

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MARK BRNOVICH, ATTORNEY GENERAL     )  
OF ARIZONA, ET AL.,                     )  
                                          Petitioners,             )  
                                          v.                             ) No. 19-1257  
DEMOCRATIC NATIONAL COMMITTEE,     )  
ET AL.,                                     )  
                                          Respondents.             )

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ARIZONA REPUBLICAN PARTY, ET AL.,    )  
                                          Petitioners,             )  
                                          v.                             ) No. 19-1258  
DEMOCRATIC NATIONAL COMMITTEE,     )  
ET AL.,                                     )  
                                          Respondents.             )

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Pages: 1 through 120  
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17          - - - - -

18  
19                                    Washington, D.C.  
20                                    Tuesday, March 2, 2021

21  
22                                    The above-entitled matter came on for  
23                                    oral argument before the Supreme Court of the  
24                                    United States at 10:00 a.m.

25

1 APPEARANCES:  
2  
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10 of Respondents DNC, et al.  
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case Number 19-1257, Brnovich versus Democratic National Committee, and the consolidated case.

Mr. Carvin.

ORAL ARGUMENT OF MICHAEL A. CARVIN  
ON BEHALF OF THE PETITIONERS IN 19-1258

MR. CARVIN: Mr. Chief Justice, and may it please the Court:

I think the key conceptual point here to understand is that Arizona has not denied anyone any voting opportunity of any kind. There's not, like, a literacy test which denies you the right to vote. It's not like vote dilution, where white bloc voting denies minorities an equal opportunity to elect. Everyone here is eligible and registered to vote. All they have to do is utilize the myriad opportunities that Arizona's offered them over 27 days to vote by mail for free or in person.

And since there's no denial of opportunity, this is a disparate impact claim that would not even be cognizable in other

1 contexts. Under Title VII, disparate impact  
2 relates to a denial of an employment  
3 opportunity, a job or a promotion. It doesn't  
4 get involved in the process. No one's ever  
5 brought a Title VII claim saying you can't  
6 require people to send in applications because  
7 minorities have less access to transportation  
8 and mail, analogous to the claim being made  
9 here.

10 So Respondents are trying to move  
11 disparate impact into an entirely different  
12 context. Since there's no denial of any voting  
13 opportunity in this context, the circumstances  
14 in which time, place, and manner rules can  
15 violate Section 2 are extraordinarily limited.  
16 They only occur if the state has organized the  
17 time, place, and manner rules and stacked them  
18 in such a way that minorities have less  
19 opportunity than non-minorities to cast their  
20 votes.

21 That comes directly from the plain  
22 language of Section 2, and it's also, of course,  
23 as a practical matter, the only circumstance in  
24 which the state has erected any kind of  
25 cognizable barrier to minority voting.

1 Respondents' alternative view is at  
2 war with the text of Section 2. Section 2 says,  
3 again, voting practices cannot provide less  
4 opportunity. They say that voting practices  
5 which provide the same opportunity are  
6 nonetheless unlawful if external socioeconomic  
7 factors somehow contribute to disproportionate  
8 utilization. But that language is nowhere in  
9 the text and was never even mentioned in the  
10 legislative history, which is clear --

11 CHIEF JUSTICE ROBERTS: Mr. --

12 MR. CARVIN: -- and notable --

13 CHIEF JUSTICE ROBERTS: -- Mr. Carvin,  
14 as I understand your test as you've just  
15 articulated it, it reduces to -- anything  
16 dealing with time, place, or manner, it's an --  
17 an intent test rather than a results test that's  
18 provided under Section 2.

19 In other words, so long as it's a  
20 time, place, or manner restriction, it's only  
21 when there's a difference and it's between  
22 minority voters and white voters that you have a  
23 problem. Is that not true?

24 MR. CARVIN: Not entirely, Mr. Chief  
25 Justice, for this reason: It does involve

1 differential systems, unequal access, but  
2 regardless of whether or not that unequal access  
3 is racially motivated, you would not have to  
4 prove that the intent behind the differential  
5 access provided to minorities was to suppress or  
6 hinder the minority vote. And that's a key  
7 distinction from Mobile versus Bolden.

8 CHIEF JUSTICE ROBERTS: Now you -- you  
9 talk about the concern being that the analysis  
10 would be driven to racial proportionality under  
11 the Respondents' approach.

12 Now I understand the concerns about  
13 that when you're talking about districting, but  
14 why is that -- why is that a bad thing when  
15 you're talking about electoral procedures?

16 MR. CARVIN: Well, what it means is  
17 that any neutral system must be changed in order  
18 to maximize minority voting strength regardless  
19 of how strong the justification is.

20 Things that provide no unfairness at  
21 all to minorities, you must rejigger every  
22 aspect of the time, place, and manner, from  
23 registration, to Election Day, to early voting,  
24 in order to maximize minorities' participation.

25 Why is that bad? Because it's the



1 same kind of race-conscious activity of  
2 subordinating --

3 CHIEF JUSTICE ROBERTS: Well, is it --

4 MR. CARVIN: -- neutral principles --

5 CHIEF JUSTICE ROBERTS: -- is it  
6 really -- is it maximizing participation or --  
7 or equalizing it? In other words, that only  
8 comes up when you have disparate results.  
9 And -- and why should there be disparate results  
10 if -- if -- if you can avoid them?

11 MR. CARVIN: Because why should you --  
12 well, for example, because it would eliminate  
13 all the valuable antifraud concerns implicated  
14 in the ban on ballot harvesting and because it  
15 would substitute the federal courts for the  
16 state legislatures to make these rules.

17 The question is not what's wrong with  
18 it. The question is why a system that imposes  
19 no unfairness on the group should nonetheless be  
20 changed simply because they find a different  
21 method of voting more convenient.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Thomas.

24 MR. CARVIN: There's no reason to --  
25 there's no reason to say --

1 CHIEF JUSTICE ROBERTS: Just --

2 MR. CARVIN: -- that simply because --

3 CHIEF JUSTICE ROBERTS: Justice --

4 MR. CARVIN: I apologize.

5 CHIEF JUSTICE ROBERTS: Yeah.

6 MR. CARVIN: I apologize, Your Honor.

7 CHIEF JUSTICE ROBERTS: Justice

8 Thomas.

9 JUSTICE THOMAS: Thank you, Mr. Chief  
10 Justice.

11 Mr. Carvin, I -- I under -- your -- I  
12 understand your race neutrality argument, and  
13 normally you see that in -- to come in -- in --  
14 in the context of a non-discrimination statute  
15 or Fourteenth Amendment that under -- that  
16 really requires equal treatment.

17 How does that race neutrality approach  
18 fit within the language of the Voting Rights  
19 Act, though, that doesn't speak in -- in those  
20 terms?

21 MR. CARVIN: Well, Justice Thomas, I  
22 think it speaks precisely in those terms. It  
23 says that a voting practice cannot result in  
24 minorities having less opportunity than  
25 non-minorities. It says the system needs to be

1 equally open. So what it's saying is as long as  
2 everyone has the same opportunity and the system  
3 is equally open, Section 2 does not condemn it.

4 The Respondents, however, would say  
5 that even if minorities are given precisely the  
6 same opportunity, unless they utilize it  
7 proportionally, then somehow that comes within  
8 the constraints of Section 2.

9 But, again, there's nothing in the  
10 text of Section 2 which says you need to expand  
11 time, place, and manner restrictions to enhance  
12 proportionality or maximization.

13 Indeed, if that had been the rule, in  
14 1982, virtually every time, place, and manner  
15 restriction in the country would have been  
16 illegal overnight because there was severe  
17 disproportionate utilization and socioeconomic  
18 disparities were ubiquitous. And surely, if  
19 Congress had intended that kind of sea change,  
20 it would have given some hint of it in the  
21 legislative history.

22 So this rule is both contrary to the  
23 text of Section 2 and any other formulation of  
24 what Congress was intending.

25 JUSTICE THOMAS: So is there a

1 causation standard implicit in your neutrality  
2 argument?

3 MR. CARVIN: Only in the sense that  
4 result, obviously, connotes causation, right?  
5 And the question is: what is the prohibited --  
6 what can you not cause? What is the prohibited  
7 result? And the plain language of Section 2  
8 tells you what the system can't result in is  
9 providing less opportunity to minorities. It  
10 doesn't say it can't result in providing them  
11 the same opportunity, but, for whatever reason,  
12 they don't utilize it to the same extent.

13 So there is a causation question, but  
14 the question is what can the state not cause.  
15 We say it can't cause less opportunity. The  
16 other side says it can't do anything that  
17 results in disproportionate outcomes.

18 JUSTICE THOMAS: And how much less  
19 opportunity? The Ninth Circuit speaks in terms  
20 of de minimis language. Does that -- and then  
21 the -- of course, Justice -- Judge Scan --  
22 O'Scannlain talks more in the language of  
23 substantial.

24 What -- what -- what -- how much less  
25 opportunity?

1           MR. CARVIN: Well, again, it depends  
2 what you're talking about, Justice Thomas. If  
3 you're talking about disproportionate outcomes,  
4 we don't think that's the issue. So we don't  
5 think a severely disproportionate outcome  
6 jeopardizes Section 2 viability, nor does a  
7 minor disproportionate outcome.

8           The question is not the outcome. The  
9 question is the opportunity and if the state has  
10 provided everyone the same opportunity.

11           Now I will agree with the attorney  
12 general, however, if you get past that, then,  
13 obviously, there needs to be something  
14 substantial for two reasons. No one requires  
15 perfect, of course --

16           JUSTICE THOMAS: I'm out of time. I'm  
17 sorry to cut you off, Mr. Carvin.

18           MR. CARVIN: I apologize. Thank you.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Breyer.

21           JUSTICE BREYER: I have two questions.  
22 One question is a literacy test. Does that  
23 provide people the same opportunity?

24           MR. CARVIN: No.

25           JUSTICE BREYER: I thought that.

1           MR. CARVIN: By definition, a literacy  
2 test --

3           JUSTICE BREYER: A literacy test  
4 doesn't. And so how do we know whether the test  
5 -- the -- the OOP and the other -- whether they  
6 do or they don't? I didn't think --

7           MR. CARVIN: Well, I think --

8           JUSTICE BREYER: Well --

9           MR. CARVIN: -- there's an obvious  
10 distinction.

11          JUSTICE BREYER: Yes.

12          MR. CARVIN: I apologize. No, I think  
13 there's an --

14          JUSTICE BREYER: I just thought that  
15 it was a measure, a way of finding out if it's  
16 the same opportunity or not to see if minority  
17 people use it equally.

18          MR. CARVIN: No, it --

19          JUSTICE BREYER: If they don't use it  
20 equally, well, it doesn't prove it, but it might  
21 be, but the rule that prevents them from using  
22 it equally results in an abridgement on account  
23 of race.

24          MR. CARVIN: Right. And that's the  
25 key point. A literacy test denies you the

1 opportunity to vote, says you can't vote. Go to  
2 the polls, they won't let you vote.

3 Nothing like that is going on here.  
4 Everyone has a complete opportunity to vote.  
5 The state has not erected any barrier. If the  
6 state denies you an opportunity like, under  
7 Title VII, it denies --

8 JUSTICE BREYER: No, I've got that  
9 point.

10 MR. CARVIN: -- you a job --

11 JUSTICE BREYER: I've got that point,  
12 but I have another --

13 MR. CARVIN: -- then you ask your --

14 JUSTICE BREYER: Yeah. I have  
15 another, more -- I think a more important  
16 question. What would you think of Professor  
17 Stephanopoulos's test, basically, or standards  
18 which bring in from Title VI, Title VII, The  
19 Housing Act, the -- the ADA, you know, it uses  
20 roughly the same approach and there would be an  
21 opportunity for the state to say we have a good  
22 non-race-related reason for doing this.

23 And, therefore, whatever result is,  
24 fewer -- fewer minorities use it, but it's not  
25 on account of race, it's on account of our good

1 reason. Now that's what we have in all these  
2 other statutes, something like that.

3 What would you think of just taking  
4 forms of those rules and using them here?

5 MR. CARVIN: Yes. Well, two points.  
6 One is, of course, there's nothing in the  
7 language of Section 2 which allows you to  
8 justify a discriminatory result based on the  
9 strength of --

10 JUSTICE BREYER: What about the words  
11 "on account of race"?

12 MR. CARVIN: Right. And --

13 JUSTICE BREYER: If the reason you are  
14 doing it is because you have the most wonderful  
15 non-race-related reason in the world for doing  
16 this, then it is not on account of race.

