WATFORD, Circuit Judge, concurring:

I join the court's opinion to the extent it invalidates Arizona's out-of-precinct policy and H.B. 2023 under the results test. I do not join the opinion's discussion of the intent test.

O'SCANNLAIN, Circuit Judge, with whom CLIFTON, BYBEE, and CALLAHAN, Circuit Judges, join, dissenting:

We have been asked to decide whether two current Arizona election practices violate the Voting Rights Act or the First, Fourteenth, or Fifteenth Amendments to the United States Constitution.[1] Based on the record before us and

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[1] Section 2 of the Voting Rights Act prohibits a State from adopting an election 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." 52 U.S.C. § 10301(a).

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble." U.S. Const. amend. I.

The Fourteenth Amendment guarantees: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

The Fifteenth Amendment ensures that the right "to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV.

relevant Supreme Court and Ninth Circuit precedent, the answer to such question is clear: they do not. The majority, however, draws factual inferences that the evidence cannot support and misreads precedent along the way. In so doing, it impermissibly strikes down Arizona's duly enacted policies designed to enforce its precinct-based election system and to regulate third-party collection of early ballots.

I respectfully dissent.

I

Given the abundant discussion by the district court and the en banc majority, I offer only a brief summary of the policies at issue here and discuss the district court's factual findings as pertinent to the analysis below.

A

Arizona offers voters several options: early mail ballot, early in-person voting, and in-person Election Day voting. *Democratic Nat'l Comm. v. Reagan ("DNC")*, 329 F. Supp. 3d 824, 838 (D. Ariz. 2018).

1

Since at least 1970, Arizona has required that in-person voters "cast their ballots in their assigned precinct and has enforced this system by counting only those ballots cast in the correct precinct." *Id.* at 840. A voter who arrives at a precinct in which he or she is not listed on the register may cast a provisional ballot, but Arizona will not count such ballot if it determines that the voter does not live in the

precinct in which he or she voted. *Id.* For shorthand, I refer to this rule as Arizona's "out-of-precinct" or "OOP" policy.

Most Arizona voters, however, do not vote in person on Election Day. *Id.* at 845. Arizona law permits all registered voters to vote early by mail or in person at an early voting location in the 27 days before an election. Ariz. Rev. Stat. §§ 16-121(A), 16-541(A), 16-542(D). All Arizona counties operate at least one location for early in person voting. *DNC*, 329 F. Supp. 3d at 839. Rather than voting early in person, any voter may instead request an early ballot to be delivered to his or her mailbox on an election-by-election or permanent basis. *Id.* In 2002, Arizona became the first state to make available an online voter registration option, which also permits voters to enroll in permanent early voting by mail. *Id.* Voters who so enroll will be sent an early ballot no later than the first day of the 27-day early voting period. *Id.* Voters may return early ballots in person at any polling place, vote center, or authorized office without waiting in line or may return their early ballots by mail at no cost. *Id.* To be counted, however, an early ballot must be received by 7:00 p.m. on Election Day. *Id.*

2

For years, Arizona has restricted who may handle early ballots.[2] Since 1992, Arizona has prohibited anyone but the elector himself from possessing "that elector's unvoted absentee ballot." 1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B.

[2] The majority's effort to deny history can easily be dismissed. Maj. Op. 104–105. As Judge Bybee's dissent ably recounts, not only Arizona but 21 other states have restricted early balloting for years. Bybee, J. Diss. Op. 157–158.

1390) (West). In 2016, Arizona enacted a parallel regulation, H.B. 2023 (the "ballot-collection" policy), concerning the collection of early ballots.[3] *DNC*, 329 F. Supp. 3d at 839. Under the ballot-collection policy, only a "family member," "household member," "caregiver," "United States postal service worker" or other person authorized to transmit mail, or "election official" may return another voter's completed early ballot. *Id.* at 839–40 (citing Ariz. Rev. Stat. § 16-1005(H)–(I)).

B

In April 2016, the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party (together, "DNC") sued the State of Arizona to challenge the OOP policy and the ballot-collection policy. The district court denied DNC's motions to enjoin preliminarily enforcement of both polices, and DNC asked our court to issue injunctions pending appeal of such denials. After expedited proceedings before three-judge and en banc panels, our court denied the motion for an injunction against the OOP policy but granted the parallel motion against the ballot-collection policy. *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1165 (9th Cir. 2016) (en banc) (mem.) (per curiam); *Feldman v. Ariz. Sec'y of State's Office (Feldman III)*, 843 F.3d 366 (9th Cir. 2016) (en banc). The Supreme Court, however, stayed our injunction against the ballot-collection policy and the OOP and ballot-collection policies functioned in usual fashion. *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016) (mem.).

