intent. Plaintiffs conclude their eight assignments of error by asserting that the district court's "factual findings are irreconcilable with its ultimate conclusion" regarding discriminatory intent. Pet. 9. Try as they might to call this a legal question, the Supreme Court has held that discriminatory intent "is not a question of law and not a mixed question of law and fact." *Pullman-Standard*, 456 U.S. at 288. Instead, intent "is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Id.*; *see also Abbott v. Perez*, 138 S.Ct. 2305, 2326 (2018) ("[A] district court's finding of fact on the question of discriminatory intent is reviewed for clear error."). Plaintiffs offer nothing to meet that exacting standard.

* * *

Plaintiffs’ litany of alleged errors is long, but none of them comes anywhere close to reaching the high threshold for rehearing en banc. Fed. R. App. P. 35(a). Plaintiffs are dissatisfied with their losses at trial and on appeal. That frustration and attempt to have a redo trial on appeal do not imbue their scattershot petition with the legal significance required for rehearing en banc.

II. The Panel’s Holding Is Consistent with the Supreme Court and Every Other Court of Appeals.

Plaintiffs assert that the majority opinion “conflict[s] with decisions of other courts of appeals regarding applicable standards for evaluating voting rights claims under § 2 and the Constitution.” Pet. 9. In support, Plaintiffs string-cite four decisions from the Fourth, Fifth, and Sixth Circuits—all of which the majority opinion addressed. See Op. 19, 26, 30 n.12, 42–43 n.19, 53, 55. Plaintiffs never actually identify a conflict with those sister court decisions. None exists.

First, Plaintiffs cite *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (“*LWV*”), which analyzed a Section 2 claim at the preliminary-injunction stage. Plaintiffs never explain how the Fourth Circuit’s approach allegedly conflicts with the majority opin-

ion here. And they ignore that the panel specifically explained how its “two-step analysis” to evaluate Plaintiffs’ Section 2 claim was “consistent with the two-step framework adopted” in *LWV* and other circuits. Op. 42–43 n.19.

Indeed, just like the panel here, *LWV* correctly stated that a Section 2 plaintiff must show 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.” *LWV*, 769 F.3d at 240 (emphasis added); *see also* Op. 38; *Ortiz v. City of Phila. Office of City Comm’rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994) (“Section 2 plaintiffs must demonstrate that they had less opportunity *both* (1) to participate in the political process, *and* (2) to elect representatives of their choice.”) (citing *Chisom*, 501 U.S. at 397 n.24) (emphasis added). Here, Plaintiffs could not make the necessary factual showing at trial on (at least) the latter part of this conjunctive standard—*i.e.*, a diminished opportunity to elect representatives of their choice. *See* Op. 45–46, 71–73.

Plaintiffs further ignore that *LWV* was decided at the preliminary-injunction phase, before the appellate court had the benefit of a full tri-

al record. Consequently, and unlike this case, the Fourth Circuit did not have before it factual findings that the challenged practices did not meet Section 2's standard because they were "not burdensome" and were offset by "easily accessible alternative means of voting." Op. 41 (citing *Chisom*, 501 U.S. at 397 n.24); see also Op. 46 ("[N]ot a single voter testified at trial that H.B. 2023 made it significantly more difficult to vote."); *id.* at 73 (explaining that "a common electoral practice" like precinct-based voting "is a minimum requirement, like the practice of registration, that does not impose anything beyond 'the usual burdens of voting'" (quoting *Crawford*, 553 U.S. at 198); *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986) ("It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'").²

² The amicus brief supporting rehearing en banc provides slightly more specificity than Plaintiffs regarding *LWV*, arguing that "the Fourth Circuit expressly rejected the notion that the number of minority voters affected is always dispositive of a Section 2 vote denial claim." Amicus at 17 (citing *LWV*, 769 F.3d at 244). This argument mischaracterizes the panel opinion, which nowhere creates such an automatic mechanism. To the contrary, it explains that whether a practice "has some material effect on elections and their outcomes," as Section 2 requires, does *not*