17 MR. CARVIN: Right. "On account of  
18 race," as you know, generally and under Gingles  
19 means because of race. And the results test  
20 means it doesn't have to be on account of  
21 intentional discrimination.

22 In terms of reading in a  
23 justification, obviously, that would make it --  
24 make their proportionality mandate somewhat less  
25 inflexible. But, again, even if you could read



1 it into the statute, you would nonetheless be  
2 subjecting the policy judgments of state  
3 legislatures to some ad hoc determinations of  
4 the sort that was engaged in by the en banc  
5 court, where they can find simple things like  
6 out-of-precinct voting and ballot harvesting  
7 bans to somehow be unjustified.

8 And even under the totality of  
9 circumstances in vote dilution, the tenuousness  
10 of the policy is only the ninth of the factors.  
11 And so I don't understand why, if the statute  
12 had actually prohibited, as Respondents said,  
13 any kind of disparate outcome, why -- why we  
14 would allow the state to get away with that.

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 MR. CARVIN: But I will fully embrace  
17 the notion that --

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Mr. Carvin, you argue  
20 that one benchmark for evaluating whether  
21 members of a protected class have less  
22 opportunity to participate is what we refer to  
23 in Crawford as "the usual burdens of voting."

24 What does that mean? What are the --

25 MR. CARVIN: Well --

1 JUSTICE ALITO: -- "usual burdens of  
2 voting"? Are they the burdens as they existed  
3 in 1982? Do they change? How do we determine  
4 what they are?

5 MR. CARVIN: I -- I think what they  
6 mean is what the Court meant in Crawford, which  
7 is what we all understand to be the usual  
8 burdens of voting.

9 You make a very good point about 1982.  
10 We know that needs to be the benchmark for the  
11 usual burdens because, otherwise, that meant  
12 Congress in 1982 was invalidating virtually  
13 every time, place, and manner restriction. So  
14 that needs to be, if you will, the safe harbor.

15 The only point we're making is Section  
16 2 did not immunize minorities from the usual  
17 burdens of voting. It didn't say, you -- you  
18 don't have to show up at the right precinct and  
19 those sorts of things. And there's nothing in  
20 the language of Section 2 which somehow exempts  
21 them from doing so.

22 So, as long as it's roughly  
23 commensurate with the normal Election Day system  
24 that exists, that would constitute the usual  
25 burden of voting.

1                   JUSTICE ALITO: Now this relates to  
2 what you were just discussing with Justice  
3 Breyer. Your approach differs a bit from that  
4 of the attorney general and the Solicitor  
5 General's brief in that I don't understand you  
6 to argue that a -- a consideration of the  
7 strength of the state's interests for a voting  
8 practice has a role to play here.

9                   Is that a correct understanding of  
10 your position? And if so, why isn't that a -- a  
11 legitimate consideration?

12                   MR. CARVIN: Your Honor, I would love  
13 it if the state could justify its systems if  
14 you're going to impose on them some kind of  
15 proportionality mandate. Our basic point is  
16 it's not a proportionality mandate and their  
17 justification should not be an affirmative  
18 defense to that. If you want to read that into  
19 the statute, that would make it better than a  
20 straight proportionality mandate.

21                   I will emphasize again that even under  
22 Houston Lawyers' Association, which the  
23 Solicitor General puts forward, the  
24 justification is merely one factor out of the  
25 nine to be considered. So that means you're now

1 into this amorphous nine Senate report factors  
2 where every district court and appellate court  
3 can do its own kind of balancing test, which  
4 will lead to all sorts of ad hoc results and not  
5 give you the kind of clarity and guidance that  
6 state legislatures need prior to Election Day.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor.

10 JUSTICE SOTOMAYOR: Counsel, you keep  
11 talking about equal opportunity, but I don't see  
12 it anywhere in the statute.

13 Aren't you rewriting Section 2? You  
14 keep saying repeatedly that it prohibits giving  
15 or providing an unequal opportunity to vote.

16 But the language is very clear. It  
17 focuses on the effects of government action, not  
18 the government action in a vacuum. It says no  
19 voting qualification or practice can "result in  
20 a denial or abridgement of the right to vote on  
21 account of race." So --

22 MR. CARVIN: Yes.

23 JUSTICE SOTOMAYOR: -- where do you  
24 get equal opportunity from in that language?

25 MR. CARVIN: In two places. One is we

1 -- it's not a denial at a time, place, and  
2 manner, so it needs --

3 JUSTICE SOTOMAYOR: Excuse me, sir.

4 MR. CARVIN: -- to be a written --

5 JUSTICE SOTOMAYOR: Excuse me. If you  
6 can't vote because you are a Native American or  
7 a non-Hispanic in areas where car ownership  
8 rates are very small, where you don't have mail  
9 pickup or mail delivery, where your post office  
10 is at the edge of town and so that you require  
11 either a relative to pick up your vote, or you  
12 happen to vote in a wrong precinct because your  
13 particular area has a confusion of precinct  
14 assignments, if you just can't vote for those  
15 reasons and you're not -- and your vote is not  
16 being counted, you've been denied the right to  
17 vote, haven't you?

18 MR. CARVIN: I don't think anyone  
19 would say you've been denied a due process right  
20 to a hearing --

21 JUSTICE SOTOMAYOR: This is not a due  
22 process --

23 MR. CARVIN: -- in defining --

24 JUSTICE SOTOMAYOR: -- this is not a  
25 due process claim.

1 MR. CARVIN: So I'm trying to get at  
2 the distinction between denial and --

3 JUSTICE SOTOMAYOR: Well, no. You're  
4 denied something if you're not given the right  
5 to vote because or it results in your denial  
6 from circumstances that the state could remedy  
7 easily.

8 MR. CARVIN: Well, again, the only way  
9 they could remedy it is to engage in the  
10 counterintuitive policies allowing everybody to  
11 vote in any precinct they want or to have  
12 partisan operatives collect their ballots in a  
13 real threat --

14 JUSTICE SOTOMAYOR: I -- I thought  
15 that -- but I'm sorry --

16 MR. CARVIN: -- to fraud. And that's  
17 not --

18 JUSTICE SOTOMAYOR: -- if you --

19 MR. CARVIN: -- that's a Hobson's  
20 Choice that --

21 JUSTICE SOTOMAYOR: But I would have  
22 to --

23 MR. CARVIN: -- I don't --

24 JUSTICE SOTOMAYOR: -- I have to say  
25 that if you look at the district court's

1 findings, which, in the end, it voted on your  
2 behalf, but the district court found no  
3 meaningful threat that ballot collection leads  
4 to fraud. It found no meaningful threat  
5 whatsoever. Perceived threat, but none.

6 And with respect to voting out of  
7 precinct, there was no finding by the district  
8 court that the ballots couldn't be easily  
9 counted.

10 MR. CARVIN: The -- the only way they  
11 could be counted is by defeating the entire  
12 purpose of the precinct system, which is to have  
13 a uniform ballot so you don't need to create  
14 these extra post-election remedies to figure out  
15 which offices are --

16 JUSTICE SOTOMAYOR: But you -- but  
17 you --

18 MR. CARVIN: -- valid and which are  
19 not.

20 JUSTICE SOTOMAYOR: -- but you have --

21 MR. CARVIN: So it would be an  
22 enormous --

23 JUSTICE SOTOMAYOR: Counsel, your  
24 state counts out-of-precinct ballot-type things  
25 very easily.

1 MR. CARVIN: Well, actually not.

2 JUSTICE SOTOMAYOR: It -- it -- it has  
3 a whole mechanism in place according to the  
4 district court.

5 MR. CARVIN: Well, what the district  
6 court said and what the Ninth Circuit said was  
7 the precincts serve -- system serve very  
8 valuable purposes. And if the precinct system  
9 serves valuable purposes, then enforcing the  
10 precinct system must necessarily serve those  
11 precinct systems.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 MR. CARVIN: If we're not allowed --

14 CHIEF JUSTICE ROBERTS: Justice --

15 MR. CARVIN: If we turn --

16 CHIEF JUSTICE ROBERTS: -- Justice --  
17 Justice Kagan.

18 JUSTICE KAGAN: Mr. Carvin, I have a  
19 number of hypotheticals for you, and I'd -- I'd  
20 be grateful if we could run through these fairly  
21 quickly just so I can get an understanding of  
22 your position.

23 So the first one is that the state  
24 decides that each county can have one polling  
25 place, and because of who lives in -- in -- in



1 larger counties, that creates a -- a -- a -- a  
2 -- a disparate impact that black voters have to  
3 wait in line for 10 times the amount that white  
4 voters do, two-and-a-half hours instead of 15  
5 minutes. Is that system equally open in the  
6 language of the statute?

7 MR. CARVIN: I would say not.  
8 "Equally open" means takes into account  
9 demographic realities. If you have one polling  
10 place for five people and one polling place for  
11 5 million people, obviously, in the latter  
12 situation, those people do not have an equal  
13 opportunity to vote.

14 JUSTICE KAGAN: Okay. How about --

15 MR. CARVIN: So, no, I would think --

16 JUSTICE KAGAN: -- how about this one?

17 MR. CARVIN: -- I would think --

18 JUSTICE KAGAN: That's helpful --  
19 that's helpful, Mr. Carvin.

20 A state has long had two weeks of  
21 early voting, and then the state decides that  
22 it's going to get rid of Sunday voting on those  
23 two weeks, leave everything else in place.

24 That -- black voters vote on Sunday 10  
25 times more than white voters. Is -- is that

1 system equally open?

2 MR. CARVIN: I would think it would be  
3 because, let's think about it, Sunday is the day  
4 that we traditionally close government offices.  
5 It would be the exception rather than the rule  
6 to have government workers come in on a Sunday.

7 JUSTICE KAGAN: It -- it's a -- you  
8 know, it's an exception --

9 MR. CARVIN: So simply having --

10 JUSTICE KAGAN: -- to have government  
11 workers come in on a Saturday too. That's not  
12 -- that's not a real problem.

13 MR. CARVIN: Well, I mean, there are  
14 Sunday closing laws, as we know from McGowan v.  
15 Maryland, which are different than Saturday.  
16 But, in all events, Saturday would implicate  
17 other religions --

18 JUSTICE KAGAN: Okay. So that -- that  
19 means equally open.

20 MR. CARVIN: -- Jewish and --

21 JUSTICE KAGAN: Thank you, Mr. Carvin.  
22 Can we go -- just go on to another one? The  
23 state says we're placing all our polling places  
24 at country clubs. And that decision means that  
25 black voters have to drive 10 times as long to

1 the polls and have to go into places which, you  
2 know, are traditionally hostile to them.

3 MR. CARVIN: Yeah, I would think that  
4 would provide them with less opportunity than  
5 non-minorities --

6 JUSTICE KAGAN: And why is that?

7 MR. CARVIN: -- or else they'd --  
8 well, because they have to travel further into  
9 hostile territory where non-minorities can --  
10 can travel one block to very sympathetic. Under  
11 any definition of --

12 JUSTICE KAGAN: Okay. That's helpful.

13 MR. CARVIN: -- whether or not they  
14 have less opportunity --

15 JUSTICE KAGAN: The state says we're  
16 going to have Election Day voting only, and it's  
17 going to be from 9 to 5. And there's plenty of  
18 evidence on the record that voters of one races  
19 are 10 times more likely to work a job that  
20 wouldn't allow them to vote during that time  
21 period. Is that system equally open?

22 MR. CARVIN: Seems like it because  
23 that would be pretty much the status quo in  
24 1982. And, of course, if it was 8 to 7, you  
25 could make the same argument about people

1 working --

2 JUSTICE KAGAN: How about 9 to 3?

3 MR. CARVIN: I think anytime you  
4 diminish from what I will call the usual  
5 burdens, if you went to 15 minutes, to -- to use  
6 an extreme example, then, obviously, you're  
7 effectively denying the opportunity --

8 JUSTICE KAGAN: So 9 to 5 is okay, but  
9 10 to 4 would not be okay? Is that the idea?

10 MR. CARVIN: Again, these are all  
11 hypotheticals that have never existed in the  
12 real world because --

13 JUSTICE KAGAN: This -- this seems  
14 like -- you know, this doesn't seem so fanciful  
15 to me. Basically --

16 MR. CARVIN: It may or may not be -- I  
17 apologize.

18 JUSTICE KAGAN: -- 9 to 5 is okay, 10  
19 to 3 is not? Is that the idea?

20 MR. CARVIN: I -- again, it's a  
21 sliding scale, and I think the farther you get  
22 from the normal hours that were extant in 1982,  
23 the much more specious it becomes. If you want  
24 to put it --

25 JUSTICE KAGAN: Thank you, Mr. Carvin.

1 I'm sorry my time is up.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Gorsuch.

4 JUSTICE GORSUCH: Good morning,  
5 Mr. Carvin. I'd like to return to some  
6 questions Justice Thomas touched on.

7 What is the relationship between your  
8 test focused on opportunities and the test that  
9 the Solicitor General's brief at least suggested  
10 about causation and the need for maybe a  
11 proximate causation test?

