RECENT CASES

ELECTION LAW — VOTING RIGHTS ACT — NINTH CIRCUIT HOLDS TWO ARIZONA VOTING LAWS ARE UNLAWFUL UNDER SECTION 2 OF THE VOTING RIGHTS ACT. — *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir.) (en banc), *cert. granted sub nom. Brnovich v. Democratic National Committee*, No. 19-1257, 2020 WL 5847130 (U.S. 2020).

Section 2 of the Voting Rights Act of 1965[1] (VRA) provides that no state practice "shall be imposed . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race."[2] In the years post–*Shelby County v. Holder*,[3] section 2 is perhaps the most powerful instrument for challenging racially discriminatory voting laws.[4] The heightened interest in bringing vote denial claims under section 2[5] has forced courts to come up with a manageable standard for evaluating them. But while some courts have mostly settled on a test, it lacks the Supreme Court's imprimatur and many argue it's far too broad to stand.[6] Recently, in *Democratic National Committee v. Hobbs*,[7] the Ninth Circuit, sitting en banc, enjoined two Arizona laws on the grounds that they violated section 2 of the VRA.[8] In its opinion, the court implicitly rejected the Department of Justice's (DOJ) proposed framework for vote denial claims. This framework would require plaintiffs to show the challenged law produced both a disparate impact *and* a substantial or material burden on voting. But a material burden standard improperly blends the constitutional standard for racially discriminatory election laws with the statutory requirements of the VRA. Though alternatives to the current standard are worth considering given the uncertainty around the doctrine, the DOJ's proposed standard would hobble efforts to challenge a host of laws that the VRA was enacted to combat.

Shortly before the 2016 general election, the Democratic National Committee (DNC), along with the Democratic Senatorial Campaign Committee (DSCC) and the Arizona Democratic Party (ADP), filed suit in the United States District Court for the District of Arizona asking for

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[1] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

[2] 52 U.S.C. § 10301(a).

[3] 570 U.S. 529 (2013).

[4] *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 440 (2015).

[5] *See id.* at 448.

[6] *See, e.g.*, Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1592–93 (2019).

[7] 948 F.3d 989 (9th Cir.) (en banc), *cert. granted sub nom.* Brnovich v. Democratic Nat'l Comm., No. 19-1257, 2020 WL 5847130 (U.S. 2020).

[8] *Id.* at 1046.

an injunction preventing the State from enforcing two separate Arizona voting laws: the State's out-of-precinct (OOP) policy and Arizona House Bill 2023 (H.B. 2023).[9] The OOP policy required counties to cancel the votes (including those for statewide and federal office) on a provisional ballot cast outside of the voter's assigned precinct,[10] while H.B. 2023 made it a felony for a third party to collect a voter's mail ballot.[11] The plaintiffs claimed both laws had a disproportionate effect on minority voters in contravention of section 2 of the VRA.[12] The plaintiffs also argued that H.B. 2023 violated the Fifteenth Amendment.[13]

For vote denial claims, plaintiffs can show a violation of section 2 in one of two ways. The first is to show the challenged law was enacted with the intent to discriminate.[14] This test — called the "intent test" — is coextensive with the guarantees of the Fifteenth Amendment.[15] The second is to show that the law produced a discriminatory result.[16] Most courts, including the Ninth Circuit, have applied the aptly named "results test,"[17] the first step of which asks whether there is a "disparate burden on members of the protected class."[18] If so, the second step asks "whether, under the 'totality of the circumstances,' there is a relationship between the challenged 'standard, practice, or procedure,' on the one hand, and 'social and historical conditions' on the other."[19] The second step is evaluated under the so-called "Senate factors," a list of nine considerations in the Senate Report accompanying the 1982 version of the VRA.[20]

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[9] *Id.* at 998; Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 831–32 (D. Ariz. 2018).

[10] *See* ARIZ. REV. STAT. ANN. §§ 16-122, -135, -584 (2020), *invalidated by Hobbs*, 948 F.3d 989.

