**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

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF APPELLANTS ON REHEARING *EN BANC*

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

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

The American Civil Liberties Union (ACLU) and the ACLU of Arizona seek leave to file the attached amicus brief in support of Appellants on rehearing en banc because this appeal presents significant, novel issues in this Circuit concerning the vote denial standard under Section 2 of the Voting Rights Act (VRA).[1] Both amici have a significant interest in ensuring that the growing body of vote denial jurisprudence does not unfairly foreclose the ability of plaintiffs to bring claims in this area.

The 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

[1] Appellants have consented to the filing of this brief. The State Appellees and Intervenor-Appellees oppose the filing of this brief, despite consenting to amicis' filing of an amicus brief in support of rehearing en banc.

denial claims under Section 2 of the Voting Rights Act throughout the country, including in North Carolina, Ohio, 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 (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).

Because of their expertise in this area and participation in some of the foundational Section 2 cases in other Circuits, the ACLU and ACLU of Arizona have helpful insight to offer the en banc Court as it considers important issues concerning the relevant legal standards and methods of proof of vote denial claims under Section 2 of the VRA. The attached brief discusses key distinctions between vote dilution and vote denial claims under Section 2, and explains the development of vote denial case law over the past decade. Additionally, the brief explains how—despite purporting to apply the consensus standard for evaluating vote denial claims—the district court departed from these principles by imposing improper numerical thresholds on the plaintiffs and grafting inappropriate vote dilution requirements onto these claims. The brief also discusses the interactive, localized, totality-of-the-circumstances review required under the second-prong of the vote denial test, and explains how the district court's cabined, cursory review does not meet this standard.

Therefore, because of the importance of ensuring that courts within the Ninth Circuit do not improperly shut the door to vote-denial plaintiffs by imposing inappropriate legal standards, and because of amici's experience and interest in this area, the Court should grant leave to file the attached amicus brief.

Dated: January 23, 2019

Respectfully submitted,

*/s/ Dale E. Ho*

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

This document complies with the word limit of Ninth Circuit Rule 27-1 because this document contains less than three pages.

Dated: January 23, 2019 */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: January 23, 2019 */s/ Dale E. Ho*

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## 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.

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## INTEREST OF AMICI[1]

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, Ohio, 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).

## ARGUMENT

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). **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 of the Voting Rights Act ("VRA") has employed a two-part framework, in which Plaintiffs must show: (1) that a challenged practice "impose[s] a discriminatory burden" on minority voters, 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 Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367, 400 (9th Cir. 2016) (en banc) (adopting Chief Judge Thomas's dissent from the panel opinion, which employed the two-part framework for vote denial liability), *stay granted*, 137 S. Ct. 446 (2016) (mem.); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016) ("*ODP*"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) ("*LWVNC*"), *cert. denied*, 135 S. Ct. 1735 (2015); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014). In doing so, *none* of these courts have set a numerical threshold for the individuals impacted or required evidence about the effect of the challenged practice on electoral outcomes. *See, e.g.*, *LWVNC*, 769 F.3d at 244 (holding that "what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities."). And under the second prong, these courts have required an intensely local, totality-of-the-circumstances analysis of "whether the vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process." *Veasey*, 830 F.3d at 259.

Despite purporting to apply this same vote-denial standard, the district court did something quite different. As to the first prong, the court ruled against the plaintiffs because it found that the policies they challenged—while disparately impacting minority groups—did not impact a "majority" of minority voters. In so

doing, it relied on inapposite vote-dilution case law requiring plaintiffs to show that a challenged practice affects electoral *outcomes*. The court's analysis not only manufactured a new and erroneous requirement of proving a numerical threshold of affected voters, it also improperly conflated the standards for vote dilution and vote denial claims, ignoring the principle that "[a]ny abridgment" of the opportunity of members of a minority group to vote "inevitably impairs their ability to influence the outcome of an election." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). And on the second prong, rather than conducting a totality-of-the-circumstances analysis of how the history of discrimination in Arizona *interacted with* the challenged law, it viewed each of the "Senate Factors" for liability in isolation. The district court offered only a conclusory, cabined review divorced from the facts at hand, rather than the broad, fact-specific review called for by Section 2.

The district court committed plain legal error in its application of the vote denial standard under Section 2 of the VRA. In doing so, it not only failed to properly evaluate the claims of the plaintiffs in this case, but also contradicted a growing nationwide consensus of courts on this issue of national importance. This Court should reverse.

## I. THE SUPREME COURT AND COURTS OF APPEALS HAVE LONG RECOGNIZED IMPORTANT DISTINCTIONS BETWEEN VOTE DENIAL AND VOTE DILUTION CLAIMS.