12 MR. CARVIN: Yeah, I -- at the end of  
13 the day, I don't know that there's really any  
14 difference. They -- they taught -- their first  
15 step is, do minorities have the ability to vote?  
16 And they say that's synonymous with equal  
17 opportunity. So I think we're on the same page  
18 there.

19 They also say, if socioeconomic  
20 factors lead to underutilization by minorities,  
21 that's not a cognizable factor under Section 2  
22 because it's got to be the voting practice that  
23 causes the diminished opportunity. Again, we  
24 are in full-throated agreement with that  
25 provision as well.

1                   So the two key points are the system  
2                   itself needs to provide less opportunity to  
3                   voters, and if socioeconomic factors, which are  
4                   external to the voting practice, lead to  
5                   diminished utilization, under neither our test  
6                   nor the Solicitor's General test would there be  
7                   a problem under Section 2.

8                   JUSTICE GORSUCH: Do you -- is there  
9                   anything in the Solicitor General's brief that  
10                  you disagree with?

11                  MR. CARVIN: I don't know why they use  
12                  the word "ability" instead of "opportunity,"  
13                  because one's in the statute and one's not, but  
14                  other than that semantic quibble, no.

15                  We've also talked about reading  
16                  justification into the statute, a result which I  
17                  warmly embrace. We may be a tad more skeptical  
18                  about whether that flows from the statutory  
19                  language than the Solicitor General was.

20                  But, no, we have no real disagreements  
21                  with the Solicitor General --

22                  JUSTICE GORSUCH: Okay.

23                  MR. CARVIN: -- the one that was  
24                  withdrawn.

25                  JUSTICE GORSUCH: All right. And then

1 the other question Justice Thomas touched on  
2 that I want to dig down a little bit further on  
3 is you speak of equality of opportunity.

4 Does that permit any de minimis  
5 distinctions, or does it require equality of  
6 opportunity under all circumstances?

7 MR. CARVIN: Right, yes. Obviously,  
8 any -- any of these phrases need to take into  
9 account the sort of demographic realities, for  
10 example, that Justice Kagan was discussing, and  
11 if a polling place was a foot farther away for  
12 minorities than for non-minorities, I don't  
13 think anybody could argue that that really has a  
14 cognizable effect on opportunity.

15 So, sure, in all of these tests,  
16 there's some kind of basic common-sense  
17 definition.

18 JUSTICE GORSUCH: Okay. And then, to  
19 add one more hypothetical to this -- well, maybe  
20 I'll just stop there. Thank you, Mr. Carvin.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Kavanaugh.

23 JUSTICE KAVANAUGH: Thank you, Chief  
24 Justice.

25 And good morning, Mr. Carvin. Your

1 brief says, "Ordinary race-neutral regulations  
2 of the time, place, and manner of voting do not  
3 violate Section 2." And that, of course, will  
4 put a lot of pressure on the word "ordinary."

5 Can you tell us how courts are  
6 supposed to distinguish ordinary regulations  
7 from extraordinary regulations?

8 MR. CARVIN: Well, I -- I think the  
9 way the Court has done it countless times in the  
10 Anderson/Burdick line of cases and in Crawford,  
11 what are the usual burdens of voting? This is  
12 not some mystery. We have a long history of  
13 about how people go about voting. They show up  
14 at precincts and they cast a ballot. That  
15 requires you to leave your house, but that's not  
16 an ordinary burden of voting -- that's a usual  
17 burden of voting.

18 Whereas the other side says, you can  
19 never have a system which requires anybody to  
20 leave their house. They claim that they can't  
21 find the precincts because of socioeconomic  
22 disparities. They claim that they can't get to  
23 mailboxes because of socioeconomic disparities,  
24 which means that the state needs to allow  
25 partisan operatives to go collect the ballots.



1 Well, if that's true, of course, that  
2 means that the only system that would satisfy  
3 their test is something where the government is  
4 sent house to house to collect the ballots.

5 And I'm just saying that that can't  
6 come with any rational definition of the usual  
7 burdens of voting, which is you register and you  
8 go cast your ballot. And that is not a very  
9 difficult burden, and it's certainly not a  
10 difficult burden here when 99.8 percent of  
11 minorities were able to find the right precinct.

12 JUSTICE KAVANAUGH: You said in  
13 response to Justice Kagan that the test can take  
14 account of demographic realities. How exactly  
15 under your test does that occur?

16 MR. CARVIN: Well, the precise  
17 hypothetical is populations, right? Do they  
18 provide precincts that are analogous for  
19 minorities and non-minorities? And you can't  
20 engage in a formalistic view, well, we put one  
21 precinct here, one precinct there, therefore,  
22 that's equal.

23 Again, if there's huge population  
24 disparities in whom -- in terms of whom the  
25 precincts are serving, then that would not be

1 a -- a realistic equal opportunity. If you have  
2 10 times the population, then roughly eight to  
3 10 more precincts would need to be provided.

4 JUSTICE KAVANAUGH: You referred to  
5 common sense. And I think two factors among  
6 others, but two factors that, as a matter of  
7 common sense, as I think about it, would trigger  
8 more suspicion. One factor would be if you're  
9 changing to a new rule that puts minorities in a  
10 worse position than they were under the old  
11 rule, and a second factor would be whether a  
12 rule is commonplace in other states that do not  
13 have a similar history of racial discrimination.

14 Do those two considerations matter  
15 under your view of Section 2?

16 MR. CARVIN: Not really. And I think  
17 the Court has cautioned -- I'm not saying that  
18 you couldn't look at it, but, no, the Court has  
19 cautioned in terms of the retrogression point  
20 that that is an analysis under Section 5, not  
21 under Section 2.

22 And if you think about it, there's a  
23 common-sense reason for that. If one party  
24 takes power and expands the vote dramatically,  
25 without concern for ballot integrity or

1 security, and then the other party comes in and  
2 wants to reemphasize the notion of secure  
3 ballots, they would somehow be hamstrung by  
4 whatever the predecessor group did.

5 It would seem odd --

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett.

8 MR. CARVIN: -- that once they  
9 suggested --

10 CHIEF JUSTICE ROBERTS: Justice  
11 Barrett.

12 JUSTICE BARRETT: Mr. Carvin, I want  
13 to make sure that I understand your position  
14 because it strikes me that it has some  
15 contradictions in it.

16 So, as I understood from your brief,  
17 your position is that Section 2 does not apply  
18 to the how, to the time, place, and manner  
19 restrictions, as long as they're facially  
20 neutral, that it's only about the who.

21 Am I right about that?

22 MR. CARVIN: Qualifications would deny  
23 people the opportunity to vote. Time, place,  
24 and manner do not deny anybody the opportunity  
25 to vote. They're simply providing opportunity

1 to --

2 JUSTICE BARRETT: Okay. But then I  
3 don't understand why you conceded in your  
4 examples to Justice Kagan that some of those  
5 time, place, and manner restrictions -- like  
6 time, place, and manner, you can only vote at a  
7 country club, or time, place, and manner, you  
8 know, this is the placement of the polls and  
9 they're going to be placed in areas that are  
10 burdensome to minorities. Aren't those time,  
11 place, and manner restrictions?

12 MR. CARVIN: But they're not neutral,  
13 in other words, because they don't give  
14 minorities the same opportunity to access the  
15 precincts as is given to whites. In other  
16 words, if you put all of your precincts at  
17 country clubs, the notion that minorities have  
18 the same opportunity to vote is -- is laughable.

19 So, no, no one is arguing for an  
20 unrealistic opportunity in terms of what the  
21 state has provided.

22 JUSTICE BARRETT: Okay. Well, then --

23 MR. CARVIN: What we're simply saying  
24 --

25 JUSTICE BARRETT: -- I don't think

1 that --

2 MR. CARVIN: -- is the --

3 JUSTICE BARRETT: -- I don't really  
4 think -- excuse me for interrupting -- that the  
5 relevant distinction here is between those that  
6 regulate who and those that regulate time,  
7 place, and manner. Really, the -- the pressure  
8 under your interpretation is looking at  
9 opportunity and what opportunity means.

10 I don't see why time, place, and  
11 manner really bears -- you know, carries a lot  
12 of weight in your analysis. Can you explain to  
13 me --

14 MR. CARVIN: Well, if --

15 JUSTICE BARRETT: -- why I'm wrong?

16 MR. CARVIN: Well, I just want to make  
17 it clear, if a facially neutral literacy test  
18 denies you the opportunity to vote, then we  
19 would think, since the state has now erected a  
20 barrier to voting, you would need to look at the  
21 racial composition of who the literacy test  
22 applies to, because they denied you an  
23 opportunity. They stopped you from voting.

24 If the state has not stopped you from  
25 voting and the electoral system doesn't skew how

1 you can vote, then you haven't established the  
2 threshold requirement to look at the  
3 disproportionate outcome. In other words, the  
4 state has not done anything wrong.

5 In a time, place, or manner case, if  
6 you ask why didn't this person vote, the answer  
7 in the literacy test would be because the state  
8 told them not to.

9 JUSTICE BARRETT: Okay. Mr. Carvin --

10 MR. CARVIN: And the time frame for  
11 that --

12 JUSTICE BARRETT: -- let me move on to  
13 a different question. I'm interested in knowing  
14 why the RNC is in the case.

15 So, you know, the DNC had standing and  
16 the district court said that it had standing to  
17 challenge the out-of-precinct policy because the  
18 policy placed a greater imperative on Democratic  
19 organizations to educate their voters and  
20 because the policy harmed its members who would  
21 have voted out-of-precinct.

22 What's the interest of the Arizona RNC  
23 here in keeping, say, the out-of-precinct voter  
24 ballot disqualification rules on the books?

25 MR. CARVIN: Because it puts us at a

1 competitive disadvantage relative to Democrats.  
2 Politics is a zero sum game, and every extra  
3 vote they get through unlawful interpretations  
4 of Section 2 hurts us. It's the difference  
5 between winning an election 50 to 49 and losing  
6 --

7 JUSTICE BARRETT: Okay. Thank you.

8 MR. CARVIN: -- an election --

9 JUSTICE BARRETT: My time is up.

10 MR. CARVIN: -- 51 to 50.

11 CHIEF JUSTICE ROBERTS: A minute to  
12 wrap up, Mr. Carvin.

13 MR. CARVIN: Yes. Thank you, Mr.  
14 Chief Justice.

15 The Court has a stark choice between  
16 two systems here. Ours is clear, we think  
17 derived directly from the text, and is easy to  
18 apply. Theirs is one that requires the courts  
19 to engage in a maximization policy, which  
20 anything that has a disproportionate result is  
21 somehow taken out of the hands of state  
22 legislatures.

23 If you go down that path, even if you  
24 try and limit it by suggesting that the state  
25 can justify it or that we'll examine

1 socioeconomic factors, that still gets the  
2 courts involved in an amorphous, manipulable  
3 situation where no one knows what the rules are  
4 going into the next election and they'll all be  
5 decided on an ad hoc basis in a hyper-partisan  
6 environment.

7           So, in addition to the fact that our  
8 test is the only one that comports with the text  
9 of Section 2 and the Constitution, it's also the  
10 only one that gives lower courts the clarity  
11 that is especially important in the voting  
12 context.

13           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
14 Carvin.