[11] *See* H.B. 2023, 52d Leg., 2d Reg. Sess. (Ariz. 2016) (codified at ARIZ. REV. STAT. ANN. § 16-1005(H), *invalidated by Hobbs*, 948 F.3d 989). The law made special exceptions for family members, household members, and caregivers, who were permitted to collect a voter's ballot. ARIZ. REV. STAT. ANN. § 16-1005(I), *invalidated by Hobbs*, 948 F.3d 989.

[12] *Hobbs*, 948 F.3d at 998.

[13] *Id.*

[14] *See id.* at 1011.

[15] *See id.*

[16] *See id.*

[17] *See, e.g.*, *id.*; Lee v. Va. State Bd. of Elections, 843 F.3d 592, 599–600 (4th Cir. 2016); Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); Frank v. Walker, 768 F.3d 744, 754–55 (7th Cir. 2014); Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524, 553–54 (6th Cir. 2014); *see also* Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J.F. 799, 802–09 (2018).

[18] *Hobbs*, 948 F.3d at 1012.

[19] *Id.*

[20] *Id.* at 1033; *see* Democratic Nat'l Comm. v. Reagan, 904 F.3d 686, 712 & n.15 (9th Cir. 2018) ("[T]he Senate [f]actors include the extent of any history of official discrimination, the use of election practices or structures that could enhance the opportunity for discrimination, the extent to which voting is racially polarized, and the extent to which minorities bear the effects of discrimination in education, employment and health."), *vacated and reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019); *see also Hobbs*, 948 F.3d at 1012–13.

Following a ten-day bench trial, the district court denied both of the VRA claims under the results test.[21] With regard to the OOP policy, the district court found that the plaintiffs did not carry their burden under step one because they failed to show either that the policy caused a disproportionate number of minority voters to go to the wrong precinct or that the racial disparities led to "meaningful inequality" in the political process.[22] The district court also found that the impact of H.B. 2023 was too trivial a burden to constitute a violation of section 2 under step one.[23]

The Ninth Circuit affirmed.[24] Writing for the panel, Judge Ikuta held that the district court appropriately found that the plaintiffs did not meet their burden under the VRA.[25] The panel, like the district court, found that both claims failed at step one and that there was not enough evidence to show that the Arizona legislators voting for the passage of H.B. 2023 were motivated by racial animus.[26] The plaintiffs filed a petition for rehearing en banc, which the Ninth Circuit granted.[27]

Sitting en banc, the Ninth Circuit reversed.[28] Writing for the majority, Judge Fletcher enjoined both the OOP policy and H.B. 2023's ban on ballot collection under section 2 of the VRA.[29] The court first found that the OOP policy ran afoul of section 2's results test. Under the first step of the test, the court accepted the expert report introduced at trial and concluded that the OOP policy produced a disparate burden on minority voters.[30] Judge Fletcher noted that Arizona had a notably high rate of rejection for provisional ballots, and that many were rejected for having been cast out of precinct.[31] The court gave three reasons for this high rate of rejection: "[F]requent changes in polling locations; confusing placement of polling locations; and high rates of residential mobility."[32]

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[21] Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 832, 870–73, 883 (D. Ariz. 2018). The court found that both claims failed at step one of the results test. *Id.* at 871, 873. The plaintiffs claimed that the OOP policy and H.B. 2023 also violated the Fourteenth Amendment, but the district court rejected these claims, *id.* at 856, 862, and the en banc panel did not discuss them, *Hobbs*, 948 F.3d at 999.

[22] *Reagan*, 329 F. Supp. 3d at 873. The district court also found that the plaintiffs did not carry their burden in step two of the analysis under the VRA's results test. *Id.* at 878.

[23] *Id.* at 870–71. Under the step two analysis, the district court also noted that Arizona "has a constitutionally adequate justification for the law: to reduce opportunities for early ballot loss or destruction." *Id.* at 878.

[24] *Reagan*, 904 F.3d at 697.

[25] *Id.* at 731–32. Judge Ikuta was joined by Judge Bea. Chief Judge Thomas dissented.

[26] *Id.* at 712 n.15, 720–21.