Second, Plaintiffs cite *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016), apparently to suggest that the Fifth Circuit has applied different legal standards under Section 2. Not true. The majority opinion here explained that its analysis involved the same two-part framework adopted by the Fifth Circuit (as well as the Fourth Circuit in *LWV*). *See* Op. 42–43 n.19. Where *Veasey* and the present case part ways is on the facts. Specifically, the Fifth Circuit discussed the trial court’s factual findings that Texas’s voter-identification law imposed “substantial” and “significant” obstacles to in-person voting, and that “mail-in voting is not an acceptable substitute for in-person voting *in the circumstances presented by this case.*” *Veasey*, 830 F.3d at 254–56 (emphasis added).³ Here, Plaintiffs failed to make a similar showing with respect to either H.B. 2023 or precinct-based voting. Op. 45–46, 72–73 (discussing de minimis burdens and consistency with *Crawford*). If anything, *Veasey*’s

necessarily turn on the number of impacted voters, but can also hinge on the severity of the challenged practice and the availability of voting alternatives. *See* Op. 39, 41.

³ Applying the principle of constitutional avoidance, *Veasey* declined to consider whether the challenged voter identification law imposed an unconstitutional burden on voting. *Veasey*, 830 F.3d at 265.

fact-dependency illustrates why the panel here was correct and why Plaintiffs' many assignments of error are mistaken.

Third, Plaintiffs cite the Sixth Circuit's vacated decision in *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Plaintiffs' citation lacks even a pin cite, but in their previous arguments to the panel, Plaintiffs contended that Arizona needed to provide specific instances of fraud in order to justify H.B. 2023. Responding to that argument, the panel majority explained why Plaintiffs' "reliance on [this] vacated Sixth Circuit opinion is unpersuasive": "The Sixth Circuit has explained that any persuasive value in *Ohio State Conference* . . . is limited to cases involving 'significant' . . . burdens," not "minimal" ones. Op. 30 n.12 (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016)). If there were any question about where the Sixth Circuit stands, the later *Ohio Democratic Party* case eliminates any doubt. In both this Court and the Sixth Circuit, minimal burdens on voting are insufficient to offend the Fourteenth Amendment. *See* Op. at 24; 63–64.

Moreover, all federal courts are bound by the Supreme Court's decisions. The Supreme Court closed the door on Plaintiffs' demand for evidence of actual fraud before the State can enact prophylactic measures like H.B. 2023. In *Crawford*, "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194. The Supreme Court nonetheless affirmed that States may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The federal courts of appeals are not divided on this issue, and *could not be* without ignoring the Supreme Court.

Fourth, Plaintiffs cite another Sixth Circuit decision, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016) ("*NEOCH*"). Based on the page they cite, Plaintiffs apparently contend that the panel failed to assess properly the impact of H.B. 2023 and precinct-based voting on "subgroups" in applying the *Anderson-Burdick* test. The panel specifically addressed *NEOCH*, however, explaining that "it is an error to consider 'the burden that the challenged provisions uniquely place' on a subgroup of voters in the absence of 'quantifi-

able evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of [those provisions].” Op. 19 (quoting *NEOCH*, 837 F.3d at 631) (alteration in original).⁴ The panel’s approach to subgroups is entirely consistent with the Sixth Circuit’s decision in *NEOCH*. Any objection Plaintiffs might have to the subgroup standard is aimed at both circuits, not this Court alone.

On the merits of the subgroup question, the district court addressed subgroups where possible, *see supra* 6–7, but declined to speculate where Plaintiffs presented failed to present “sufficient evidence,” ER25. Citing *Crawford*, Judge Rayes held that “there is insufficient ‘concrete evidence’ for the Court to gauge the magnitude of that burden or the portion of it that is justified.” ER26 (citing 553 U.S. at 201). The panel affirmed. *See* Op. 24, 26, 27-28 (H.B. 2023), 66 (precinct-based voting). These evidentiary deficiencies are particular to the present case and do not merit *en banc* review.