15           Mr. Brnovich.

16           ORAL ARGUMENT OF GEN. MARK BRNOVICH  
17 ON BEHALF OF THE PETITIONERS IN 19-1258

18           MR. BRNOVICH: Mr. Chief Justice, and  
19 may it please the Court:

20           Public servants have no more sacred  
21 duty than protecting the people's right to vote  
22 while maintaining confidence in the integrity of  
23 election results, this case before the Court  
24 establishing a clear and constitutional test  
25 that allows states to meet these imperatives. A



1 Section 2 vote denial claim requires substantial  
2 disparate impact that is also caused by the  
3 challenged law.

4 The laws at issue here are valid under  
5 that test. They are also common-sense and  
6 commonplace. Requiring in-person voters to cast  
7 their ballots at assigned precincts ensures that  
8 they can vote in local races and helps officials  
9 monitor for fraud. Restricting early ballot  
10 collections by third parties, including  
11 political operatives, protects against voter  
12 coercion and preserves ballot secrecy.

13 Arizona urges this Court to adopt a  
14 clear and workable test for voter denial claims  
15 that allows states to properly regulate their  
16 elections.

17 I would be happy to take questions.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 General. Your approach requires that the burden  
20 at issue be substantial, the disparate impact,  
21 as you just said. Where do you get that in the  
22 statutory language?

23 MR. BRNOVICH: Chief Justice Roberts,  
24 it's for the same reasons the Seventh, Fourth,  
25 and Sixth Circuits have adopted this

1 requirement. Section 2 prohibits state voting  
2 practices only when they result in minorities  
3 having less opportunity to vote and to elect  
4 representatives of their choice. Any sort of  
5 insubstantial impact cannot clearly meet these  
6 thresholds.

7 CHIEF JUSTICE ROBERTS: But what if it  
8 --

9 MR. BRNOVICH: But one example we  
10 believe --

11 CHIEF JUSTICE ROBERTS: -- what if it  
12 -- what if the provision --

13 MR. BRNOVICH: Go ahead.

14 CHIEF JUSTICE ROBERTS: -- results in  
15 a 1 percent decline in participation by minority  
16 voters? Is that substantial enough? I mean,  
17 1 percent, according to the statistical  
18 analysis, has been denied the opportunity to  
19 vote. Why -- is that substantial?

20 MR. BRNOVICH: Chief Justice Roberts,  
21 we believe that our test is the most workable  
22 because, if you look at what a substantial  
23 impact would be, we must analyze that under a  
24 totality of circumstances, and it has to rise to  
25 a level of the denial and abridgement of the

1 right to vote and the opportunity to participate  
2 and elect candidates of their choice, because  
3 the whole point of Section 2 is to suss out  
4 intentional discrimination when it's used as a  
5 proxy or a guise.

6 So I believe that if this Court looks  
7 at even the redistricting cases, such as Harris  
8 versus IRC, at that -- in that point, the Court  
9 determined that 10 percent was something that  
10 was a substantial number. And then you --

11 CHIEF JUSTICE ROBERTS: When you look  
12 at what the -- you're looking at what the --

13 MR. BRNOVICH: -- have the  
14 Respondents' arguments --

15 CHIEF JUSTICE ROBERTS: I'm sorry,  
16 counsel. When you're looking at the impact, do  
17 you look at alternative procedures? In other  
18 words, let's say there's a significant impact  
19 on -- for -- on minorities voting at the polls.

20 In analyzing that, do you say, well,  
21 they can vote by mail, so, overall, it's not  
22 that substantial an impact?

23 MR. BRNOVICH: Yes, Chief Justice. We  
24 believe that in Arizona there are numerous ways  
25 that people can vote. They can -- there's

1 no-excuse absentee balloting. They can vote by  
2 mail. We have voting centers in some counties.  
3 They can vote early up to 27 days before the  
4 election. And so the only way to determine  
5 whether there's a substantial impact is to look  
6 at the totality of the election numbers.

7 CHIEF JUSTICE ROBERTS: Thank you --  
8 thank you, counsel.

9 Justice Thomas.

10 JUSTICE THOMAS: Thank you, Mr. Chief  
11 Justice.

12 General, there's been some  
13 disagreement as to your standing in this case.  
14 Would you take a minute to discuss why you have  
15 standing here?

16 MR. BRNOVICH: Justice Thomas, first  
17 and foremost, the Ninth Circuit allowed us to  
18 intervene on behalf of the state. As the  
19 Attorney General for the State of Arizona, Title  
20 41 in -- in Arizona statutes clearly allows the  
21 attorney general to represent the state in  
22 federal court.

23 JUSTICE THOMAS: The -- there was a --  
24 the theory that the Ninth Circuit used to  
25 discuss some questionable legislative intent

1 involved in the Arizona legislation was the  
2 cat's paw theory. One, I'd like you to address  
3 that, but I'd also like you to tell us -- to  
4 discuss how you would determine the intent of  
5 the Arizona legislature in passing this  
6 legislation.

7 MR. BRNOVICH: Justice Thomas, I -- we  
8 believe that the cat's paw doctrine is  
9 completely inapplicable to a case like that.  
10 That doctrine arose out of the context of agency  
11 relationships, and it imputes the motives for  
12 superiors to the agents.

13 But, as this Court knows and has  
14 recognized in the past, that you cannot impute a  
15 motive from one legislature -- legislator to a  
16 group of 90 independent coequal actors spread  
17 across two houses in the legislature. So this  
18 is no different, I believe, than the Court's  
19 prior recognition that what motivates one  
20 legislator to speak out or vote for a bill is  
21 not -- not necessarily what motivates other  
22 legislators to vote for that bill.

23 At the end of the day, as we've  
24 articulated our test, we believe it's a  
25 two-prong test and we need -- and it's designed

1 to make sure that -- and determine whether an  
2 intentional discrimination is done by proxy.  
3 And that's why we need to look at the  
4 substantial disparity looking at the totality of  
5 the circumstances and to analyze whether that  
6 caused that difference in voting.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Breyer.

9 JUSTICE BREYER: I'm curious to know  
10 what you think of -- of Professor  
11 Stephanopoulos's test. My reason is simply  
12 this: It seems to me that in many  
13 discrimination statutes -- anti-discrimination,  
14 Title VII, Title VI, the Housing Act, the age  
15 discrimination -- essentially, the courts have  
16 come down in disparate impact situations to  
17 three elements.

18 First, the plaintiff has to show that  
19 there is some kind of significant disparity.

20 Second, the plaintiff has to show that  
21 there is at least a but-for cause and the  
22 state's or the employer's policy is the but-for  
23 cause.

24 And then, third, the defendant can  
25 come back and show, well, we have a good

1 non-race-related reason for this and it can't be  
2 accomplished easily in other ways.

3           Those three elements run through the  
4 law. Many of the tests, and Stephanopoulos, who  
5 says it explicitly, embody those three elements.  
6 Are you against our saying those same three  
7 elements that implemented the statutory language  
8 here are the basis of a cause, we'll never get  
9 it perfect, it will always be case by case, it  
10 will always involve all the circumstances, but  
11 those are the three key elements?

12           MR. BRNOVICH: Justice Breyer, that --  
13 those are -- that's an interesting test, but I  
14 think, at the end of the day, Congress didn't  
15 require that. And we do believe that to adopt  
16 those tests from the Title VII context would  
17 actually shift the burden. And the text of  
18 Section 2 doesn't require it.

19           Once again, I believe that any --  
20 analyzing any of these burdens on voters or if  
21 there's statistical disparities, we have to look  
22 at the totality of the circumstances and a  
23 totality of the voting systems within that  
24 state. And once again, if you look at all the  
25 opportunities that people have to vote,

1 regardless of who they are or their background,  
2 Arizona provides a plethora of options for  
3 people to exercise their franchise.

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: Can I ask you  
6 something about the statistics regarding  
7 out-of-precinct voting. Are -- do they refer  
8 only to voters who cast their ballots at a  
9 polling place on Election Day, or do they also  
10 include voters who voted early?

11 MR. BRNOVICH: Justice Alito, Mark  
12 Twain famously said that there are three types  
13 of lies: lies, damn lies, and statistics. And  
14 I -- we believe that the Ninth Circuit  
15 cherry-picked some of those statistics because,  
16 if you look at the overall totality of people  
17 that voted in Arizona, we're talking about a  
18 tenth of a percent, essentially, that may have  
19 been affected by the rules relating to  
20 in-precinct voting. And --

21 JUSTICE ALITO: No. What about what  
22 would --

23 MR. BRNOVICH: -- at the end of the  
24 day, of the nearly 2 million votes cast, only  
25 4,000 -- about 4,000 people voted



1 out-of-precinct. So, to simply answer your  
2 question, that only included day of voting. It  
3 did not include the 80 percent of people that  
4 voted early by mail.

5 JUSTICE ALITO: So what would happen  
6 if someone showed up for early voting and went  
7 to the wrong precinct?

8 MR. BRNOVICH: Justice Alito, they  
9 would be told that they are voting in the wrong  
10 precinct and they would be told where to go to  
11 vote. If they insisted on voting in that  
12 precinct, they would be giving a -- given a  
13 provisional ballot but be told that that ballot  
14 may not count.

15 JUSTICE ALITO: And this would apply  
16 to early voting as well as Election Day voting?  
17 That was the question I was getting at.

18 MR. BRNOVICH: I'm sorry, Justice  
19 Alito. All ballots are available at early  
20 voting centers, but not every county in Arizona  
21 has voting centers if I understand your question  
22 correct -- question correctly.

23 JUSTICE ALITO: Okay. Let me go on to  
24 another -- another point. You say we should  
25 give some teeth to the requirement that

1 challengers must show not only that a protected  
2 class has less opportunity to -- to participate  
3 in the political process but also less  
4 opportunity to elect representatives of their  
5 choice. What would that look like in practice?  
6 Does it require pointing to a very close  
7 election on -- on a particular day?

8 MR. BRNOVICH: Justice Alito, under  
9 our test, it would require looking at both of  
10 those prongs. So, first, there would have to be  
11 a determination made by the plaintiffs, who  
12 would have the burden of proof, to show that  
13 there was a substantial disparate impact on the  
14 ability of minority voters' ability to  
15 participate and elect candidates of their  
16 choice.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Sotomayor.

19 MR. BRNOVICH: Once that hurdle is --

20 JUSTICE ALITO: Thank you, thank you.  
21 My time is up.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel, you said  
25 that the general test under Title VII and other

1 civil rights statutes in response to Justice  
2 Breyer puts the burden on the state. But the  
3 only burden that that test requires is for the  
4 state to justify its practice, to explain why.

5 Why is that a burden that you can't  
6 meet?

7 MR. BRNOVICH: Well, the text of  
8 Section 2 doesn't require it. What Section 2 --

9 JUSTICE SOTOMAYOR: Well, compatible  
10 --

11 MR. BRNOVICH: -- essentially means is  
12 that --

13 JUSTICE SOTOMAYOR: -- in their -- I'm  
14 sorry, counsel. By your own admission, the test  
15 under voting -- voting rights too is a totality  
16 of the circumstances test. And isn't  
17 justification one of the circumstances that the  
18 Senate report pointed to?

19 MR. BRNOVICH: Justice Sotomayor, but  
20 the burden would be on the plaintiffs to  
21 establish that. Under our test --

22 JUSTICE SOTOMAYOR: You have that --

23 MR. BRNOVICH: -- the plaintiffs would  
24 have to come forward --

25 JUSTICE SOTOMAYOR: -- absolutely --

1           MR. BRNOVICH: -- and, one, fill that  
2           substantial --

3           JUSTICE SOTOMAYOR: Counsel, the test  
4           requires an examination of the totality of the  
5           circumstances. Can you seriously argue that the  
6           reason for why you did something isn't part of  
7           that test?

8           MR. BRNOVICH: Well, first and  
9           foremost, I believe we look to the -- to the  
10          text of the statute itself --

11          JUSTICE SOTOMAYOR: The statute --

12          MR. BRNOVICH: -- to determine how it  
13          --

14          JUSTICE SOTOMAYOR: -- talks about --

15          MR. BRNOVICH: -- should be  
16          interpreted, of course.

17          JUSTICE SOTOMAYOR: -- totality --  
18          counsel, the statute talks about totality of  
19          circumstances. I'm asking you a simple  
20          question. Are you arguing that the reason you  
21          did something is not part of that totality of  
22          circumstances?

23          MR. BRNOVICH: Well, twofold. One is  
24          -- is --

25          JUSTICE SOTOMAYOR: Counsel, why is

1 that question --

2 MR. BRNOVICH: -- as I mentioned  
3 earlier --

4 JUSTICE SOTOMAYOR: -- counsel, why is  
5 that question so hard to answer? Yes or no? Is  
6 the reason why the state has picked a particular  
7 practice an important part of the totality of  
8 the circumstances test?