[27] *See* Democratic Nat'l Comm. v. Reagan, 911 F.3d 942 (9th Cir. 2019).

[28] *Hobbs*, 948 F.3d at 998.

[29] *Id.* at 997, 1046. Judge Fletcher was joined by Chief Judge Thomas and Judges Berzon, Rawlinson, Clifton, Callahan, Murguia, and Owens. Judge Watford issued a concurring opinion, joining the court's opinion except for the discussion of the intent test. *Id.* at 1046 (Watford, J., concurring).

[30] *Id.* at 1014–16 (majority opinion). The court critiqued the district court's focus on overall numbers of OOP ballots rather than OOP ballots as a percentage of in-person ballots cast. *Id.* at 1014–15.

[31] *See id.* at 1000–01.

[32] *Id.* at 1001.

Each of these factors had a much greater effect on minority voters, and therefore, the OOP policy itself disproportionately impacted minority voters.[33] The court also rejected the district court's conclusion that the OOP policy did not cause the discriminatory result.[34]

The majority also found that the policy violated the second step of the results test. The court examined the Senate factors the district court considered at trial.[35] Judge Fletcher noted that the fifth (the effects of discrimination on minority access to the ballot) and ninth (the justification given for the policy) factors were "particularly important" to the analysis.[36] The court emphasized Arizona's history of racial disenfranchisement, low turnout of minority residents compared to their white counterparts, racially polarized voting patterns, other occurrences of racial discrimination, racialized campaign rhetoric, and general unresponsiveness to concerns of minority residents, as well as the lack of diversity of Arizona's elected officials and weakness of Arizona's justification.[37]

Turning to H.B. 2023, the majority found that the ban on ballot collection also had a disproportionate effect on minority voters.[38] Judge Fletcher wrote that "[i]n urban areas of heavily Hispanic counties, many apartment buildings lack outgoing mail services" and that "[o]nly 18 percent of American Indian registered voters have home mail service."[39] Moreover, issues such as mail security, lack of accessible transportation, and community isolation make third-party ballot collection all the more important to minority communities.[40] And because the majority found that the number of ballots collected from minority voters was sufficient to constitute "meaningful inequality," it held that the ban failed the first step of the results test.[41] The court concluded the ban also failed step two for largely the same reasons as the OOP policy did. In its analysis of Senate factor nine, it noted that the State's justifications for the law, preventing voter fraud and bolstering "public confidence in election[s]," were tenuous.[42] There was no evidence of fraud in Arizona's history,

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[33] *Id.* at 1002–05.

[34] *Id.* at 1016. The en banc majority held that the plaintiffs did not need to show that the policy was the cause of disparate out-of-precinct voting, but only that the result of discarding the ballots disproportionately impacted minority voters. *Id.*

[35] *Id.* at 1017. This examination included factors one, two, five, six, seven, eight, and nine. *Id.*

[36] *Id.*

[37] *Id.* at 1017, 1026–31. The court further noted: "The only plausible justification for Arizona's OOP policy would be the delay and expense entailed in counting OOP ballots, but in its discussion of the Senate factors, the district court never mentioned this justification. Indeed, the district court specifically found that '[c]ounting OOP ballots is administratively feasible.'" *Id.* at 1031 (quoting Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 860 (D. Ariz. 2018)).

[38] *Id.* at 1005–06.

[39] *Id.* at 1006.

[40] *See id.*

[41] *Id.* at 1033.

[42] *Id.* at 1035 (quoting *Reagan*, 329 F. Supp. 3d at 852); *see id.* at 1035–37.

and Arizona already criminalized fraudulent ballot collection.[43] Therefore, the ban violated section 2's results test.[44]

