

FOR PUBLICATION

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.

KATIE HOBBS, 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.

No. 18-15845

D.C. No.
2:16-cv-01065-
DLR

OPINION

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

Argued and Submitted En Banc March 27, 2019
San Francisco, California

Filed January 27, 2020

Before: Sidney R. Thomas, Chief Judge, and Diarmuid F.
O'Scannlain, William A. Fletcher, Marsha S. Berzon *,
Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee,
Consuelo M. Callahan, Mary H. Murguia, Paul J. Watford,
and John B. Owens, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Watford;
Dissent by Judge O'Scannlain;
Dissent by Judge Bybee

* Judge Berzon was drawn to replace Judge Graber. Judge Berzon has read the briefs, reviewed the record, and watched the recording of oral argument held on March 27, 2019.

SUMMARY**

Civil Rights

The en banc court reversed the district court's judgment following a bench trial in favor of defendants, the Arizona Secretary of State and Attorney General in their official capacities, in an action brought by the Democratic National Committee and others challenging, first, Arizona's policy of wholly discarding, rather than counting or partially counting, ballots cast in the wrong precinct; and, second, House Bill 2023, a 2016 statute criminalizing the collection and delivery of another person's ballot.

Plaintiffs asserted that the out-of-precinct policy (OOP) and House Bill (H.B.) 2023 violated Section 2 of the Voting Rights Act of 1965 as amended because they adversely and disparately affected Arizona's American Indian, Hispanic, and African American citizens. Plaintiffs also asserted that H.B. 2023 violated Section 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. Finally, plaintiffs asserted that the OOP policy and H.B. 2023 violated the First and Fourteenth Amendments because they unduly burden minorities' right to vote.

The en banc court held that Arizona's policy of wholly discarding, rather than counting or partially counting, OOP ballots, and H.B. 2023's criminalization of the collection of another person's ballot, have a discriminatory impact on

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

American Indian, Hispanic, and African American voters in Arizona, in violation of the “results test” of Section 2 of the Voting Rights Act. Specifically, the en banc court determined that plaintiffs had shown that Arizona’s OOP policy and H.B. 2023 imposed a significant disparate burden on its American Indian, Hispanic, and African American citizens, resulting in the “denial or abridgement of the right of its citizens to vote on account of race or color.” 52 U.S.C. § 10301(a). Second, plaintiffs had shown that, under the “totality of circumstances,” the discriminatory burden imposed by the OOP policy and H.B. 2023 was in part caused by or linked to “social and historical conditions” that have or currently produce “an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives” and to participate in the political process. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); 52 U.S.C. § 10301(b).

The en banc court held that H.B. 2023’s criminalization of the collection of another person’s ballot was enacted with discriminatory intent, in violation of the “intent test” of Section 2 of the Voting Rights Act and of the Fifteenth Amendment. The en banc court held that the totality of the circumstances—Arizona’s long history of race-based voting discrimination; the Arizona legislature’s unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat; the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023; the substantial increase in American Indian and Hispanic voting attributable to ballot collection that was targeted by H.B. 2023; and the degree of racially polarized voting in Arizona—cumulatively and unmistakably revealed that racial discrimination was a motivating factor in enacting H.B. 2023. The en banc court further held that Arizona had

not carried its burden of showing that H.B. 2023 would have been enacted without the motivating factor of racial discrimination. The panel declined to reach DNC's First and Fourteenth Amendment claims.

Concurring, Judge Watford joined the court's opinion to the extent it invalidated Arizona's out-of-precinct policy and H.B. 2023 under the results test. Judge Watford did not join the opinion's discussion of the intent test.

Dissenting, Judge O'Scannlain, joined by Judges Clifton, Bybee and Callahan, stated that the majority drew factual inferences that the evidence could not support and misread precedent along the way. In so doing, the majority impermissibly struck down Arizona's duly enacted policies designed to enforce its precinct-based election system and to regulate third-party collection of early ballots.

Dissenting, Judge Bybee, joined by Judges O'Scannlain, Clifton and Callahan, wrote separately to state that in considering the totality of the circumstances, which took into account long-held, widely adopted measures, Arizona's time, place, and manner rules were well within our American democratic-republican tradition.