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). Although this standard applies in both vote denial and vote dilution cases, the fundamental differences between these types of claims create different evidentiary burdens and analytical frameworks. *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999) (referring to vote dilution and vote denial as "two distinct types of discriminatory practices and procedures").

Vote dilution claims involve "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. *See, e.g.*, *Burton*, 178 F.3d at 1198. As such, evidence of election

outcomes as well as various preconditions, including that a group of minority voters "is sufficiently large and geographically compact to constitute a majority in a single-member district," *Thornburg v. Gingles*, 478 U.S. 30, 49–51 (1986), are necessary aspects of a vote dilution claim. This evidence is needed 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, *Applying Section 2*, *supra*, at 442; *see also Burton*, 178 F.3d at 1197–98. As Professor Karlan 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 of 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?"); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579, 595–96 (2013) (explaining that the *Gingles* preconditions "have no place in the vote denial analysis.").

Thus, 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 LWVNC*, 769 F.3d at 240; *ODP*, 834 F.3d at 637; *Frank*, 768 F.3d at 754–55; *Feldman*, 843 F.3d at 400.

## II. THE FIRST VOTE DENIAL PRONG DOES NOT REQUIRE A NUMERICAL THRESHOLD FOR DISCRIMINATORY BURDEN OR EVIDENCE ABOUT ELECTION OUTCOMES, CONTRARY TO THE DISTRICT COURT'S DECISION.

The district court, and the now-vacated panel decision affirming it, purported to apply the standard for vote-denial claims described *supra*. Yet the court imposed a standard at odds with the prevailing case law when applying the

first prong. It profoundly erred by imposing an arbitrary numerical requirement that plaintiffs prove that a majority (or some other unknown number) of individual minority group members are burdened by the ballot-collection and out-of-precinct ("OOP") voting rules at issue in this case. It compounded that error by looking to electoral outcomes, which are irrelevant to vote denial claims.

### A. All Circuits to Address the Issue Have Agreed Upon a Uniform Standard for Section 2 Vote Denial Cases, Which Does Not Set a Numerical Bar for Proving Discriminatory Burden or Require Proof of Effect on Electoral Outcomes.

As applied by every Circuit to have considered the appropriate framework for vote denial liability, the "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 LWVNC*, 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 the "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"). None of these courts have required evidence about electoral outcomes or set a numerical threshold of impact as a part of that standard. Requiring any of this evidence would not only hamstring pre-

election vote denial claims, but would also run contrary to the principle that courts should interpret the VRA to provide "the broadest possible scope in combating racial discrimination." *Chisom*, 501 U.S. at 403 (internal quotation marks & citation omitted).

Courts have focused exclusively on whether the challenged practice contributes to "affording protected group members less opportunity to *participate* in the political process." *ODP*, 834 F.3d at 637–38 (emphasis added). They do not consider whether the practice affects electoral *outcomes*, as courts do in vote dilution cases. *See Gingles*, 478 U.S. at 49–51. As the Supreme Court explained in *Chisom*, "*[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*." 501 U.S. at 397 (emphasis added). Consequently, vote denial claims do not require the same, separate evidentiary proof of an effect on electoral outcomes as do vote dilution claims. Indeed, all Circuits that have considered this question have held that plaintiffs satisfy the first prong of the two-part framework for vote denial liability where they show that a restriction on voting imposes a disproportionate burden on minority voters; no proof regarding election outcomes is required. *See, e.g.*, *Veasey*, 830 F.3d at 250–51 (holding 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); *see also LWVNC*, 769 F.3d at 243, 245; *Feldman*, 843 F.3d at 400–01.

Moreover, no appellate court has required that vote-denial plaintiffs reach any particular numerical threshold of individuals disparately impacted by an electoral practice in order to satisfy the first step of the vote-denial test. As the Fourth Circuit explained, "what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities." *LWVNC,* 769 F.3d at 244; *see also* 52 U.S.C. § 10301(a) (forbidding any practice that "results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color") (emphasis added); *Feldman*, 843 F.3d at 401 ("The 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."). *Cf. Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily.").

The United States took the same position in *Veasey*, arguing that the first step in a vote denial claim is assessing "whether the law bears more heavily on minority voters," which "incorporates both the likelihood that minority voters are

affected and their relative ability to overcome burdens the law imposes." Suppl. En Banc Br. of United States as Appellee, *Veasey v. Abbott*, Dkt. No. 14-41127, 2016 WL 2735717, at *13 (5th Cir. May 9, 2016). While the number of affected voters may be a relevant consideration, nothing in this standard requires a certain numerical threshold of impacted minority voters, only that they are materially burdened and disproportionately affected.

### B. The District Court Applied the Wrong Standard Under the First Vote Denial Prong by Setting a Numerical Impact Threshold and Looking to Election Outcomes Evidence.