The court also found that H.B. 2023 violated the intent test under section 2, as its passage was partially motivated by a discriminatory purpose.[45] The court wrote that there were two reasons that Republican legislators passed H.B. 2023: "[U]nfounded . . . allegations" of voter fraud promoted by State Senator Don Shooter and a "racially-tinged" video.[46] The "LaFaro Video" pictured a man who appeared to be of Hispanic heritage depositing ballots into a drop box.[47] Nothing showed the man in the video was engaged in fraud, but the video was widely shared and even featured in a political ad.[48] The court found that even though the legislators may have sincerely believed the ban was necessary to address ballot fraud, that belief was largely influenced by (and thus attributable to) the LaFaro Video and false and racially motivated allegations of fraud.[49] And since the court had already concluded the law produced a discriminatory effect, it held that the plaintiffs had carried their burden under the intent test.[50] Under *Arlington Heights*,[51] Arizona had to show that the law still would have been adopted despite the discriminatory motivating factor.[52] But Judge Fletcher found that the district court had already concluded that the law "would not have been enacted without Senator Shooter's and LaFaro's false and race-based allegations of voter fraud."[53] Therefore, H.B. 2023 ran afoul of section 2 of the VRA as well as the Fifteenth Amendment.[54]

Judge O'Scannlain dissented.[55] He would not have found that the district court clearly erred in making its determination.[56] Starting with the OOP policy, the dissenters disagreed that precedent required only

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[43] *See id.* at 1007, 1036. And when Arizona passed a similar bill in 2011, the DOJ did not approve it under the pre–*Shelby County* preclearance regime because the preclearance request was "insufficient to enable [DOJ] to determine that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race." *Id.* at 1008 (alteration in original) (quoting *Reagan*, 329 F. Supp. 3d at 880–81).

[44] *Id.* at 1037.

[45] *Id.* at 1041–42.

[46] *Id.* at 1009 (quoting *Reagan*, 329 F. Supp. 3d at 880).

[47] *Id.* at 1040.

[48] *Id.*; *Reagan*, 329 F. Supp. 3d at 877.

[49] *Hobbs*, 948 F.3d at 1039–41. The court refers to this theory of attribution as the "cat's paw" doctrine. *Id.* at 1040 ("The doctrine is based on the fable, often attributed to Aesop, in which a clever monkey induces a cat to use its paws to take chestnuts off of hot coals for the benefit of the monkey.").

[50] *Id.* at 1041–42.

[51] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[52] *Hobbs*, 948 F.3d at 1041.

[53] *Id.* at 1042.

[54] *Id.*

[55] Judge O'Scannlain was joined by Judges Clifton, Bybee, and Callahan.

[56] *Hobbs*, 948 F.3d at 1049 (O'Scannlain, J., dissenting) ("We review *de novo* the district court's conclusions of law, but may review its findings of fact only for *clear error*.").

that a plaintiff show a discriminatory effect.[57] In their view, showing that the affected population had "substantial difficulty" in electing preferred representatives is critical to establishing a violation of section 2.[58] And while the majority wrote that Congress — as well as Supreme Court precedent — had made clear that requirement applies only to vote dilution claims (like challenges to gerrymandering), rather than vote denial claims,[59] the dissent replied that if only disparate impact were necessary, there would be virtually no limit to courts' ability to enjoin any law for that reason.[60] Furthermore, to Judge O'Scannlain, the alleged burden stemmed not from the consequence of voting out of precinct, which is what the challenged law prescribed, but the precinct system itself.[61] Turning to the law on ballot collection, the dissent found that there was no clear error by the district court in concluding the plaintiffs did not carry their burden to prove a violation of section 2 because even though minority voters relied more on ballot collection, the plaintiffs didn't show that minority voters now had "less opportunity" to cast their ballots than did nonminority voters.[62] Finally, Judge O'Scannlain criticized the majority's analysis of the legislature's intent and reasoned that since at least some legislators did not harbor racial animus when voting for H.B. 2023, the district court did not clearly err in its finding.[63]

Judge Bybee penned a second dissent.[64] He wrote to stress the importance of regulations as part of a comprehensive election code necessary for a well-functioning democracy.[65] Specifically, Judge Bybee mentioned the long history of precinct-based voting in states around the country,[66] noting that "[n]owhere in its discussion of the 'totality of the circumstances' has the majority considered that Arizona's OOP provision is a widely held time, place, or manner rule."[67] Moreover, the majority's implicit requirement that Arizona count the portions of the ballot for which the voter would have otherwise been eligible undervalues local elections and overvalues statewide and national elections.[68] With respect

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[57] *Id.* at 1051.