9 MR. BRNOVICH: Yes.

10 JUSTICE SOTOMAYOR: Thank you,  
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: General Brnovich,  
14 would you have answered my hypotheticals the  
15 same way that Mr. Carvin did?

16 MR. BRNOVICH: No.

17 JUSTICE KAGAN: What would be  
18 different?

19 MR. BRNOVICH: Well, I think that our  
20 test would require looking first and foremost at  
21 whether there was a substantial disparity and  
22 then, two --

23 JUSTICE KAGAN: I'm just asking  
24 which --

25 MR. BRNOVICH: -- really going through

1 a causation analysis.

2 JUSTICE KAGAN: -- which hypotheticals  
3 would be different.

4 MR. BRNOVICH: So --

5 JUSTICE KAGAN: Which ones would you  
6 have answered differently?

7 MR. BRNOVICH: All three of them. I  
8 mean, yeah, I -- I think all three of them would  
9 require that analysis. For example --

10 JUSTICE KAGAN: I mean --

11 MR. BRNOVICH: -- just because there's  
12 --

13 JUSTICE KAGAN: -- I'm not asking  
14 really about analysis.

15 MR. BRNOVICH: -- a polling place at a  
16 country club, I don't believe --

17 JUSTICE KAGAN: General, if you could  
18 stop for a second. I -- I just want to know  
19 what the -- the -- the answers are. Mr. Carvin  
20 said both polling place hypotheticals would be  
21 impermissible. Are they impermissible?

22 MR. BRNOVICH: Justice, it would  
23 depend on the evidence that was presented at  
24 trial.

25 JUSTICE KAGAN: I -- I just gave --

1 MR. BRNOVICH: We know in our case --

2 JUSTICE KAGAN: -- you the evidence.

3 MR. BRNOVICH: -- it was a 10-day  
4 trial that --

5 JUSTICE KAGAN: I just gave you the  
6 evidence, General. The -- the evidence is 10  
7 times more wait times, 10 times fewer votes for  
8 blacks than whites. That's the evidence.

9 MR. BRNOVICH: Under -- under our  
10 analysis, so you would look at whether there's a  
11 substantial disparity. So, in that situation,  
12 what percentage of, for example, African  
13 American voters were voting less than white  
14 voters.

15 JUSTICE KAGAN: I just meant --

16 MR. BRNOVICH: They say now -- now  
17 they'd have to look at the --

18 JUSTICE KAGAN: General, the  
19 hypothetical is the hypothetical, all right?  
20 It's 10 times the impact, right? Ten times, you  
21 know, a greater distance to the polls, 10 times  
22 more polling stations.

23 MR. BRNOVICH: Justice Kagan, I'm not  
24 trying to be difficult, but it -- it really  
25 depends on the magnitude. Are we talking about

1 one person versus 10 people, 100 people versus  
2 1,000 people?

3 JUSTICE KAGAN: All right. We're  
4 talking about 1,000 people.

5 MR. BRNOVICH: Ultimately, it's is  
6 that burden -- does that cause someone to not be  
7 allowed to elect a representative of their  
8 choice and --

9 JUSTICE KAGAN: Okay.

10 MR. BRNOVICH: -- if there's a  
11 significant prohibition --

12 JUSTICE KAGAN: How about hours? How  
13 about hours, General? How about hours, 10 to 2?

14 MR. BRNOVICH: Same answer. It -- it  
15 depends on the circumstances and how that  
16 impacts and does that have a substantial impact  
17 on the ability of minorities to participate in  
18 the election.

19 JUSTICE KAGAN: Yes, it does have a  
20 substantial impact, General. You know, if it's  
21 10 to 2, people who work 10 to 2 and don't have  
22 cars and -- and -- the impact has been shown to  
23 be that black voters will be very  
24 disproportionately impacted by hours that are 10  
25 to 2.



1 MR. BRNOVICH: Justice Kagan, in that  
2 hypothetical, it very well could be a violation  
3 of Section 2. At that point, I believe it would  
4 be -- we've moved on to the second prong of that  
5 and we'd look at causation and whether the  
6 challenged law did indeed cause that --

7 JUSTICE KAGAN: Thank you, General.

8 MR. BRNOVICH: -- circumstance. Once  
9 it's generally determined that --

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch.

12 MR. BRNOVICH: -- the totality of the  
13 circumstances --

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch.

16 JUSTICE GORSUCH: Go ahead and finish  
17 your answer, counsel, please.

18 MR. BRNOVICH: Thank you, Justice  
19 Gorsuch. Once again, both of these prongs, we  
20 have to look at the totality of circumstances.  
21 And so, even with voting hours, the question  
22 becomes, well, what are the alternative methods  
23 or ways for people to vote? How many people act  
24 -- actually are affected by that 10 to 2 voting,  
25 those hours?

1 JUSTICE GORSUCH: All right. So we --  
2 we have before us two actual voting practices,  
3 the in-precinct requirement and the rule against  
4 vote collection or harvesting. Can you explain  
5 in -- in -- succinctly your thoughts on why  
6 those don't count as substantial burdens?

7 MR. BRNOVICH: Justice Gorsuch, after  
8 a 10-day trial, Federal District Judge Rayes  
9 found both of these statutes constitutional,  
10 that there was -- additionally, the states, when  
11 it comes to time, place, and manner, when it  
12 comes to regulations that are designed to uphold  
13 the integrity of the election process, I think  
14 the Court should be very skeptical when it  
15 overturns any sort of state election statutes  
16 based on some sort of statistical anomalies.

17 JUSTICE GORSUCH: Okay. But what do  
18 you say about what you call the statistical  
19 anomalies but the other side would call proof?  
20 What -- why -- why -- why don't they rise to the  
21 level of a substantial burden?

22 MR. BRNOVICH: As the district court  
23 found, there was -- there was no burden on the  
24 ability of votes. And literally we're talking,  
25 for example, in the out-of-precinct voting of

1 about 4,000 ballots of more than 2 million cast.

2 No one was denied the opportunity.

3 And if we look at these statistical anomalies,  
4 those slight statistical differences, we have to  
5 look at that in the context of the totality of  
6 our voting system. You know, once again,  
7 Arizona provides, you know, early voting.  
8 People can vote at voting centers. They can  
9 vote 27 days before the election.

10 There's no excuse. Absentee  
11 balloting. Eighty percent of people in Arizona  
12 vote by mail. So there are a whole plethora of  
13 options and ways for people to exercise the  
14 right to franchise. And so by -- just when  
15 the -- what the Ninth Circuit en banc did is  
16 they took a small number, as Justice Alito  
17 referred to, of people that actually voted day  
18 of and then tried to extrapolate that somehow  
19 that Arizona's laws were racist or  
20 unconstitutional.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief  
25 Justice.

1                   Counsel, you acknowledged several  
2 times that the totality of the circumstances are  
3 relevant here, and, of course, that's in the  
4 statutory text, as my colleagues have pointed  
5 out. Is the availability of alternatives that  
6 could serve your policy goals a circumstance  
7 that matters when we consider the totality of  
8 the circumstances?

9                   MR. BRNOVICH: Yes, absolutely,  
10 Justice Kavanaugh.

11                   JUSTICE KAVANAUGH: And so, if there's  
12 an alternative available that would serve the  
13 policy objective without causing the  
14 disproportionate impact or would cause less of a  
15 disproportionate impact, do you have to go with  
16 that? And if not, why not?

17                   MR. BRNOVICH: Yes, Justice Gorsuch,  
18 that -- that is in the law. And we believe that  
19 causation also plays an important role. In the  
20 totality, we look at that not only on  
21 substantial impact but also on the causation  
22 because that causation plays an important role  
23 in connecting the totality of the circumstances  
24 with the integrity measures.

25                   So there may be multiple or there

1 could be isolated instances of disparity, and  
2 those can be remedied without upsetting a  
3 race-neutral election integrity law. And that  
4 would obviously be strongly preferred.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett.

8 JUSTICE BARRETT: So, General, one of  
9 the disputes in this case about -- is about  
10 whether we look at the electoral system as a  
11 whole or whether we look at the challenged  
12 regulation in isolation or let's say on a  
13 regulation-by-regulation basis.

14 And I want to give you this point or  
15 this example that's in Secretary Hobbs's brief,  
16 she makes a pretty good point. She says in  
17 response to your argument that we have to look  
18 at the process itself to say, overall, is the  
19 process, you know, open enough for disadvantaged  
20 voters. So, you know, even if they can't send  
21 their ballot in via ballot collection, they have  
22 many other opportunities to do so, early voting,  
23 et cetera.

24 She points out in Footnote 6 on page  
25 23 that if a state sends unsolicited ballot

1 applications to residents of white neighborhoods  
2 but not to residents of black neighborhoods,  
3 that would amount to giving the latter less  
4 opportunity to participate. And she's, you  
5 know, quoting the Republican party there.

6           Wouldn't that be true even if black  
7 voters could vote in other ways? In other  
8 words, reducing an opportunity is reducing an  
9 opportunity in the text of the statute even if  
10 there's still other avenues open to the black  
11 voters.

12           MR. BRNOVICH: Justice Barrett, in the  
13 hypothetical, the example you provided, that  
14 would seem to be unconstitutional on its face  
15 because it's not facially neutral.

16           JUSTICE BARRETT: Okay. But isn't --  
17 you know, we might disagree about that, but  
18 let's say that, you know, some of Justice  
19 Kagan's examples, which seemed on their face to  
20 be ostensibly neutral, on their face, time,  
21 place, and manner restrictions, if it takes one  
22 opportunity away, I guess I still don't  
23 understand why that isn't reducing the ability  
24 of those voters to vote, relative to other white  
25 voters that don't share that same burden.

1           MR. BRNOVICH: Once again, if we focus  
2 too much on de minimis or small statistical  
3 disparities, I believe we run into grounds where  
4 then the statute itself would run afoul of the  
5 Fourteenth, Fifteenth Amendments.

6           So that's why, if we take a step back  
7 and we analyze it with our test, looking at,  
8 one, the substantial disparate impact, the total  
9 -- totality of circumstances --

10           JUSTICE BARRETT: Okay. Thank you,  
11 General.

12           MR. BRNOVICH: -- and then looking at  
13 --

14           JUSTICE BARRETT: I'm out of time.

15           CHIEF JUSTICE ROBERTS: Take a minute  
16 to wrap up, General Brnovich.

17           MR. BRNOVICH: Thank you, Chief  
18 Justice.

19           Arizona endorses without qualification  
20 the Voting Rights Act goal of ending racial  
21 discrimination in voting. The Constitution  
22 demands that all Americans be free from this  
23 pernicious evil.

24           A disparate impact on minority voters  
25 can be an appropriate proxy for legal

1 discrimination when that disparity is  
2 substantial. But, without these showings,  
3 Section 2 would exceed Congress's powers to  
4 enforce the Reconstruction amendments,  
5 improperly inject race into all voting laws, and  
6 impede a state's ability to run their elections.

7 Arizona's requirement that ballots be  
8 cast at assigned local precincts and its  
9 restrictions on ballot harvesting are  
10 appropriate election integrity measures that do  
11 not create any disparate impact on racial  
12 minorities but serve us all equally well.

13 The desire to enhance the convenience  
14 of voting must never outweigh the imperative of  
15 securing the integrity of the result.

16 We urge this Court to reverse with  
17 instructions and enter judgment for the State.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Ms. Amunson.

21 ORAL ARGUMENT OF JESSICA R. AMUNSON  
22 ON BEHALF OF RESPONDENT SECRETARY HOBBS

23 MS. AMUNSON: Good morning, Mr. Chief  
24 Justice, and may it please the Court:

25 When an eligible voter casts a ballot



1 and that ballot is discarded rather than  
2 counted, that voter has been denied the right to  
3 vote. Likewise, when an eligible voter relies  
4 on ballot collection to vote and that practice  
5 is criminalized, that citizen's vote right has  
6 at the very least been abridged.

7           The question then is whether that  
8 denial or abridgement has occurred on account of  
9 race. Section 2's plain text tells courts how  
10 to answer that question, and the statutory  
11 command to answer based on the totality of  
12 circumstances necessarily requires rejection of  
13 the inflexible rules Petitioners advocate.

14           To the contrary, it mandates what this  
15 Court has called a searching, practical  
16 evaluation of the past and present reality and a  
17 functional view of the political process.