⁴ Defendants continue to believe that Supreme Court precedent bars consideration of subgroups. Answering Br. 21; *see also NEOCH*, 837 F.3d at 631 (“Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.”).

CONCLUSION

The Court should deny the petition for rehearing en banc.

October 16, 2018

Respectfully Submitted,

/s/ Dominic E. Draye

Dominic E. Draye

Solicitor General

Andrew G. Pappas

Kara M. Karlson

Karen J. Hartman-Tellez

Joseph E. La Rue

OFFICE OF THE ATTORNEY GENERAL

2005 North Central Ave.

Phoenix, AZ 85004

(602) 542-3333

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 40-1(a) because this brief contains 3,260 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type.

/s/ Dominic E. Draye

Dominic E. Draye

Solicitor General

OFFICE OF THE ATTORNEY GENERAL

2005 North Central Ave.

Phoenix, AZ 85004

(602) 542-3333

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 16, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Dominic E. Draye

Dominic E. Draye

Solicitor General

OFFICE OF THE ATTORNEY GENERAL

2005 North Central Ave.

Phoenix, AZ 85004

(602) 542-3333

No. 18-15845

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE DEMOCRATIC NATIONAL COMMITTEE; et al.,

Plaintiffs-Appellants,

v.

MICHELE REAGAN; et al.,

Defendants-Appellees,
and

ARIZONA REPUBLICAN PARTY; et al.,

Intervenor-Defendants-Appellees

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR

**JOINDER IN BRIEF IN OPPOSITION TO REHEARING EN
BANC**

Brett W. Johnson
Colin P. Ahler
SNELL & WILMER L.L.P.
400 E. Van Buren Street
Suite 1900
Phoenix, AZ 85004-2202

(602) 382-6000
Attorneys for Appellees
Arizona Republican Party, Bill
Gates, Suzanne Klapp, Debbie
Lesko, and Tony Rivero

Appellees the Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero hereby give notice of their join-der in the *Brief in Opposition to Rehearing En Banc* filed by Appellees Arizona Secretary of State Michele Reagan and Attorney General Mark Brnovich on October 16, 2018.

DATED this 16th day of October, 2018.

SNELL & WILMER L.L.P.

/s/ Brett W. Johnson

Brett W. Johnson

Colin P. Ahler

SNELL & WILMER L.L.P.

400 E. Van Buren, Suite 1900

Phoenix, AZ 85004

Attorneys for Intervenor-Defendant-Appellees

Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 47 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Century Schoolbook 14-point font.

DATED this 16th day of October, 2018.

SNELL & WILMER L.L.P.

/s/ Brett W. Johnson

Brett W. Johnson

Colin P. Ahler

SNELL & WILMER L.L.P.

400 E. Van Buren, Suite 1900

Phoenix, AZ 85004

Attorneys for Intervenor-Defendant-Appellees

Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 16th day of October, 2018.

SNELL & WILMER L.L.P.

/s/ Marge Johnson

Brett W. Johnson

Colin P. Ahler

SNELL & WILMER L.L.P.

400 E. Van Buren, Suite 1900

Phoenix, AZ 85004

Attorneys for Intervenor-Defendant-Appellees

Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero

4844-0805-4904

No. 18-15845

**In the United States Court of Appeals
for the Ninth Circuit**

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR
Hon. Douglas Rayes

**APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING
EN BANC**

Attorneys for Plaintiffs-Appellants the Democratic National Committee; DSCC, a/k/a Democratic Senatorial Campaign Committee; and the Arizona Democratic Party:

Daniel C. Barr
Sarah R. Gonski
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
DBarr@perkinscoie.com
SGonski@perkinscoie.com