[58] *Id.* (emphases omitted) (quoting Thornburg v. Gingles, 478 U.S. 30, 49 n.15 (1986)). The majority disagreed that in vote denial cases (as opposed to vote dilution cases), plaintiffs must also show a substantial burden. *Id.* at 1043 (majority opinion).

[59] *See id.* at 1043 (majority opinion).

[60] *See id.* at 1051–52 (O'Scannlain, J., dissenting).

[61] *Id.* at 1053.

[62] *Id.* at 1055.

[63] *Id.* at 1059.

[64] Judge Bybee was joined by Judges O'Scannlain, Clifton, and Callahan.

[65] *See Hobbs*, 948 F.3d at 1060 (Bybee, J., dissenting).

[66] *See id.* at 1063–64, 1063 nn.3–4.

[67] *Id.* at 1064.

[68] *Id.* at 1065–66 ("When voters do not go to their local precincts to vote, they cannot vote in those races. Voters who do not take the time to determine their appropriate precinct — for whatever

to H.B. 2023, Judge Bybee emphasized "[t]here is no constitutional or federal statutory right to vote by absentee ballot."[69] And laws of general applicability designed to target potential voter fraud ought to be evaluated against the backdrop of genuine concerns about election integrity.[70] The U.S. Supreme Court granted certiorari.[71]

As judges and scholars argue in the pages of court opinions and law reviews about the applicability of the results test,[72] *Hobbs* brings several of these disagreements to the fore. But while the court homed in on the analysis under step one, it passed on the opportunity to engage substantively with another of the chief disputes in the case. In briefings and oral arguments, the DOJ advocated a new, elevated evidentiary standard for plaintiffs under section 2.[73] Concerned about the potential for *any* law, however ordinary, to be struck down, it argued that section 2 requires plaintiffs to show not only that the challenged law produces a disparate impact, but also that it "materially burdens" the affected group's ability to cast a ballot.[74] But the efficacy of the test hinges on its application and, more specifically, which obstacles are and aren't considered "material." In applying the "material burden" standard to the facts of *Hobbs*, the DOJ and Arizona demonstrated that this proposed standard conflicts with other antidiscrimination laws and that adopting it would undermine the purpose of section 2.

The DOJ introduced its proposal in a time of relative unease about the state of the VRA. Prior to *Shelby County*, the preclearance regime under section 5 of the VRA prevented many voting laws with racially disparate impacts from going into effect.[75] As Judge Fletcher noted in the court's opinion, a previous iteration of Arizona's ban on ballot collection was derailed in 2011.[76] But after the Supreme Court effectively ended preclearance,[77] litigants were left with two main options for challenging laws that made it more difficult for minorities to vote.

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reason — and vote out of precinct have disenfranchised themselves with respect to the local races." *Id.* at 1066.).

[69] *Id.* at 1067.

[70] *See id.* at 1070–72. Judge Bybee pointed to the Carter-Baker Commission recommendation for regulating ballot collection and the ballot fraud in North Carolina's Ninth Congressional District in 2018. *Id.* at 1070–71.

[71] Brnovich v. Democratic Nat'l Comm., No. 19-1257, 2020 WL 5847130 (U.S. 2020) (mem.).

[72] *See generally, e.g.*, Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763 (2016).

[73] *See* Brief for the United States as Amicus Curiae in Support of Appellees on Rehearing En Banc and Supporting Affirmance at 15–16, *Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 18-15845) [hereinafter DOJ Brief]. The Justice Department was also granted time to advocate for its interpretation of section 2 at the oral argument. Transcript of Oral Argument, *Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 18-15845), 2019 WL 5260056, at *14.

[74] DOJ Brief, *supra* note 73, at 16.

[75] *See* Shelby County v. Holder, 570 U.S. 529, 562–63 (2013) (Ginsburg, J., dissenting).

[76] *Hobbs*, 948 F.3d at 1008.