[3] While the majority refers to the legislation as "H.B. 2023," I prefer to call it the ballot-collection policy by which it is commonly known and will do so throughout the dissent.

In 2017, the district court proceeded to the merits of DNC's suit. In May 2018, after a ten-day bench trial, the district court issued a decision supported by thorough findings of fact and conclusions of law. *DNC*, 329 F. Supp. 3d at 832. The district court found that DNC failed to prove any violation of the Voting Rights Act or the United States Constitution and issued judgment in the state's favor. *Id.* at 882–83.

DNC timely appealed, and a three-judge panel of our court affirmed the decision of the district court in its entirety. *Democratic Nat'l Comm. v. Reagan ("DNC")*, 904 F.3d 686 (9th Cir. 2018), *vacated by order granting rehearing en banc*, 911 F.3d 942 (9th Cir. 2019) (mem.). But today, the en banc panel majority reverses the decision of the district court and holds that the OOP and ballot-collection policies violate § 2 of the Voting Rights Act and that the ballot-collection policy was enacted with discriminatory intent in violation of the Fifteenth Amendment.

II

The first mistake of the en banc majority is disregarding the critical standard of review. Although the majority recites the appropriate standard, it does not actually engage with it.[4] Maj. Op. 8–9. The standard is not complex. We review *de novo* the district court's conclusions of law, but may review

[4] As the majority admits, we review the district court's "overall finding of vote dilution" under § 2 of the Voting Rights Act only for clear error. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (emphasis added); Maj. Op. 8–9. The majority quotes an elaboration of this standard by the Supreme Court in *Gingles*. Maj. Op. 8–9. But the Court in *Gingles* actually held that the district court's ultimate finding was not clearly erroneous. *Gingles*, 478 U.S. at 80.

its findings of fact only for *clear error*. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc).

The majority's disregard of such standard and, thus, our appellate role, infects its analysis of each of DNC's claims. The demanding clear error standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Rather, we may reverse a finding only if, "although there is evidence to support it, [we are] left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). To do otherwise "oversteps the bounds of [our] duty under [Federal Rule of Civil Procedure] 52(a)" by "duplicat[ing] the role of the lower court." *Id.* at 573. As explained in Parts III and IV, I fail to see how *on the record before us* one could be "left with a definite and firm conviction" that the district court erred.

III

DNC first contends that Arizona's policies violate § 2 of the Voting Rights Act. A district court's determination of whether a challenged practice violates § 2 of the Voting Rights Act is "intensely fact-based": the court assesses the "totality of the circumstances" and conducts "a 'searching practical evaluation of the past and present reality.'" *Smith v. Salt River Project Agric. Improvements & Power Dist. ("Salt River")*, 109 F.3d 586, 591 (9th Cir. 1997) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). Thus, "[d]eferring to the district court's superior fact-finding

capabilities, we review *only for clear error its ultimate finding of no § 2 violation*." *Id.* at 591 (emphasis added).

In relevant part, § 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State . . . *are not equally open to participation by members of a class of citizens protected by subsection (a)* in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301 (emphasis added). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. To determine whether a practice violates § 2, courts employ a two-step analysis. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014); *League of Women*

Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014).

The first step is asking whether the practice provides members of a protected class "less 'opportunity' than others 'to participate in the political process *and* to elect representatives of their choice.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (alteration in original) (quoting 52 U.S.C. § 10301). In other words, the challenged practice "must impose a *discriminatory burden* on members of a protected class." *League of Women Voters*, 769 F.3d at 240 (emphasis added). To prevail at step one, the plaintiff therefore "must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Salt River*, 109 F.3d at 595 (alteration in original) (quoting *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 312 (3d Cir. 1994)); *see also Ohio Democratic Party*, 834 F.3d at 638. If a discriminatory burden is established, then—and only then—do we consider whether the burden is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *League of Women Voters*, 769 F.3d at 240 (quoting *Gingles*, 478 U.S. at 47).