18           Petitioners have caricatured the  
19 Section 2 results test as resting on bare  
20 statistical disparities that will call into  
21 question every election regulation in the  
22 country. Not true.

23           Section 2's results test has been in  
24 place for almost 40 years, and nothing like what  
25 Petitioners claim has come to pass. Indeed,

1 successful Section 2 challenges to statewide  
2 election laws involving voter ID, early voting,  
3 ballot collection, and out-of-precinct voting  
4 number in the single digits.

5 Section 2 liability has been limited  
6 to policies that, due to their interaction with  
7 particular facts on the ground, are outliers in  
8 the discriminatory burden that they impose on  
9 minority voters. That is the case here.

10 As Arizona's chief elections officer,  
11 Secretary of State Hobbs knows that the  
12 out-of-precinct policy and the ballot collection  
13 statute impose discriminatory burdens on Native  
14 American, Latino, and black voters that are not  
15 justified by any legitimate state interest.

16 We, therefore, ask this Court to  
17 affirm the judgment below. And I welcome the  
18 Court's questions.

19 CHIEF JUSTICE ROBERTS: Counsel,  
20 you're aware of what the Carter-Baker Commission  
21 found about ballot harvesting. They said that  
22 absentee ballots are the largest source of  
23 potential voter fraud. They said citizens who  
24 vote at home, at nursing homes, at the workplace  
25 or church are more susceptible to pressure or to

1 intimidation and that they recommended that the  
2 practice of allowing candidates or party workers  
3 to pick up and deliver absentee ballots should  
4 be eliminated.

5 You think that's -- you disagree with  
6 that in this case, right, given your --

7 MS. AMUNSON: In --

8 CHIEF JUSTICE ROBERTS: -- position on  
9 ballot harvesting?

10 MS. AMUNSON: In this case, Your  
11 Honor, and that is the important distinction  
12 here. States can have an interest in -- in  
13 securing their elections through limiting ballot  
14 collection, but, when you look at the particular  
15 facts here, that does not appear to have been  
16 Arizona's interest.

17 And in McCutcheon, for example, Your  
18 Honor, the Court noted that where, as here, a --  
19 a legislature takes a prophylaxis upon  
20 prophylaxis approach, the courts should be  
21 particularly diligent in scrutinizing the law.

22 CHIEF JUSTICE ROBERTS: So the -- the  
23 law is -- you would strike down because of --  
24 there's not racial proportionality in -- in  
25 enforcing the law, and that means that your

1 pursuit of racial proportionality would require  
2 you to keep in place the pressure, the  
3 intimidation that caused President Carter and  
4 Secretary Baker to recommend that that  
5 harvesting practice be eliminated?

6 MS. AMUNSON: Your Honor, it has -- it  
7 has nothing to do with racial proportionality.  
8 What it has to do with are the burdens that the  
9 law actually imposes on voters here. So there  
10 are particular facts and circumstances in  
11 Arizona that may not be present in other states.  
12 And --

13 CHIEF JUSTICE ROBERTS: Well, but when  
14 you say it doesn't -- when you say it doesn't  
15 involve racial proportionality, you say it's if  
16 the burdens were equally distributed among the  
17 races, that issue or that policy wouldn't be  
18 before us, would it?

19 MS. AMUNSON: Your Honor, what I'm  
20 saying is that, here, what we have is a record  
21 that shows that Native Americans and Latinos in  
22 Arizona rely disproportionately on ballot  
23 collection and white voters do not. So that is  
24 why this is before you.

25 So, for example, as the district court

1 found, voting on Native American reservations is  
2 an activity that requires the active --

3 CHIEF JUSTICE ROBERTS: No, no --

4 MS. AMUNSON: -- participation of --

5 CHIEF JUSTICE ROBERTS: -- I  
6 understand your position, which is that if there  
7 isn't racial proportionality, then the -- the  
8 law should be struck down. I'm just asking you  
9 if that requires you to tolerate the  
10 difficulties and problems and pressures that  
11 President Carter and Secretary Baker outlined in  
12 their report.

13 MS. AMUNSON: Your Honor, I am simply  
14 saying that while states can have a -- an  
15 interest in -- in securing absentee ballots and  
16 in limiting ballot collection, that is not the  
17 -- the interest here. And I think the  
18 legislative history shows that, in fact, what  
19 Arizona was acting to do was to limit the  
20 participation of Hispanics and Native Americans  
21 in particular to enable --

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Ms. Amunson, is the out-of-precinct  
3 policy still in place?

4 MS. AMUNSON: It is, Your Honor.

5 JUSTICE THOMAS: And there's -- and  
6 the Secretary of State plans to enforce it?

7 MS. AMUNSON: The out-of-precinct  
8 policy is in -- is part of the election  
9 procedures manual that is by statute in place  
10 until at least the end of this year. So, yes,  
11 the -- the -- the out-of-precinct policy was  
12 enforced in the 2020 election.

13 JUSTICE THOMAS: Okay. The -- what  
14 percentage of the minority voters in the state  
15 of Arizona are affected by the out-of-precinct  
16 policy or were adversely affected, as well as  
17 the ballot collection policies?

18 MS. AMUNSON: As to the  
19 out-of-precinct policy, the -- the record showed  
20 that minority voters were affected at a rate of  
21 two to one as to the -- as to the  
22 out-of-precinct policy.

23 As to the --

24 JUSTICE THOMAS: No, I -- I understand  
25 what you're saying there, but what percentage of

1 the minorities who cast ballots in the State of  
2 Arizona were affected by the policies?

3 MS. AMUNSON: It was less than  
4 1 percent, Your Honor. However, Your Honor,  
5 this Court has never held -- and, in fact, the  
6 text of Section 2 says that it is about the  
7 right of any voter to be abridged.

8 Of course, we recognize that the  
9 number of voters affected may affect how a  
10 plaintiff can prove that a policy denied or  
11 abridged the right to vote on account of race.  
12 But it is not the case that simply a small  
13 number of voters being affected by the policy is  
14 enough to render it immune from Section 2  
15 liability, as -- as the United States also  
16 agreed both in its brief below and in its brief  
17 in this case.

18 JUSTICE THOMAS: You know, I often  
19 wonder when you -- when we say there's an  
20 additional burden, Arizona is a big state and  
21 it's quite rural. I'm sure there are some  
22 people in very rural parts of Arizona who are  
23 quite burdened by the distance they have to  
24 travel in order to vote.

25 How do you compare someone who is

1 supposedly burdened or allegedly burdened by the  
2 out-of-precinct policy to a person like that?

3 MS. AMUNSON: Well, Your Honor,  
4 it's -- it's -- that's exactly our point here,  
5 is that, for example, with respect to Native  
6 American voters, who have to vote -- who rely on  
7 ballot collection to vote, simply saying that  
8 those voters can go ahead and vote in person or  
9 go ahead and vote by mail when they don't  
10 actually have home mail service or access to  
11 postal facilities, that's exactly our -- our --  
12 the contrast that we draw with Mr. Carvin's  
13 position that it's all just about opportunity.

14 Instead, you have to actually look at  
15 the reality of how the -- the burden is  
16 affecting voters on the ground under the  
17 totality of circumstances inquiry.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer.

21 JUSTICE BREYER: Well, I have two  
22 related questions, and both are about standards,  
23 which I think is the main issue here.

24 What do you think of, since disparate  
25 impact is -- this is not the only field in which



1 it comes up, that we take the standards from the  
2 other areas -- employment, age, and housing and  
3 so forth -- and simply say they're roughly the  
4 same here? The statute does speak on account of  
5 race, which means if it's justified, it's not on  
6 account of race, all right? So we simply take  
7 those standards, producing a uniformity in the  
8 law. That's my general question.

9 My specific question is, what do you  
10 really say about the question that I think  
11 Justice Thomas was asking, that if you win in  
12 the details here, in many -- in the majority of  
13 states, they won't be able to engage in precinct  
14 voting, because a lot of the precincts will turn  
15 out to be maybe 10 feet or maybe 100 yards or  
16 maybe 1,000 yards on -- in general further away  
17 from a minority group of houses than a majority  
18 group of houses. Are you supposed to go out  
19 with a tape measure? What? All right. That's  
20 a concern in the specific case.

21 So I'm interested in both. One,  
22 what's your general view of using roughly the  
23 same standards, and, two, what about that  
24 specific case?

25 MS. AMUNSON: First, Your Honor, as to

1 the -- the disparate impact standard, we think  
2 that is -- those elements are already  
3 incorporated in the test that the court applied  
4 below, and our only quibble with the -- with the  
5 standard that Your Honor set forth is the  
6 requirement of a "significant disparity."

7 We don't think that simply importing a  
8 textual adjective like "significant" or  
9 "substantial" really moves the ball. That said,  
10 we do recognize that you have to -- that the  
11 size of a disparity will matter for purposes of  
12 being able to prove whether a policy is, in  
13 fact, discriminatory on account of race.

14 As to Your Honor's second question  
15 about whether states can engage in -- still  
16 engage in precinct-based voting, certainly, Your  
17 Honor, states maintain plenty of discretion and  
18 authority to regulate their elections as they  
19 see fit and to have precinct-based voting  
20 systems.

21 The reality is that is actually not --  
22 not what is happening in Arizona. In fact, in  
23 2020, 75 percent of voters voted in counties  
24 that do not actually use precinct-based systems.

25 And so, while there may be some

1 interest in maintaining precinct-based systems  
2 in other states, that is not actually the  
3 reality on the ground in Arizona. We don't  
4 think the states need to take out tape -- tape  
5 measures. Instead, what they have to do is  
6 ensure that they are not providing less  
7 opportunity to minorities.

8 So they do have to be conscious of  
9 ensuring that -- that, in fact, opportunities  
10 are equalized across the races, and that is what  
11 Section 2 is meant to do.

12 JUSTICE BREYER: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: Counsel, I want to try  
15 to give you a couple of examples and ask you for  
16 each one to assume that a Title -- a Section 2  
17 plaintiff is able to show statistical  
18 disparities that are at least as great as those  
19 that were shown here with respect to  
20 out-of-precinct -- precinct voting and that  
21 those disparities were cause for -- but-for  
22 caused by the same socioeconomic factors that  
23 you say were the but-for causes here.

24 So the first example is a state that  
25 has the early voting period begin two weeks

1 before Election Day and the plaintiffs say --  
2 and they show that that has -- instead, it  
3 should have been 60 days, and there's the same  
4 kind of statistical disparities.

5 MS. AMUNSON: Your Honor, if I may ask  
6 in your hypothetical, the -- the plaintiffs want  
7 to go from 14 to 60 days or --

8 JUSTICE ALITO: Right.

9 MS. AMUNSON: -- they're reducing it  
10 from --

11 JUSTICE ALITO: They want to go --  
12 they want to go from 14 to 60. A lot of  
13 minority voters are unable, they -- they -- they  
14 -- or they -- they don't vote within the 14-day  
15 period to the same extent as they would within  
16 the 60-day period.

17 MS. AMUNSON: Well, Your Honor, we  
18 think that there is a difference both in text  
19 and in precedent in asking a court or asking a  
20 state to adopt a new policy versus a state  
21 taking away a policy that already exists.

22 And so I don't think that Section 2  
23 plaintiffs could come in and say that you are  
24 required to expand from six -- from 14 to 60.  
25 And that's because the text actually talks about

1 the challenged standard practice or procedure in  
2 the state or political subdivision.

3 JUSTICE ALITO: All right. How about  
4 a -- how about a rule -- the state has a rule  
5 that you have to -- you have to fill in a little  
6 box to vote for a candidate, but it can be shown  
7 that there's a statistical disparity with  
8 respect to voters who don't actually fill in the  
9 box, but they -- they make a checkmark beside  
10 the box.

11 MS. AMUNSON: Your Honor, again, I --  
12 I think that what Section 2 calls for and -- and  
13 what this Court has said is a practical  
14 evaluation of the past and present reality. I  
15 don't think statistic -- I just want to be  
16 clear, statistical disparities alone are not  
17 enough to make out a Section 2 violation.

18 You would have to show that it is, in  
19 fact, imposing a burden on -- a discriminatory  
20 burden on the minority voters that it is not  
21 imposing on non-minority --

22 JUSTICE ALITO: Well, I don't really  
23 see the difference between -- let me give you  
24 one more example. The state has a rule that  
25 says that mailed-in ballots have to be received

1 within three days after Election Day, and the  
2 section -- a Section 2 plaintiff says it should  
3 be one week, and they showed the same kind of  
4 statistical disparities.