Joshua L. Kaul
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 294-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
Alexander G. Tischenko
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
ARGUMENT	2
I. Rehearing en banc is needed to address the panel’s incorrect imposition of a “frequent election outcomes” standard for Section 2 claims	2
II. The panel’s flawed <i>Anderson-Burdick</i> analysis confirms the need for rehearing en banc	5
III. The panel erred in upholding the district court’s <i>Arlington Heights</i> analysis.....	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	PAGE
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	3, 4
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008).....	5, 6, 7
<i>Farrakhan v. Washington</i> , 338 F.3d 1009 (9th Cir. 2003)	4
<i>Feldman v. Ariz. Sec’y of State’s Office</i> , 843 F.3d 366 (9th Cir. 2016) (en banc), <i>stay granted</i> , 137 S. Ct. 446 (2016).....	3, 6, 7
<i>Frank v. Walker</i> , 768 F.3d 744 (7th Cir. 2014)	3
<i>Gonzalez v. Arizona</i> , 677 F.3d 383 (9th Cir. 2012) (en banc)	3
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014)	3, 5
<i>N.C. State Conference of NAACP v. McCrory</i> , 831 F.3d 204 (4th Cir. 2016)	7, 8
<i>Ohio Democratic Party v. Husted</i> , 834 F.3d 620 (6th Cir. 2016)	3
<i>Pub. Integrity All. v. City of Tucson</i> , 836 F.3d 1019 (9th Cir. 2016)	5, 7
<i>Shelby County v. Holder</i> , 570 U.S. 529, 537 (2013).....	4
<i>Smith v. Salt River Project Agricultural Improvement & Power District</i> , 109 F.3d 586 (9th Cir. 1997)	3, 8

TABLE OF CONTENTS
(continued)

PAGE

Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612
(2017)3

INTRODUCTION

Plaintiffs seek rehearing en banc to correct a panel decision that dramatically narrows the protection for voting rights provided by the First, Fourteenth, and Fifteenth Amendments and Section 2 of the Voting Rights Act (“VRA”). In response, the State casts the Petition for Rehearing En Banc (“Petition”) as a “request for a retrial,” Resp. 2, and suggests that Plaintiffs inappropriately seek to revisit factual findings. Not so. Had the panel applied the correct legal analysis to the facts *as the district court found them*, it would have arrived at different legal conclusions. *See, e.g.*, Dissent 88 (“I take no issue with the district court’s findings of fact. Rather, I disagree with the application of law to the facts, and the conclusions drawn from them.”); *see also id.* 96-98, 100-01, 103, 119; Pet. 5-10.

More importantly, the State does not address the broader issue: at this stage, this case is about far more than two Arizona election laws. Its outcome will reverberate through voting rights law for years to come. If left to stand, the panel’s flawed articulation of Section 2, the *Anderson-Burdick* legal standard, and *Arlington Heights* places insurmountable obstacles in the path of potential voting rights plaintiffs and cements the Ninth Circuit as an outlier among the courts of appeals, marking it as one of the unfriendliest circuits in the nation for plaintiffs seeking redress against violations of their voting rights. The panel majority’s approach would brush aside challenges to even the most suppressive and discriminatory voting

measures, so long as plaintiffs could not establish such measures would impact sufficient numbers of voters across multiple elections. That is not the law, and the full en banc court should intervene to prevent such a diminishment of voting rights. Rehearing en banc should be granted.

ARGUMENT¹

I. Rehearing en banc is needed to address the panel’s incorrect imposition of a “frequent election outcomes” standard for Section 2 claims.

Rehearing en banc is needed to correct the panel’s flawed conclusion that establishing a violation of Section 2 requires a showing that a challenged law would deprive sufficient minority votes to change the outcome not “mere[ly]” in “an occasional election,” but rather that it would have altered multiple election “outcomes.” Op. at 39-40, 42, 72-74; Pet. 7. Any “outcomes” requirement—much less a “frequent election outcomes” requirement—is incompatible with the plain language and broad purposes of Section 2, Supreme Court precedent and the decisions of every Circuit, including this one, that has decided the issue.