The majority agrees that this two-step analysis controls but mistakenly applies it. According to the majority, DNC has shown that the OOP policy and the ballot-collection policy fail at both steps—and, presumably, that the district court clearly erred in finding otherwise. Under an appropriately deferential analysis, however, DNC cannot prevail even at step one: it has simply failed to show that either policy erects a discriminatory burden.

A

As to the facially neutral OOP policy, DNC argues, erroneously, that wholly discarding, rather than partially counting, ballots that are cast out-of-precinct violates § 2 of the Voting Rights Act because such policy imposes a discriminatory burden on minority voters related to Arizona's history of discrimination. The district court, quite properly, found that DNC failed to carry its burden at step one—that the practice imposes a discriminatory burden on minority voters—for two reasons. *DNC*, 329 F. Supp. 3d at 873.

1

First, the district court determined that DNC failed to show "that the racial disparities in OOP voting are practically significant enough to work a meaningful inequality in the opportunities of minority voters as compared to non-minority voters." *Id.* Thus, it ruled that DNC failed to show that the precinct-based system has a "disparate impact on the opportunities of minority voters to elect their preferred representatives." *Id.* at 872. To the contrary, the district court made the factual finding that out-of-precinct "ballots represent . . . a small and ever-decreasing fraction of the overall votes cast in any given election." *Id.*

Furthermore, the district court determined that "the burdens imposed by precinct-based voting . . . are not severe. Precinct-based voting merely requires voters to locate and travel to their assigned precincts, which are ordinary burdens traditionally associated with voting." *Id.* at 858. Indeed, the numbers found by the district court support such conclusion. Only 0.47 percent of all ballots cast in the 2012 general election (10,979 out of 2,323,579) were not counted because

they were cast out of the voter's assigned precinct. *Id.* at 872. In 2016, this fell to 0.15 percent (3,970 out of 2,661,497). *Id.* And of those casting ballots in-person on Election Day, approximately 99 percent of minority voters and 99.5 percent of non-minority voters cast their ballots in their assigned precincts. *Id.* Given that the overwhelming majority of all voters complied with the precinct-based voting system during the 2016 election, it is difficult to see how the district court's finding could be considered clearly erroneous. *See also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion) (discussing "the usual burdens of voting"). And it further ruled that DNC "offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while non-minority voters were given correct information" to suggest that the burden of voting in one's assigned precinct is more significant for minority voters than for non-minority voters. *DNC*, 329 F. Supp. 3d at 873.

As Judge Ikuta explained in her now-vacated majority opinion for the three-judge panel:

> If a challenged election practice is not burdensome or the state offers easily accessible alternative means of voting, a court can reasonably conclude that the law does not impair any particular group's opportunity to "influence the outcome of an election," even if the practice has a disproportionate impact on minority voters.

DNC, 904 F.3d at 714 (citation omitted) (quoting *Chisom*, 501 U.S. at 397 n.24). The "bare statistic[s]" presented may indeed show a disproportionate impact on minority voters,

but we have held previously that such showing is not enough. *Salt River*, 109 F.3d at 595 ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." (emphasis in original)). A court must evaluate the burden imposed by the challenged voting practice—not merely any statistical disparity that may be shown. The Supreme Court's interpretation of § 2 in *Gingles* suggests the same. There, the Court observed that "[i]t 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.'" *Gingles*, 478 U.S. at 48 n.15 (emphasis added) (quoting 52 U.S.C. § 10301(b)). Furthermore, because "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system," it cannot be the case that pointing to a mere statistical disparity related to a challenged voting practice is sufficient to "dismantle" that practice. *Frank*, 768 F.3d at 754; *see also Salt River*, 109 F.3d at 595.

The majority, however, contends that "the district court discounted the disparate burden on the ground that there were relatively few OOP ballots cast in relation to the total number of ballots." Maj. Op. 43. In the majority's view, the district court should have emphasized that the percentage of in-person ballots that were cast out-of-precinct increased, thus isolating the specific impact of the OOP policy amongst in-person voters bound by the precinct-system requirements.