5 MS. AMUNSON: And, again, Your -- Your  
6 Honor, my answer is the same. Statistical  
7 disparities alone are not enough. You have to  
8 take a functional view of the political process  
9 and look to a holistic view of -- of how it is  
10 actually affecting the voter on the ground.

11 JUSTICE ALITO: Well, those are a lot  
12 of words. I really don't understand what they  
13 mean. But I -- I'm out of time. Thanks.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, I'd like  
17 to return to a question that Justice Thomas  
18 asked not of you, I don't believe, but more  
19 generally, which is: how do you prove that a  
20 legislature acted with discriminatory intent,  
21 assuming, as we must, that the legislature is  
22 made up of individuals? And so, if you show  
23 only two or three of them have a discriminatory  
24 intent, how can you assume that the others do?

25 MS. AMUNSON: Well, Your Honor, as

1 this Court has held in Arlington Heights and in  
2 the cases applying it, what the plaintiffs must  
3 do is show that discriminatory intent was a  
4 motivating factor for the legislation.

5           And, here, I think the record was  
6 abundantly clear, in fact, much more clear than  
7 it normally is in such cases, that  
8 discriminatory intent was a motivating factor  
9 and that the entire purpose of introducing the  
10 law by Senator Shooter was to attempt to keep  
11 Hispanics in his district from voting and was  
12 premised on far-fetched racial -- racially  
13 tinged allegations that Latinos in the district  
14 were engaging in fraud with respect to ballot  
15 collection.

16           JUSTICE SOTOMAYOR: Do you know  
17 whether the -- can you remind me whether the  
18 district court found that absent those -- those  
19 two legislative motives, this law would not have  
20 passed? Meaning --

21           MS. AMUNSON: Sure.

22           JUSTICE SOTOMAYOR: -- just -- the  
23 Chief Justice pointed out that there are  
24 independent reasons for passing the ballot  
25 collection limitations. Did the district court

1 actually look to determine that even if this was  
2 a motivating factor, that the law would not have  
3 passed without it?

4 MS. AMUNSON: Your Honor, the -- the  
5 district court, because it found it was not a  
6 motivating factor, did not reach that question,  
7 but -- but, as the en banc court held, clearly,  
8 discriminatory intent was a motivating factor.

9 And it used the district court's own  
10 fact findings. The district court simply  
11 minimized the importance of those findings.  
12 They do show that discriminatory intent was a  
13 motivating factor, and -- and, certainly, the  
14 state did not meet its burden to show that the  
15 law would -- would have been enacted absent  
16 that.

17 JUSTICE SOTOMAYOR: Thank you,  
18 counsel.

19 CHIEF JUSTICE ROBERTS: Justice Kagan.

20 JUSTICE KAGAN: Ms. Amunson, the  
21 longer this argument goes on, the less clear I  
22 am as to how the parties' standards differ.

23 So, if I understood what Mr. Carvin  
24 said at argument, as opposed to what he said in  
25 his brief, he said, of course, you should look



1 at demographic realities. He even said, you  
2 know, it would be laughable not to look at  
3 demographic realities on occasion.

4           And I bring you back to this  
5 hypothetical question where black voters have  
6 many fewer polling stations, even though that's  
7 a completely neutral rule on its face, but the  
8 way it operates is to make voting more difficult  
9 for black voters than white voters and leave it  
10 so that they -- the political system is not  
11 equally open to their participation. And he  
12 said, sure, you can -- you can look at that.  
13 And, similarly, you talked about, like, the  
14 practical evaluation of realities on the ground.

15           So, I mean, tell me how you think  
16 these things differ. And I guess, more  
17 specifically -- I guess, when you start thinking  
18 about a whole run of hypotheticals, there are  
19 some things that are really quite obvious  
20 burdens which you just know looking at them is  
21 going to lead to -- to real difficulty for  
22 some -- you know, to black -- for black voters  
23 or for Native American voters or for Latino  
24 voters, and then other restrictions where you  
25 can say, well, you know, that's kind of an

1 inconvenience, but they could -- they could  
2 overcome that inconvenience if -- if they really  
3 wanted to.

4           So how -- how -- is -- is -- is -- you  
5 know, I guess what I'm saying, that there's a  
6 spectrum of restrictions and a spectrum of the  
7 effects that those restrictions cause. How are  
8 we to think about that?

9           MS. AMUNSON: Well, Your Honor, as to  
10 the -- Mr. Carvin's concession that the Court  
11 needs to look to demographic realities, I -- I  
12 find myself in agreement with him on that. And  
13 -- and as the Court has said in its -- its  
14 Gingles and in its vote dilution jurisprudence,  
15 the essence of a Section 2 claim is looking to  
16 how the state's practice interacts with social  
17 and historical conditions to cause the  
18 inequality.

19           And so, Your Honor, as to the kind of  
20 spectrum of regulations, that's exactly what  
21 Section 2 is meant for courts to do, to  
22 undertake a functional inquiry into the totality  
23 of the circumstances.

24           What I took Mr. Carvin's brief to be  
25 saying, as opposed to what Mr. Carvin argued

1 here today, is that, in fact, so-called neutral  
2 time, place, and manner regulations don't even  
3 implicate Section 2. That is, you don't even  
4 get to get past the pleading stage if you come  
5 in with -- and say this is simply a -- a neutral  
6 time, place, and manner restriction.

7           Instead, what courts should be doing  
8 is looking at how that restriction interacts  
9 with the facts on the ground to see whether it  
10 is, in fact, causing a discriminatory burden on  
11 minority voters. And, here, that's what the  
12 court did and, in fact, found, that the  
13 out-of-precinct policy and the ballot collection  
14 law impose discriminatory burdens that are not  
15 justified by any legitimate state interests.

16           JUSTICE KAGAN: Thank you,  
17 Ms. Amunson.

18           CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch.

20           JUSTICE GORSUCH: Good morning,  
21 Ms. Amunson. Would the State agree that -- or  
22 would the Secretary of State agree that Arizona  
23 could have a law saying we will not count  
24 fraudulent ballots?

25           MS. AMUNSON: In fact, Arizona does

1 have such a law, Your Honor, yes.

2 JUSTICE GORSUCH: Okay. And if -- if  
3 that's the case, can the State also have some  
4 laws that try to prevent fraud in balloting?

5 MS. AMUNSON: Certainly, Your Honor.  
6 States have an interest in preventing fraud in  
7 balloting. But, as this Court has recognized in  
8 its campaign finance jurisprudence, when it is  
9 acting to prevent fraud in balloting, a state  
10 must actually have record evidence that there  
11 is, in fact, the danger that it is acting to  
12 prevent. Here, there was no such danger.

13 JUSTICE GORSUCH: Okay. So -- so  
14 let's -- let's take the harvesting one, for  
15 example. The -- you know, the district court  
16 found that there was evidence available. The  
17 Chief Justice has referred to the -- the  
18 Carter-Baker Commission, and there was also  
19 evidence, I believe, in the record of -- of  
20 harvesting affecting -- fraudulent practices,  
21 harvesting affecting at least one election  
22 elsewhere. What about that is insufficient?

23 MS. AMUNSON: Your Honor, with  
24 respect, there was no such evidence of there  
25 ever being any ballot collection fraud in

1 Arizona and --

2 JUSTICE GORSUCH: I didn't say  
3 Arizona. It was in another state.

4 MS. AMUNSON: Oh.

5 JUSTICE GORSUCH: Does Arizona have to  
6 wait for fraud to occur in Arizona using a  
7 practice --

8 MS. AMUNSON: No, Your Honor.

9 JUSTICE GORSUCH: -- before it can  
10 outlaw it?

11 MS. AMUNSON: No, Your Honor, but, as  
12 this Court has said in its --

13 JUSTICE GORSUCH: Okay. So it doesn't  
14 matter then -- you -- you agree it doesn't  
15 matter that there -- harvesting hasn't resulted  
16 in fraud in Arizona. How many states, how many  
17 elections does it need to affect out -- out of  
18 state before Arizona can take cognizance of it  
19 in its own state?

20 MS. AMUNSON: Your Honor, what this  
21 Court said is that when -- in McCutcheon, is  
22 that when a legislature takes a prophylactic  
23 upon prophylactic approach, the courts should be  
24 particularly diligent in scrutinizing the law.  
25 And that should be just as true --

1 JUSTICE GORSUCH: I'm afraid that --  
2 yeah, I'm just asking, you know, how many  
3 elections? What -- what would be enough in --  
4 in -- in the Secretary's view?

5 MS. AMUNSON: Well --

6 JUSTICE GORSUCH: If it doesn't have  
7 to happen in Arizona, how many states does it  
8 have to happen in? How many elections?

9 MS. AMUNSON: Your Honor, to be clear,  
10 Arizona already has a law prohibiting fraudulent  
11 ballot collection. What this law does is it  
12 criminalizes neighbors helping neighbors deliver  
13 ballots with up to two years in jail and a --

14 JUSTICE GORSUCH: But you can't --

15 MS. AMUNSON: -- \$150,000 fine.

16 JUSTICE GORSUCH: -- counsel, I -- I  
17 guess it's -- I'm just asking a pretty simple  
18 question. You -- you -- you agree that some  
19 prophylactics are allowed and that this  
20 addresses a prophylactic issue that other states  
21 have found to be problematic and -- and a  
22 blue-ribbon commission found to be problematic.

23 How much more evidence -- what more  
24 concretely would you require?

25 MS. AMUNSON: Your Honor, what I'm

1 saying is Arizona already has a law  
2 preventing --

3 JUSTICE GORSUCH: I understand what  
4 you've said. I'm asking, how much more would  
5 you require before Arizona could do -- do this?  
6 Or are you saying it could never do this?

7 MS. AMUNSON: I am saying that  
8 criminalizing non-fraudulent ballot collection  
9 simply is -- does not get at the state's  
10 interest in preventing fraud. And as with  
11 respect to prophylactic restrictions, the  
12 Court's inquiry should be at least as searching  
13 for restrictions on the ability to participate  
14 in the political process through voting as it is  
15 for restrictions on the political process  
16 through spending money.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief  
21 Justice.

22 And good morning, Ms. Amunson. I want  
23 to explore how we got here as a statutory matter  
24 and try to square up the statutory text and  
25 common sense a bit. It seems like there are two

1 polar positions one could have reading different  
2 parts of the statute.

3 So Section 2(a) speaks only of  
4 results. That was the House bill, of course.  
5 And that strongly supports a position that any  
6 disproportionate impact would be problematic  
7 under the statute. Of course, the Dole  
8 compromise meant that Section 2(b) was added to  
9 the statute, and that speaks of opportunity.

10 And a polar position on that would be,  
11 as was suggested in Mr. Carvin's brief, that  
12 time, place, and manner restrictions that are  
13 race-neutral provide equal opportunity.

14 But, as Justice Kagan pointed out,  
15 just -- Mr. Carvin alluded to demographic  
16 realities being relevant, the state attorney  
17 general also talked about the totality of the  
18 circumstances being relevant, and, of course, in  
19 Section 2(b) -- refers to the totality of the  
20 circumstances.

21 So, to the extent we're not at either  
22 polar position, we're between pure results and  
23 pure opportunity, as defined in -- in  
24 Mr. Carvin's brief at least, and we're in  
25 totality of the circumstances, two -- two



1 circumstances that seem to make a difference as  
2 a matter of common sense. One, as the Chief  
3 Justice pointed out, when you have the  
4 Carter-Baker Commission saying that a particular  
5 state law is a good idea as a matter of policy,  
6 that would seem to be a circumstance that is --  
7 as a matter of common sense, would -- would lend  
8 support to the state's rule.

9           And then, secondly, and I mentioned  
10 this earlier, when a state rule is commonplace  
11 in other states, that would seem to be a  
12 circumstance that puts a thumb on the scale in  
13 favor of the legitimacy of the state rule and it  
14 not being a reflection of discriminatory intent.  
15 And, here, the out-of-precinct policy is in  
16 something like 26 other states, including a wide  
17 variety of states, including states with no  
18 history of discrimination.

19           So, if we get into totality of the  
20 circumstances, why don't those two things  
21 matter? And you can comment more generally on  
22 how I've outlined this.