In analyzing the first prong of the test concerning both the ballot-assistance and OOP claims, the district court found racial disproportionality. For the former, it found that minorities were "more likely than non-minorities to return their early ballots with the assistance of third parties." *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 870 (D. Ariz. 2018). For the latter, it found that "African American and Hispanic voters made up 10 percent and 15 percent of in-person voters, but accounted for 13 percent and 26 percent of OOP ballots, respectively." *Id.* at 871. But then, instead of examining the nature of the burdens that were unquestionably imposed disproportionately on minority voters to assess whether they were significant or material impediments on the right to vote, the district court concocted an additional requirement from whole cloth: that plaintiffs show an effect on a "precise" number or a "majority" of minority voters. *Id.* at 870, 872.

In requiring proof that the impacts of a challenged law affect enough voters so as to be "meaningful enough to work 'an inequality in the opportunities enjoyed by [minority as compared to non-minority] voters to elect their preferred representatives,'" the district court appears to have borrowed from vote dilution case law. *Id.* at 865 (quoting *Gingles*, 478 U.S. at 47). The court then rejected the plaintiffs' showing of a discriminatory burden because it found that the impact shown was not sufficiently "specific or precise," *id.* at 870—despite this requirement appearing nowhere in vote denial case law—and even imposed a requirement that the challenged policy affect "most" group members. *See id.* (rejecting ballot collection claim because plaintiffs did not show the policy impacted "all or even most socioeconomically disadvantaged voters"); *id.* at 872 (rejecting OOP claim because plaintiffs did not show that the "majority" of individuals were affected by the policy).

Requiring a numerical threshold showing of either participatory or electoral impact is inconsistent with guidance from the Supreme Court and the holdings of other Circuits. "Any abridgment" of the opportunity of members of a minority group to vote "inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397. None of the appellate courts to address vote denial claims have imposed the district court's "precise" numerical requirement. *See LWVNC*, 769 F.3d at 245 (finding first step met because of evidence minority

groups used early voting and OOP voting at greater rates than whites); *Veasey*, 830 F.3d at 250–257 (finding statistical disparity and anecdotal evidence of burdens on minority voters sufficient to satisfy first step). And none of the appellate courts that have rejected a vote denial claim did so because the plaintiffs failed to satisfy a particular numerical threshold of disproportionate impact. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (holding that plaintiffs did not meet burden under first prong because Virginia "provides free photo IDs to persons without them," thus providing "every voter an equal opportunity to vote"); *ODP*, 834 F.3d at 639–40 (finding impact of restriction of early voting minimal on individuals' opportunity to vote); *Frank*, 768 F.3d at 755 (rejecting claim because "everyone has the same opportunity to get a qualifying photo ID" in Wisconsin).

Moreover, by importing one of the *Gingles* vote-dilution preconditions into the vote denial context to, in effect, require a showing of electoral impact on a group, the district court improperly elided the distinction between vote dilution and vote denial claims. Rather than focusing on the abridgement of the *opportunity* to vote, the court treated "access to the political process" as equivalent to sufficient aggregate voting strength to elect its preferred candidates. *Reagan*, 329 F. Supp. 3d at 872; *see also id.* at 871 (referring to limitations on early ballot collections as unlikely to "cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities"). This defies the well-recognized

distinction between vote denial and vote dilution claims. *See Simmons*, 575 F.3d at 29. It also runs afoul of the principle that "what matters" for vote denial claims "is not *how many* minority voters are being denied equal electoral opportunities but simply that '*any*' minority voter is being denied equal electoral opportunities." *LWVNC*, 769 F.3d at 244 (emphasis added); *see also Frank*, 819 F.3d at 386 (holding that vote-denial claim is "not defeated by the fact that 99% of other people" are not affected by the policy).

## III. THE SECOND VOTE DENIAL PRONG REQUIRES AN ANALYSIS OF HOW RACE-BASED SOCIOECONOMIC DISPARITIES AND DISCRIMINATION INTERACT WITH THE CHALLENGED POLICIES, RATHER THAN THE ISOLATED, CURSORY ANALYSIS THE DISTRICT COURT PERFORMED.

Under the second prong of the vote denial test, courts must analyze how social and historical factors—including race-based socioeconomic disparities—*interact with* a challenged policy to affect minority participation, not view the issues in isolation. In doing so, the court must consider whether the plaintiffs had proven a violation of Section 2 under the "totality of the circumstances." 52 U.S.C. § 10301(b). The district court failed to conduct a broad analysis of the *relationship* between the disparities and discrimination it recognized and the conduct at issue. Instead, it looked at the two in isolation, erected a straw man, and blew it down with little thought. This, too, was legal error.

### A. The Second Vote Denial Prong Requires a Totality-of-the-Circumstances Analysis of How Historical Discrimination and Current Race-Based Disparities Relate to the Burdensome Conduct at Issue.