Contrary to the majority's assertion, however, the legal review at hand does not require that we isolate the specific challenged practice in the manner it suggests. Rather, at step one of the § 2 inquiry, we only consider whether minority voters "experience substantial difficulty electing

representatives of their choice," *Gingles*, 478 U.S. at 48 n.15, "based on the totality of circumstances," 52 U.S.C. § 10301(b).[5] Although the majority would like us to believe that the increasing percentage of in-person ballots cast out-of-precinct demonstrates that minorities are disparately burdened by the challenged policy, the small number of voters who chose to vote in-person and the even smaller number of such voters who fail to do so in the correct precinct demonstrate that any minimal burden imposed by the policy does not deprive minority voters of equal opportunities to elect representatives of their choice. A conclusion otherwise could not be squared with our determination that a mere statistical showing of disproportionate impact on racial minorities does not satisfy the challenger's burden. *See Salt River*, 109 F.3d at 595. If such statistical impact is not sufficient, it must perforce be the case that the crucial test is

[5] The majority correctly asserts that *Gingles* was a vote dilution not vote denial case. However, it incorrectly claims the standard in a vote denial case is different and, without stating such standard, it simply concludes that the 3,709 ballots cast out of precinct in the 2016 general election in Arizona is more than any "de minimis number" below which there is no Section 2 violation, without ever revealing what such minimum threshold might be. Maj. Op. 107. The majority cites *League of Women Voters*, a vote denial case, to reach this conclusion. *See* 769 F.3d at 248–49. Yet, in that case, the Fourth Circuit relies on *Gingles* throughout to determine that the same analysis applies to vote denial and vote dilution cases. *Id.* at 238–40. Earlier in its opinion, the majority itself uses *Gingles* as the standard for analyzing a § 2 violation in a vote denial case. Maj. Op. 37. The distinction the majority attempts to draw fails because, contrary to what the majority implies, "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected," *Gonzalez v. Arizona*, 677 F.3d 383, 495 (9th Cir. 2012) (internal quotation marks omitted), and "[t]his approach applies both to claims of vote denial and vote dilution." *Id.* at 495 n. 32.

the *extent* to which the practice burdens minority voters as opposed to non-minority voters. But the en banc majority offers no explanation for how or why the burden of voting in one's assigned precinct is severe or beyond that of the burdens traditionally associated with voting.

The majority argues that there may be a "de minimis number" below which no § 2 violation has occurred.[6] Maj. Op. 44. But we know from our own precedent that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 . . . inquiry." *Salt River*, 109 F.3d at 595 (emphasis in original). And *Chisom* makes clear that § 2 "claims must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice." 501 U.S. at 398 (emphasis in original). As such, the inquiry must require consideration of both the scope of the burden imposed by the particular policy—not merely how many voters are impacted by it—and the difficulty of accessing the political process in its entirety.

Thus, it cannot be true, as the majority suggests, that simply showing that some number of minority voters' ballots were not counted as a result of an individual policy satisfies step one of the § 2 analysis for a facially neutral policy.

2

Second, the district court made the factual finding that "Arizona's policy to not count OOP ballots is not the cause

[6] As Judge Ikuta explained, "an election rule requiring voters to identify their correct precinct in order to have their ballots counted does not constitute a 'disenfranchisement' of voters." *DNC*, 904 F.3d at 730 n.33; *see also id.* at 724 n.27.

of [any identified] disparities in OOP voting." *DNC*, 329 F. Supp. 3d at 872. According to the OOP policy that is challenged by DNC, a ballot is not counted if it is cast outside of the voter's assigned precinct. And the district court pointed to several factors that result in higher rates of out-of-precinct voting among minorities. For example, the district court found that "high rates of residential mobility are associated with higher rates of OOP voting," and minorities are more likely to move more frequently. *Id.* at 857, 872. Similarly, "rates of OOP voting are higher in neighborhoods where renters make up a larger share of householders." *Id.* at 857. The precinct-system may also pose special challenges for Native American voters, because they may "lack standard addresses" and there may be additional "confusion about the voter's correct polling place" where precinct assignments may differ from assignments for tribal elections. *Id.* at 873. "Additionally", the district court found, Arizona's "changes in polling locations from election to election, inconsistent election regimes used by and within counties, and placement of polling locations all tend to increase OOP voting rates." *Id.* at 858.

But the burden of *complying* with the precinct-based system in the face of any such factors is plainly distinguishable from the *consequence* imposed should a voter fail to comply. Indeed, as the district court found, "there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots." *Id.* Although "the consequence of voting OOP might make it more imperative for voters to correctly identify their precincts," *id.*, such consequence does not *cause* voters to cast their ballots out-of-precinct or make it more burdensome for voters to cast their ballots in their assigned precincts.