[77] *See Shelby County*, 570 U.S. at 557.

The first was to argue that the law was unconstitutional under *Anderson-Burdick*, a relatively high bar for plaintiffs.[78] The second was to bring a vote denial claim under section 2. Since section 2, like preclearance, provides a mechanism for challenging racially discriminatory laws, many experts thought it could be used to reverse at least some of the effects of *Shelby County* on minority voters.[79] But while standard vote dilution claims are well established under section 2, vote denial claims are not. Five circuits have settled on the two-step results test to adjudicate these claims, but the Supreme Court has yet to give the test its stamp of approval.[80] As such, lawyers continue to debate the benefits and drawbacks of the burgeoning test.[81]

These disagreements ostensibly prompted the DOJ to articulate a new test that would require plaintiffs to prove a challenged law produces both a disparate impact and a "material burden." In briefings and oral arguments, the DOJ expressed concerns about the current test shared by judges and academics.[82] Simply put, if the test is based primarily on disparate effect, it would give courts unbridled authority to invalidate a host of legitimate election regulations that disproportionately impact minorities because of socioeconomic conditions that have nothing to do with the challenged law. Because of these concerns, in its amicus brief in support of Arizona, the DOJ encouraged the Ninth Circuit to evaluate these laws under a new standard: "Rather, the burden a challenged rule imposes on the right to vote [under section 2] thus must be not only disproportionate, *but also material* to the voter's ability to vote . . . ."[83] According to the DOJ, if a law violates section 2 only when members of a protected class "have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their

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[78] *See* Edward B. Foley, Essay, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1847–48 (2013); *see also* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 479 (2016) (noting the "limited constitutional protection that voters receive from the Supreme Court"). *Anderson-Burdick* is the standard for evaluating burdens on the right to vote under the First and Fourteenth Amendments. *See* Colin Neal, Note, *Not* Gill*-ty: Challenging and Providing a Workable Alternative to the Supreme Court's Gerrymandering Standing Analysis in* Gill v. Whitford, 28 WM. & MARY BILL RTS. J. 831, 853 (2020). It is derived from two cases: *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). If a plaintiff shows that a burden on voting is severe, the court applies strict scrutiny and likely invalidates the law. *See* Derfner & Hebert, *supra*, at 482. If the burden is not severe, the court weighs the burden against the interest the state has in regulating the activity. *See id.* at 481–82.

[79] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2147 (2015); Danielle Lang & J. Gerald Hebert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 783–84 (2018).

[80] *See* Stephanopoulos, *supra* note 6, at 1578–79.

[81] *See id.* at 1580–81.

[82] *See* DOJ Brief, *supra* note 73, at 16; Transcript of Oral Argument, *supra* note 73, at *14.

[83] DOJ Brief, *supra* note 73, at 15 (emphasis added).

choice,"[84] then a practice is unlawful only if it produces a disparate result *and* "creates an impediment to the ability to vote that is not offset by other opportunities to register or vote."[85] The DOJ also argued that circuits that have adjudicated vote denial claims have at least implicitly endorsed this principle by upholding laws that merely imposed inconveniences.[86]

If the DOJ is concerned that some courts may apply the results test too permissively, there's no reason to believe its own test would fare any better. It's not clear that antidiscrimination law is or should be concerned with whether one discriminatory policy is "offset" by some other opportunity to achieve racial equality. In *Connecticut v. Teal*,[87] a case concerning racial discrimination under Title VII of the Civil Rights Act, the Supreme Court held that "a racial disparity at one stage of the promotion process, which bars certain minority employees from becoming supervisors, cannot be offset by racial balance after the process has concluded."[88] The same logic applies here. The burden should be evaluated on its own terms, not in the context of some overall election scheme.[89] The only consideration that should matter is the racial disparity produced by the OOP policy and H.B. 2023, not the other opportunities the state provides for a potentially different set of minority voters to cast a ballot.