The panel’s “outcomes” requirement is inconsistent with the framework that this Court sitting en banc and other courts of appeals have applied to Section 2 vote-

¹ Plaintiffs reiterate that rehearing en banc is merited to correct all errors detailed in the Petition and discussed at length in the Dissent. Given the word limit for this brief, however, Plaintiffs focus here on the three errors most likely to impede future voting-rights litigants’ ability to protect their right to vote.

denial claims. The Fourth, Fifth, Sixth, and Seventh Circuits have uniformly held that the first step of the two-part Section 2 test requires the court to evaluate the discriminatory burden a law places on members of a protected class—not its impact on election outcomes.² *See Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 37 (6th Cir. 2016); *Frank v. Walker*, 768 F.3d 744, 754-755 (7th Cir. 2014); *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 367, 400-01 (9th Cir. 2016) (en banc), *stay granted*, 137 S. Ct. 446 (2016); Amicus Br. 5-12.

The State argues that the “outcomes” requirement is justified under *Chisom v. Roemer*, 501 U.S. 380 (1991), and the text of Section 2, but neither authority supports that proposition. As the panel dissent explains, the *Chisom* Court “clearly understood that the VRA does not demand a showing that the challenged provision may be outcome-determinative: ‘Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.’” Dissent 82 n.1 (quoting *Chisom*, 501 U.S. at 396-97). Under *Chisom*, a court that has determined that a law imposes a

² This interpretation is consistent with the causation requirement in *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), and *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997). But the panel’s requirement that causation must be shown by demonstrating frequent loss of elections is novel, unwarranted, and impractical.

discriminatory burden should *inevitably* conclude that members of the protected class are less able to elect the representative of their choice. *See id.*; *see also* Amicus Br. 13-15 (discussing *Chisom*). This reading of *Chisom* is reinforced by the Supreme Court’s direction that the VRA must be interpreted to “provide[] the broadest possible scope in combating racial discrimination.” 501 U.S. at 403 (quotation marks omitted).

To read *Chisom* and Section 2 otherwise, as the panel did here, would eliminate pre-enforcement challenges, inoculate discriminatory laws from review under Section 2,³ and require that discriminatory burdens be imposed on voters before a violation of Section 2 can be established.⁴ *See* Amicus Br. 16-19. That view cannot be squared with the VRA’s “broad remedial purpose of ridding the country of racial discrimination in voting,” and warrants en banc review by this Court. *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003) (quotation marks

³ There is no reason to believe that the Supreme Court intended *Chisom* to have that result; to the contrary, in eliminating the pre-clearance regime in *Shelby County v. Holder*, the Supreme Court noted that “[Section 2] relief is available in appropriate cases to block voting laws from going into effect.” 570 U.S. 529, 537 (2013).

⁴ The significant difficulty of meeting this evidentiary burden is evident here. Arizona has a history of close elections and at least one election *during the pendency of this case* was decided by a margin that was smaller than the number of out-of-precinct voters. Dissent 84 n.2. And yet the panel found that the “outcomes” requirement had not been met.

omitted); *see also League of Women Voters of N. Carolina*, 769 F.3d at 244 (“even one disenfranchised voter—let alone several thousand—is too many”).

II. The panel’s flawed *Anderson-Burdick* analysis confirms the need for rehearing en banc.

In applying the *Anderson-Burdick* test, the panel held that neither of the challenged laws imposes significant burdens on voters—in large part because either a small portion of the electorate was impacted by the policy (out-of-precinct voting) or because the precise number of individuals who were impacted (ballot collection) could not be determined. *See Op.* at 20-21 (discussing imprecision in numbers of voters burdened and noting that “the vast majority of Arizona voters were unaffected by [the ballot collection ban]”); *Op.* at 64 (burden minimal because “number of out-of-precinct votes is ‘small and ever dwindling’”); *Pet.* 7-8. It then concluded that Arizona’s interests justified both practices.