The majority goes astray by failing to recognize the distinction between the burden of complying and the consequence of failing to do so. In fact, the majority undercuts its own claim by citing the same host of reasons identified by the district court as the reasons why a minority voter is more likely to vote out-of-precinct. Maj Op. 14–19. All the factors the majority seizes upon, however, stem from the general requirement that a voter cast his or her ballot in the assigned precinct—not the policy that enforces such requirement. The importance of such distinction is made clear by the relief that DNC seeks: DNC does not request that Arizona be made to end its precinct-based system or to assign its precincts differently, but instead requests that Arizona be made to count those ballots that are not cast in compliance with the OOP policy.[7] Removing the enforcement policy, however, would do nothing to minimize or to extinguish the disparity that exists in out-of-precinct voting.

Consider another basic voting requirement: in order to cast a ballot, a voter must register. If a person fails to register, his or her vote will not count. Any discriminatory result from such a policy would need to be addressed in a

[7] The majority suggests that DNC challenges only "Arizona's policy, within that system, of entirely discarding OOP ballots" as opposed to counting or partially counting them. Maj. Op. 78. But this is not a compromise position: there is no difference between counting and partially counting a ballot cast out-of-precinct. Counting an OOP ballot would entail evaluating the ballot to determine on which issues the person would have been qualified to vote in his or her assigned precinct and discarding the person's votes as to issues on which he or she would not have been qualified to vote. Certainly, the majority isn't suggesting that a person would ever be allowed to vote on issues which he or she would not have been eligible to vote even in the assigned precinct. It is difficult to discern any other possible meaning for what the majority refers to as entirely "counting" out-of-precinct ballots.

challenge to *that* policy itself. For example, if minorities are underrepresented as a segment of registered voters, perhaps they could challenge some discriminatory aspect of the registration system. But they surely could not prevail by challenging simply the state's *enforcement* of the registration policy by refusing to count unregistered voters' ballots. Minorities in a jurisdiction may very well be underrepresented as members of the registered electorate, but the discrepancy between the protected class as a segment of the general population and as a segment of the registered voting population would not require that a state permit unregistered voters to cast valid ballots on Election Day.

Similarly, the fact that a ballot cast by a voter outside of his or her assigned precinct is discarded does not *cause* minorities to vote out-of-precinct disproportionately. But DNC does not challenge the general requirement that one vote in his or her precinct or take issue with the assignment of precinct locations—the very requirements that *could* lead to a disproportionate impact. It may indeed be the case in a precinct-based voting system that a state's poor assignment of districts, distribution of inadequate information about voting requirements, or other factors have some material effect on election practices such that minorities have less opportunity to elect representatives of their choice as a result of the system. But, in the words of the majority, DNC's challenge "assumes both [the] importance and [the] continued existence" of "Arizona's precinct-based system of voting." Maj. Op. 78. Instead, DNC challenges only Arizona's *enforcement* of such system. Thus, even if there were a recognizable disparity in the opportunities of minority voters voting out-of-precinct, it would nonetheless not be the *result* of the policy at issue before us.

3

I reject the suggestion implicit in the majority opinion that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory under step one of the § 2 inquiry. We have already held otherwise. *Salt River*, 109 F.3d at 595. And the majority itself concedes that "more than a de minimis number of minority voters must be burdened before a Section 2 violation based on the results test can be found." Maj. Op. 44. Furthermore, I fail to see how DNC—and the majority—can concede the importance and continued existence of a precinct-based system, yet argue that the enforcement mechanism designed to maintain such system is impermissible.

Because DNC has failed to meet its burden under step one of the Voting Rights Act § 2 inquiry—that the district court's findings were clearly erroneous—our analysis of its OOP claim should end here.

B

As to the facially neutral ballot-collection policy, DNC argues, erroneously, that it violates § 2 because there is "extensive evidence" demonstrating that minority voters are more likely to have used ballot-collection services and that they would therefore be disproportionately burdened by limitations on such services. Specifically, DNC relies on anecdotal evidence that ballot collection has disproportionately occurred in minority communities, that minority voters were more likely to be without home mail delivery or access to transportation, and that ballot-harvesting efforts were disproportionately undertaken by the Democratic Party in minority communities. And, DNC claims, such

burden is caused by or linked to Arizona's history of discrimination.