The DOJ's proposed standard also conflates the section 2 and constitutional standards. The DOJ appeared to liken the material burden analysis to the severe burden analysis under *Anderson-Burdick*.[90] Both the DOJ and the State of Arizona argued that the plaintiffs should lose under the section 2 analysis because the district court correctly concluded that the burden produced by the OOP policy and H.B. 2023 is neither more nor less onerous than other election regulations and therefore not substantial enough to constitute a violation of the VRA.[91] Although a "material" and a "severe" burden are not linguistically the same, the DOJ's application of its standard to the facts of *Hobbs* indicates that it would operate in a substantially similar way to *Anderson-Burdick* — a

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[84] *Id.* at 11 (emphasis added) (quoting 52 U.S.C. § 10301(b)).

[85] *Id.* at 15.

[86] *See id.* at 15–16.

[87] 457 U.S. 440 (1982).

[88] Stephanopoulos, *supra* note 6, at 1613.

[89] Similarly, in explaining the legal relevance of overall voter turnout by race for vote denial claims, Professor Nicholas Stephanopoulos concludes that "the disparate impact that *does* matter is the one directly caused by the electoral policy at issue. Plaintiffs' burden is simply to demonstrate that minority citizens have more difficulty abiding by the policy than do nonminority citizens." *Id.* at 1614.

[90] *Compare* DOJ Brief, *supra* note 73, at 20 (alleging plaintiffs' failure to show that the Arizona laws make it "significantly more difficult to vote" (quoting Plaintiffs'/Appellants' Excerpts of Record Volume I of VII at 63, *Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 18-15845))), *with* Stephanopoulos, *supra* note 6, at 1630 (describing *Anderson-Burdick*'s application to "severe" restrictions on voting (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992))).

[91] *See* DOJ Brief, *supra* note 73, at 19–20; Transcript of Oral Argument, *supra* note 73, at *8–9.

test known for its inconsistent application.[92] The major difference is that the materiality test asks whether the state has offset the burden and the *Anderson-Burdick* test asks whether the state has an interest in regulating the activity at issue.[93]

This pseudoconstitutional standard proposed by the DOJ doesn't comport with the history or text of the VRA. Section 2 was revised to include the results test in 1982 after *City of Mobile v. Bolden*.[94] There, the Supreme Court held that section 2 was coextensive with the guarantees of the Fifteenth Amendment.[95] Following that decision, Congress repassed the VRA and added language to section 2 instructing courts to use a results-based analysis.[96] In doing so, Congress expressed its clear preference for a results-based VRA framework different from the intent-based constitutional framework courts generally applied. But the DOJ's proposed framework would elide the congressional purpose of creating a VRA-specific standard by again integrating a constitutional framework (this time, *Anderson-Burdick*) into the section 2 statutory analysis.

There are reasonable questions as to whether the results test adopted by several circuits is a good one. It's not impossible to imagine how the most basic election laws could come under scrutiny under this test. As some scholars, such as Professor Nicholas Stephanopoulos, have suggested, a burden shifting mechanism such as those required in other areas of disparate impact law has built-in safeguards that prevent invalidating every piece of legislation simply because it produces a disparate impact.[97] But even so, in the results test, the section 2 inquiry is properly focused on the law's impact on the ability to participate in the electoral process, rather than the materiality of the burden or the voter's ability to find other ways to cast a ballot. In other words, in a section 2 case, the disparate impact analysis should be doing most of the work, not the evaluation about the burden the law imposes. The Supreme Court held in *Thornburg v. Gingles*[98] that in drafting the VRA, Congress "ma[de] clear that a violation could be proved by showing discriminatory effect alone and . . . establish[ed] as the relevant legal standard the 'results test.'"[99] In that vein, the test the DOJ offers does not effectuate the intent behind the VRA.

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[92] *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 158–60 (2008).

[93] *Compare* DOJ Brief, *supra* note 73, at 15, *with* Foley, *supra* note 78, at 1848.

[94] 446 U.S. 55 (1980).

[95] *See id.* at 61 (plurality opinion).

[96] Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

[97] Stephanopoulos, *supra* note 6, at 1572–73.

[98] 478 U.S. 30.

[99] *Id.* at 35.