The panel’s suggestion that a voting law is not burdensome as long as most voters are unaffected is incorrect. The relevant burdens are the burdens on the voters who are most affected by the law. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling opinion) (“The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements.”); *Pub. Integrity All. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (“[C]ourts may consider not only a given law’s impact on the electorate in general, but also its

impact on subgroups, for whom the burden, when considered in context, may be more severe.”); *Feldman*, 843 F.3d at 396; *see also* Dissent 121.⁵ Here, the panel held that subgroup analysis should be conducted “*only if* the plaintiff adduces evidence sufficient to show the size of the subgroup and quantify how the subgroup’s special characteristics makes the election law more burdensome.” Op. at 19 (emphasis added). But neither *Crawford* nor *Public Integrity Alliance* created such a requirement, and it makes no sense. For instance, Plaintiffs put on significant evidence, that the district court credited, that HB2023 made it more difficult to vote for Native Americans living on tribal lands. Dissent 117-18, 121-22. The precise number of Native Americans impacted is not relevant to determining the extent of the burden HB2023 places on that subgroup; indeed, its only conceivable relevance would be potential impact on electoral outcomes.

The standard applied by the panel also imposes practical barriers to establishing an *Anderson-Burdick* claim. The precise number requirement means that potential plaintiffs may have to spend years collecting comprehensive statistical evidence and expend resources over a period of time. In addition, a single actor may not have access to comprehensive data, and the data that is available may not be sufficient to determine precisely the size of the subgroup that is disparately

⁵ The State points out that the district court considered subgroups “where the evidence allowed,” Resp. at 7, but, as discussed above, this is simply incorrect.

burdened. Dissent 117 (discussing ballot collection). Further, even if a plaintiff is able to introduce evidence regarding the precise size of a disparately burdened subgroup—as Plaintiffs did here by specifying the numbers of disenfranchised out-of-precinct voters, Op. 64—under the panel’s decision, courts could conclude that not enough voters were affected to raise constitutional concerns. Of course, there is no minimum number of voters who must be burdened before a law implicates rights protected by the First and Fourteenth Amendments. Holding otherwise was legal error, and merits correction by the en banc Court.⁶

III. The panel erred in upholding the district court’s *Arlington Heights* analysis.

The panel’s intentional discrimination determination is inconsistent with *Arlington Heights* and the Fourth Circuit’s opinion in *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). After concluding that Plaintiffs had presented evidence demonstrating the existence of the four factors set forth in *Arlington Heights*, the district court failed to draw the inevitable conclusion: that the Republican-controlled Arizona legislature passed the

⁶ Although the State argues otherwise, “*Crawford* is not a blank check for legislators seeking to restrict voting rights with baseless cries of ‘voter fraud,’” Dissent 123, and the application of it as such here is at odds with that decision and prior decisions of this Court. *Id.* 123-25; *see also Pub. Integrity All. Inc.*, 836 F.3d at 1025 (explaining that *Anderson-Burdick* does not permit rational basis or burden shifting); *Feldman*, 843 F.3d at 396 n.2 (“A court may not avoid application of a means-end fit framework in favor of rational basis review simply by concluding that the state’s regulatory interests justify the voting burden imposed.”).

ballot collection ban to inhibit voting among Arizona's minority citizens, who typically vote for Democrats. *See* Dissent 106-14 (based on facts as district court found them, all four *Arlington Heights* factors present). In refusing to draw the inevitable conclusion, the district court and the panel flouted the Supreme Court's direction in *Arlington Heights* and committed the same mistake that the Fourth Circuit held clearly erroneous in *McCrary*: "miss[ing] the forest in carefully surveying the many trees." 831 F.3d at 214. Contrary to the State's assertions, drawing the wrong legal conclusions from findings of fact constitutes legal error. Errors of law "include[e] those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Salt River*, 109 F.3d at 591. Moreover, this error will impact this Court's future discriminatory intent decisions. Dissent 106-114. En banc review is needed to correct these legal errors.

CONCLUSION

For these reasons, the petition for rehearing en banc should be granted.

RESPECTFULLY SUBMITTED this 26th day of October, 2018.

s/ *Bruce V. Spiva*

Daniel C. Barr
Sarah R. Gonski
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
Alexander G. Tischenko
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

Joshua L. Kaul
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 294-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

*Attorneys for Plaintiffs-Appellants the
Arizona Democratic Party, DSCC, and
Democratic National Committee*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 26, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Michelle DePass

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) and Rule 32-2(b). The brief contains 1,998 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Sarah R. Gonski