The district court, quite properly, rejected such argument, making the factual finding that DNC failed to establish at step one that the ballot-collection policy imposed a discriminatory burden on minority voters. *DNC*, 329 F. Supp. 3d at 866, 871. Once again, the question is whether such finding was clearly erroneous. *Salt River*, 109 F.3d at 591.

1

The district court found broadly that the non-quantitative evidence offered by DNC failed to show that the ballot-collection policy denied minority voters of "meaningful access to the political process." *DNC*, 329 F. Supp. 3d at 871. As Judge Ikuta observed, to determine whether the challenged policy provides minority voters "less opportunity to elect representatives of their choice, [we] must necessarily consider the severity and breadth of the law's impacts on the protected class." *DNC*, 904 F.3d at 717.

But no evidence of that impact has been offered. "In fact, *no* individual voter testified that [the ballot-collection policy's] limitations on who may collect an early ballot would make it significantly more difficult to vote." *DNC*, 329 F. Supp. 3d at 871 (emphasis added). Anecdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in other ways or would be burdened by having to do so. The district court simply found that "prior to the [ballot-collection policy's] enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties," *id.* at 870, but, once again, the disparate impact

of a challenged policy on minority voters is insufficient to establish a § 2 violation, *see Salt River*, 109 F.3d at 594–95.

The majority simply does not address the lack of evidence as to whether minority voters have less opportunity than non-minority voters now that ballot collection is more limited. Instead, the majority answers the wrong question by pointing to minority voters' use of ballot collection in the past. The majority offers no record-factual support for its conclusion that the anecdotal evidence presented demonstrates that compliance with the ballot-collection policy imposes a disparate burden on minority voters—a conclusion that must be reached in order to satisfy step one of the § 2 inquiry—let alone evidence that the district court's contrary finding was "clearly erroneous."

Given the lack of any testimony in the record indicating that the ballot-collection policy would result in minority voters "experienc[ing] substantial difficulty electing representatives of their choice," *Gingles*, 478 U.S. at 48 n.15, the district court did not clearly err in finding that, "for some voters, ballot collection is a preferred and more convenient method of voting," but a limitation on such practice "does not deny minority voters meaningful access to the political process." *DNC*, 329 F. 3d Supp. at 871.

2

The district court further found that the ballot-collection policy was unlikely to "cause a meaningful inequality in the electoral opportunities of minorities" because only "a relatively small number of voters have used ballot collection services" in the past at all. *DNC*, 329 F. Supp. 3d at 870–71. And, the district court noted, DNC "provided no quantitative

or statistical evidence comparing the proportion that is minority versus non-minority." *Id.* at 866. "Without this information," the district court explained, "it becomes difficult to compare the law's impact on different demographic populations and to determine whether the disparities, if any, are meaningful." *Id.* at 867. Thus, from the record, we do not know either the extent to which voters may be burdened by the ballot-collection policy or how many minority voters may be so burdened.

Nonetheless, the district court considered circumstantial and anecdotal evidence offered by DNC and determined that "the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties who would not fall within [the ballot-collection policy's] exceptions." *Id.* at 871. DNC—and the majority—argue that such finding is not supported by the record, but, given the lack of quantitative or statistical evidence before us, it is difficult to conclude that such finding is clearly erroneous. The district court itself noted that it could not "speak in more specific or precise terms" given the sparsity of the record. *Id.* at 870. Drawing from anecdotal testimony, the district court estimated that fewer than 10,000 voters used ballot-collection services in any election. *Id.* at 845. Drawing even "the unjustified inference that 100,000 early mail ballots were collected" during the 2012 general election, the district court found that such higher total would nonetheless be "relatively few early voters" as compared to the 1.4 million early mail ballots returned or 2.3 million total votes cast. *Id.* at 845. The majority further argues that the district court erred in "discounting the evidence of third-party ballot collection as merely 'circumstantial and anecdotal'" Maj. Op. 83. But the district court did nothing of the sort. To the contrary, the district court considered whether the ballot-collection policy

violated § 2 by making these estimates—and even generous estimates—from the anecdotal evidence offered. And the district court's subsequent conclusion that the limitation of third-party ballot collection would impact only a "relatively small number of voters," *id.* at 870, is clearly plausible on this record, *see Bessemer City*, 470 U.S. at 573.