Once the court has considered the first prong of the vote denial test, it must consider whether the disparate burden was "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. This analysis asks more than whether vestiges of past or current discrimination remain, and more than whether the challenged practice itself causes a discriminatory effect. Instead, a court must consider "whether the vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process." *Id.* at 259. In other words, a court should consider whether the disproportionate effects of the practice are "linked to relevant social and historical conditions." *LWVNC*, 769 F.3d at 245.

In conducting this analysis, courts have considered a number of the "Senate Factors," which include a history of discrimination against the group, racially polarized voting, the effects of past discrimination, racial appeals in political campaigns, the presence of minority public officials, the responsiveness of public officials to minority needs, and the policy rationales underlying the challenged law. *See Veasey*, 830 F.3d at 256–64. This examination looks for "signs of public and private discrimination," in order to protect "against voting practices that give force

to racial bias where discrimination or its effects still linger in the voting community." Suppl. En Banc Br. of United States, *Veasey*, 2016 WL 2735717, at *33.

But even after analyzing the Senate factors, the court's inquiry is "not the end of the story." *Feldman*, 843 F.3d at 406. Taking into account the presence of these factors, the court must then "look to the 'totality of the circumstances.'" *Id.* (quoting 52 U.S.C. § 10301(b)). This inquiry should be "broad." *LWVNC*, 769 F.3d at 241. Looking at the challenged practices in isolation from these factors is inconsistent with the totality-of-the-circumstances analysis mandated by Section 2. *Id.* at 242.

### B. The District Court Erred by Failing to Conduct a Totality-of-the-Circumstances Analysis of the Interaction Between Race-Based Disparities and Discrimination and the Challenged Policies, Conducting a Hypothetical, Cabined, and Cursory Review Instead.

In its analysis under the second prong, the district court walked through the relevant Senate factors. In doing so, it found that:

> (1) "Arizona has a history of discrimination against Native Americans, Hispanics, and African Americans," and recounted an extensive history of this conduct, *Reagan*, 329 F. Supp. 3d at 873–75;
>
> (2) "Arizona has a history of racially polarized voting, which continues today," *id.* at 876;
>
> (3) Racial disparities exist in "socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation," with transportation, housing, and education being "most pertinent" to burdens the challenged laws impose, *id.*;

(4) "Arizona's racially polarized voting has resulted in racial appeals in campaigns," *id.*;

(5) A racial disparity in elected office holders exists but has declined, *id.* at 877;

(6) Plaintiffs' evidence was "insufficient" to establish a lack of responsiveness to minority needs, *id.*; and

(7) The justification for precinct-based voting was "not tenuous," and the justifications for the ballot-collection provision were "weaker" but not without a "constitutionally adequate" justification, *id.* at 878.

After this analysis, the district court conclusorily stated that the balance of the factors was mixed, and that while "past discrimination in Arizona has had lingering effects on the socioeconomic status of racial minorities," plaintiffs' causation theory was "too tenuous" because it would make any aspect of Arizona's voting regime that had a disproportionate impact subject to challenge. *Id.* This analysis was fatally flawed.

For one, the district court's analysis considered the Senate factors in isolation from how the "vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process." *Veasey*, 830 F.3d at 259. That is, the court looked to whether the challenged practices were, in isolation, themselves the causes of racial disproportionality (in casting ballots by mail or at the wrong precinct), instead of examining whether the challenged laws *interact* with Arizona's living history of racial discrimination to reinforce patterns of racial inequality, and thus produce a prohibited discriminatory result.

On top of (and perhaps because of) this legal error, the district court never conducted the "totality of the circumstances" analysis required by Section 2—an analysis meant to be performed after looking at the Senate factors. *See Feldman*, 843 F.3d at 406. The court's analysis was not "broad," and did not consider the interaction of the challenged policies *together* along with the history of discrimination. *LWVNC*, 769 F.3d at 241–42. Rather, its analysis was cursory, incomplete, and narrow, focusing on future, possible challenges to other unspecified electoral practices rather than focusing on the fact-specific inquiry of the particular challenged practices required by Section 2.

Separately, these legal errors are sufficient to declare the district court's analysis infirm. Together, they require it.

## CONCLUSION

The district court's decision conflicts with the decisions of other Circuits concerning the Section 2 vote denial framework, contradicts the law of this Circuit, and ignores the Supreme Court's guidance on applying the VRA. These legal errors require reversal.

Dated: January 23, 2019

Respectfully submitted,

*/s/ Dale E. Ho*

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

This document complies with the word limit of Ninth Circuit Rule 29-2(c)(3) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,348 words.

Dated: January 23, 2019 */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: January 23, 2019 *<u>/s/ Dale E. Ho</u>*