The majority also argues that the total number of votes affected is not the relevant inquiry; the proper test is whether the number of ballots collected by third parties surpasses any de minimis number. Maj. Op. 84. But we already know "that a bare statistical showing" that an election practice has a "disproportionate *impact* on a racial minority does not satisfy" step one of the § 2 inquiry. *Salt River*, 109 F.3d at 595 (emphasis in original). And, even if such impact were sufficient, the record offers no evidence from which the district court could determine the extent of the discrepancy between minority voters as a proportion of the entire electorate versus minority voters as a proportion of those who have voted using ballot-collection services in the past. *DNC*, 329 F. Supp. 3d at 866–67.

3

As Judge Bybee keenly observed in a previous iteration of this case (and indeed in his dissent in this case), "[t]here is no constitutional or federal statutory right to vote by absentee ballot." *Feldman III*, 843 F.3d at 414 (Bybee, J., dissenting) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969)); *accord* Bybee, J. Diss. Op. 156. Both today and in the past, Arizona has chosen to provide a wide range of options to voters. But Arizona's previous decision to permit a particular mechanism of voting does not preclude Arizona from modifying its election system

to limit such mechanism in the future so long as such modification is made in a constitutional manner. And, in fact, Arizona's modification here was made in compliance with "the recommendation of the bipartisan Commission on Federal Election Reform." *DNC*, 329 F. Supp. 3d at 855. Without any evidence in the record of the severity and breadth of the burden imposed by this change to the ballot-collection policy, we cannot be "left with the definite and firm conviction" that the district court erred in finding that DNC failed to show that the policy violated § 2. *See Bessemer City*, 470 U.S. at 573; *see also Salt River*, 109 F.3d at 591.

C

Because I disagree with the majority's conclusion that DNC has satisfied its burden at step one of the § 2 Voting Rights Act inquiry, I would not reach step two. I therefore do not address the majority's consideration of the so-called "Senate Factors" in determining whether 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." *League of Women Voters*, 769 F.3d at 240 (quoting *Gingles*, 478 U.S. at 47). These factors—and the majority's lengthy history lesson on past election abuses in Arizona—simply have no bearing on this case. Indeed, pages 47 to 81 of the majority's opinion may properly be ignored as irrelevant.

IV

DNC also contends that the ballot-collection policy violates the Fifteenth Amendment to the United States

Constitution.[8] To succeed on a claim of discriminatory intent under the Fifteenth Amendment, the challenger must demonstrate that the state legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Because discriminatory intent "is a pure question of fact," we again review only for clear error. *Pullman-Standard v. Swint*, 456 U.S. 273, 287–88 (1982). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

The district court concluded that the ballot-collection policy did not violate the Fifteenth Amendment because it made the factual finding that the legislature "was not motivated by a desire to suppress minority voters," although "some individual legislators and proponents of limitations on ballot collection harbored *partisan* motives" that "did not permeate the entire legislative process." *DNC*, 329 F. Supp. 3d at 879, 882 (emphasis added). Instead, "[t]he legislature was motivated by . . . a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." *Id.* at 882. In analyzing DNC's appeal from such finding, the majority, once again, completely ignores our demanding standard of review and instead conducts its own

[8] The Fifteenth Amendment authorizes Congress to enforce its guarantee that the right "to vote shall not be denied or abridged . . . by appropriate legislation." U.S. Const. amend. XV. Section 2 of the Voting Rights Act is such legislation. *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013).

de novo review. Maj. Op. 93. Our duty is only to consider whether the district court clearly erred in *its finding* that the ballot-collection policy was not enacted with discriminatory intent. *See Bessemer City*, 470 U.S. at 573. And "to be clearly erroneous, a decision must . . . strike [a court] as wrong with the force of a five-week old, unrefrigerated dead fish." *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 502 (9th Cir. 1991) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

The majority therefore fails to offer any basis—let alone a convincing one—for the conclusion that it must reach in order to reverse the decision of the district court: that the district court committed clear error in its factual findings. Given the failure of the majority to conduct its review in the proper manner, I see no reason to engage in a line-by-line debate with its flawed analysis. Rather, it is enough to note two critical errors made by the majority in ignoring the district court's determinations that while some legislators were motivated by partisan concerns, the legislature as a body was motivated by a desire to enact prophylactic measures to prevent voter fraud.

A

First, the majority fails to distinguish between *racial* motives and *partisan* motives. Even when "racial identification is highly correlated with political affiliation," a party challenging a legislative action nonetheless must show that *racial* motives were a motivating factor behind the challenged policy. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)). Nonetheless, the majority suggests that a legislator motivated by *partisan* interest to enact a law that

disproportionately impacts minorities must necessarily have acted with racially discriminatory intent as well. For example, the district court noted that Arizona State Senator Don Shooter was, "in part motivated by a desire to eliminate what had become an effective Democratic [Get Out The Vote] strategy." *DNC*, 329 F. Supp. 3d at 879. The majority simply concludes that such finding shows racially discriminatory intent as a motivating factor. But the majority's unsupported inference does not satisfy the required showing. And the majority fails to cite any evidence demonstrating that the district court's finding to the contrary was not "plausible in light of the record viewed in its entirety." *Bessemer City*, 470 U.S. at 574.

B

Second, in defiance of Supreme Court precedent to the contrary, the majority assumes that a legislature's stated desire to prevent voter fraud must be pretextual when there is no direct evidence of voter fraud in the legislative record. In *Crawford*, the Court rejected the argument that *actual* evidence of voter fraud was needed to justify the State's decision to enact prophylactic measures to prevent such fraud. *Crawford*, 553 U.S. at 195–96 . There, the Court upheld an Indiana statute requiring in-person voters to present government-issued photo identification in the face of a constitutional challenge. *Id.* at 185. Although "[t]he record contain[ed] no evidence of [voter] fraud actually occurring in Indiana at any time in its history," the Supreme Court nonetheless determined that the State had a legitimate and important interest "in counting only the votes of eligible voters." *Id.* at 194, 196; *see also id.* at 195 nn.11–13 (citing "fragrant examples of" voter fraud throughout history and in recent years). Given its interest in addressing its valid

concerns of voter fraud, Arizona was free to enact prophylactic measures even though no evidence of actual voter fraud was before the legislature. Yet the majority does not even mention *Crawford*, let alone grapple with its consequences on this case.

And because no evidence of actual voter fraud is required to justify an anti-fraud prophylactic measure, the majority's reasoning quickly collapses. The majority cites Senator Shooter's "false and race-based allegations" and the "LaFaro video," which the district court explained "showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots" and "contained a narration of [i]nnuendos of illegality . . . [and] racially tinged and inaccurate commentary by . . . LaFaro." *DNC*, 329 F. Supp. 3d at 876 (second, third, and fourth alterations in original). The majority contends that although "some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed," a discriminatory purpose may be attributable to all of them as a matter of law because any sincere belief was "created by Senator Shooter's false allegations and the 'racially tinged' LaFaro video." Maj. Op. 99. The majority claims that these legislators were used as "cat's paws" to "serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies." Maj. Op. 100. Yet, the majority's reliance on such employment discrimination doctrine is misplaced because, unlike employers whose decision may be tainted by the discriminatory motives of a supervisor, each legislator is an independent actor, and bias of some cannot be attributed to all members. The very fact that *some* members had a sincere belief that voter fraud needed to be addressed is enough to

rebut the majority's conclusion. To the contrary, the underlying allegations of voter fraud did not need to be true in order to justify the "legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196. And the majority provides no support for its inference of pretext where there is a sincere and legitimate interest in addressing a valid concern. Maj. Op. at 97–100. Instead, the majority *accepts* the district court's finding that some legislators "had a sincere, non-race-based belief that there was fraud" that needed to be addressed. Nevertheless, unable to locate any discriminatory purpose, it simply attributes one to them using the inapplicable "cat's paw doctrine." Maj. Op. 99. Such argument demonstrates the extraordinary leap in logic the majority must make in order to justify its conclusion.

Let me restate the obvious: we may reverse the district court's intensely factual determination as to discriminatory intent only if we determine that such finding was *clearly erroneous*. Thus, even if the majority disagrees with the district court's finding, it must demonstrate that the evidence was not "plausible in light of the record viewed in its entirety." *Bessemer City*, 470 U.S. at 574. Perhaps if the majority had reminded itself of our appellate standard, it would not have simply re-weighed the same evidence considered by the district court to arrive at its own findings on appeal.

V

The district court properly determined that neither Arizona's out-of-precinct policy nor its ballot-collection policy violates § 2 of the Voting Rights Act and the Fifteenth