23           MS. AMUNSON: Thank you, Your Honor.

24           Taking both policies in turn, it  
25 certainly is relevant that policies are

1 commonplace. However, it doesn't give a state a  
2 free pass just by saying this is a common  
3 policy. Instead, you have to look at whether,  
4 in fact, the policy is justified in that state.  
5 And so, for example, with the out-of-precinct  
6 policy, the state justifies it by saying that it  
7 needs to maintain a precinct-based system.

8           But the reality in Arizona is that  
9 75 percent of voters in the 2020 election voted  
10 in counties that do not use a precinct-based  
11 system. And so that should cause a court to  
12 question whether, in fact, such a policy is  
13 actually necessary or is, in fact, doing  
14 something else which is disenfranchising  
15 minority voters.

16           Second, with respect to the ballot  
17 collection statute, again, Arizona had a 25-year  
18 history of literally not a single instance of  
19 fraud with ballot collection. It already has a  
20 statute that criminalizes ballot collection.  
21 And it -- the way that the policy will operate  
22 on the ground will be to disenfranchise Native  
23 American and Hispanic voters. So --

24           CHIEF JUSTICE ROBERTS: Justice  
25 Barrett.

1 MS. AMUNSON: -- again, that it is  
2 commonplace doesn't give the state a pass. You  
3 still have to look --

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett.

6 JUSTICE BARRETT: Secretary -- Ms. --  
7 let's see. Sorry, I got distracted by the  
8 run-on there.

9 So, Ms. Amunson, I want to ask you a  
10 question about the degree of, say, inconvenience  
11 versus burden, because one of the difficulties  
12 in this case is that, you know, the attorney  
13 general says that the burden has to be  
14 substantial, Mr. Carvin's talking about the  
15 ordinary burdens of voting. And there's a  
16 difficulty that, you know, the statutory  
17 language and its lack of clarity presents in  
18 trying to figure out when something crosses from  
19 an inconvenience to a burden.

20 You know, on the other side -- and I  
21 think some of the hypotheticals that Justice  
22 Alito was asking you emphasized this -- I think,  
23 you know, your position and its emphasis on any  
24 disparity at all risks saying that any election  
25 rule, you know, which, as Judge Easterbrook

1 pointed out in his Frank opinion, you know, all  
2 election rules are going to make it easier for  
3 some to vote than others.

4 So your approach risks ruling them all  
5 out. So let me give you an example. What about  
6 a rule that the polls close at 7 p.m. and  
7 because of socioeconomic reasons, it's harder  
8 for minority voters to get to the poll spot  
9 before 7 p.m. because of the time, you know, of  
10 their work hours in the day?

11 Is that the kind of burden that  
12 triggers Section 2? Would that -- would such a  
13 rule -- poll closure rule, would that violate  
14 Section 2?

15 MS. AMUNSON: Your Honor, no, I don't  
16 believe so. And -- and, again, though, Your  
17 Honor, you would look to the actual facts on the  
18 ground. And as I said to Justice Alito, a  
19 statistical disparity, that is not enough.  
20 Instead, you would have to see whether, in fact,  
21 on the ground this is acting to actually cause  
22 less opportunity for minority voters.

23 JUSTICE BARRETT: But I'm telling you  
24 it is, that because of socioeconomic conditions  
25 and the hours that minorities work, you know,

1 that is the cause of their not being able to get  
2 to the polls during hours that the polls are  
3 open.

4 MS. AMUNSON: Well, again, Your Honor,  
5 one would have to make out a case that -- that  
6 those -- those minority voters had no other  
7 alternatives of voting. If one was able to do  
8 that, then, in fact, you may be able to show --

9 JUSTICE BARRETT: But I thought that  
10 your position was that you look at it on a  
11 regulation-by-regulation basis, not the system  
12 as a whole, so that it didn't matter if there  
13 were other alternatives, the question whether  
14 this alternative --

15 MS. AMUNSON: Your Honor --

16 JUSTICE BARRETT: -- would reduce  
17 opportunities --

18 MS. AMUNSON: -- our position is that  
19 you should consider the -- the regulations in  
20 the context of -- of the system as a whole.  
21 However, you can't simply excuse one  
22 discriminatory practice by saying that there are  
23 others.

24 So, for example, to say to a Native  
25 American voter who lives on a reservation 45

1 miles from the post office that --

2 JUSTICE BARRETT: Okay. But you're  
3 changing my hypothetical. I want you to explain  
4 why my hypothetical doesn't fail your test.

5 MS. AMUNSON: Your Honor, under our  
6 test, you would have to show that the voter, in  
7 fact, has less ability to vote, that the -- that  
8 the policy is a but-for cause of that lesser  
9 ability to vote, and that there -- you would  
10 consider the totality of the circumstances,  
11 including, in particular, the state's  
12 justification. The courts --

13 JUSTICE BARRETT: Okay, thank you.

14 MS. AMUNSON: -- always have strong  
15 justifications in ending elections by -- by a  
16 reasonable time.

17 CHIEF JUSTICE ROBERTS: A minute to  
18 wrap up, counsel.

19 MS. AMUNSON: Thank you, Your Honor.

20 As this Court has repeatedly said, no  
21 right is more precious in a democracy than the  
22 right to vote and to have that vote counted.  
23 That is what Section 2 protects.

24 Petitioners have pejoratively called  
25 Section 2 a one-way ratchet, but, in a

1 democracy, we should actually want to ratchet up  
2 participation so that every eligible citizen who  
3 wants to vote can do so. Candidates and parties  
4 should be trying to win over voters on the basis  
5 of their ideas, not trying to remove voters from  
6 the electorate by imposing unjustified and  
7 discriminatory burdens.

8           Unfortunately, Petitioners have made  
9 clear that that is not their vision of  
10 democracy. Indeed, Mr. Carvin's clients frankly  
11 admitted to this Court in their briefing that  
12 they are here because they view enforcement of  
13 the Voting Rights Act as a "injury to their  
14 electoral prospects."

15           Secretary Hobbs submits that the real  
16 injury here is to the Native American, Latino,  
17 and black citizens of Arizona whose right to  
18 vote has been denied or abridged by the  
19 out-of-precinct policy and the criminalization  
20 of neighbors helping neighbors deliver their  
21 ballots.

22           We ask the Court to affirm the  
23 judgment below.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Spiva.

2 ORAL ARGUMENT OF BRUCE V. SPIVA  
3 ON BEHALF OF RESPONDENTS DNC, ET AL.

4 MR. SPIVA: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 The Ninth Circuit applied the correct  
7 test to determine that Arizona's policy of  
8 entirely disenfranchising voters who cast  
9 out-of-precinct ballots and its criminal ban on  
10 non-fraudulent ballot collection violates  
11 Section 2 of the Voting Rights Act.

12 The test is rooted in the plain text  
13 of Section 2, clear congressional intent, and  
14 this Court's long-standing precedents. It has  
15 proven workable over many years in vote denial  
16 cases in the circuit courts.

17 This test has resulted neither in the  
18 rejection of all manner of common-sense voting  
19 regulations nor in the impermissible  
20 consideration of race in the adoption of voting  
21 laws. Far from it.

22 Using this test, courts have done the  
23 intensely localized analysis called for by the  
24 Act and have struck laws only with clear  
25 discriminatory effects. Applying the right



1 test, the Ninth Circuit also reached the correct  
2 result in this case.

3 I welcome your questions.

4 CHIEF JUSTICE ROBERTS: Counsel, I  
5 want to touch on an issue that Justice Sotomayor  
6 raised with -- with your friend about  
7 legislative intent.

8 Let's say that you have 49 legislators  
9 who speak and give good reasons for adopting,  
10 say, a law against ballot harvesting. They --  
11 they quote the Carter-Baker Commission, 49 of  
12 the legislatures don't say anything, legislators  
13 don't say anything at all, and two legislators  
14 have a clear racial motivation. And the law  
15 passes 80 to 20.

16 Was race a motivating factor in that  
17 case so that the legislation would be suspect?

18 MR. SPIVA: Probably not, Your Honor,  
19 assuming that in your hypothetical that only the  
20 two were motivated by race and that did not  
21 infect any of the other members.

22 What we have here in this record,  
23 though, Your Honor, is -- is far from that. It  
24 is a careful application of this Court's test in  
25 Arlington Heights that looked at not only --

1 CHIEF JUSTICE ROBERTS: Well, I  
2 thought -- I thought the evidence of racial  
3 intent was really quite limited in this case.

4 MR. SPIVA: It's actually well beyond  
5 what you normally have, Your Honor. Not only  
6 did you have the pervasive influence of Senator  
7 Shooter, but also you had the LaFaro video that  
8 was widely played, as the district court found,  
9 and that was --

10 CHIEF JUSTICE ROBERTS: Well, what --

11 MR. SPIVA: -- wasn't going to be --

12 CHIEF JUSTICE ROBERTS: -- how many --  
13 how many -- how much evidence did you have? Is  
14 it -- is there any evidence of other legislators  
15 other than Mr. Shooter?

16 MR. SPIVA: Well, yes, Your Honor.  
17 There -- there was -- there was evidence that,  
18 in terms of the history of the -- of the -- of  
19 the Act that a precursor bill was withdrawn when  
20 the DOJ asked for additional information,  
21 declined to preclear it until it could get  
22 additional information.

23 CHIEF JUSTICE ROBERTS: Well, with  
24 respect to this -- this legislation, you know,  
25 the only racial motivation I -- I thought on the

1 record was Mr. Shooter, one of the legislators.

2 MR. SPIVA: No, Your Honor, that's not  
3 accurate. I -- I think in each of these prongs  
4 of the Arlington Heights test that look at the  
5 circumstantial and direct evidence that's  
6 available, there -- there were several things  
7 that indicated a racial motivation. One was Mr.  
8 Shooter, but also there was the LaFaro video.  
9 Also, there was the sequence event -- of events  
10 that started with the DOJ --

11 CHIEF JUSTICE ROBERTS: Thank you.

12 MR. SPIVA: -- declining to preclear  
13 --

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Justice Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief  
18 Justice.

19 Counsel, the -- again, the legislative  
20 intent is interesting, and I don't know how much  
21 weight we should put on it, but the -- the Ninth  
22 Circuit did put somewhat -- some weight on that.

23 I'm wondering how you would analyze  
24 that if, in addition to what was said that was  
25 somewhat of a pejorative nature about

1 minorities, if someone said the opposite or  
2 something similar or countervailing about  
3 whites, and you had both sets of pejoratives in  
4 the legislative history, how would you analyze  
5 that and how would it change the way you would  
6 analyze this case?

7 MR. SPIVA: I -- I'm -- I'm not sure  
8 that it would make a difference, Your Honor. I  
9 guess it would depend on what -- what was said  
10 and what role, if any, it played in the passage  
11 of the legislation, because, as this Court has  
12 held in -- in Arlington Heights, determining  
13 whether racial motivation was a factor, doesn't  
14 have to be the only factor, but a factor in the  
15 passage of the Act is not simply a question of  
16 counting heads or -- or -- or statements.

17 Oftentimes there are -- there are no  
18 discriminatory statements available, and yet the  
19 Court has -- has said that the way to determine  
20 whether racial discrimination is at work as a  
21 motivating factor is to analyze the Arlington  
22 Heights factors because often, in this day and  
23 age, the circumstantial evidence of that is all  
24 that's available.

25 Here is one of these extraordinary

1 cases where you actually have, in addition to a  
2 wealth of -- of circumstantial evidence,  
3 actually direct evidence of -- of racial  
4 motivation at work.

5 JUSTICE THOMAS: The -- there have  
6 been some questions raised about the RNC roles  
7 or participation in this case. If there are  
8 doubts about the RNC, if those prevail, should  
9 that also undermine your standing in this case  
10 too?

11 MR. SPIVA: No, Your Honor. The DNC  
12 and the other plaintiffs' standing rests on  
13 organizational standing principles because they  
14 have to expend resources in order to overcome  
15 the discriminatory effects of these laws.

16 Their -- their constituents and  
17 members are also impacted because it makes it  
18 harder at least and sometimes result -- results  
19 in the denial of their vote.

20 The RNC's standing, as I understand it  
21 from their briefing, is that if this -- if the  
22 ruling stands, that -- that more minorities who  
23 will vote for Democrats -- and this -- I'm  
24 taking the view of their -- of their brief --  
25 will -- will vote against them.

1                   And that's not a cognizable interest,  
2                   trying to -- a concern that more people will be  
3                   able to vote and it's because you don't like the  
4                   way they're going to vote.

5                   CHIEF JUSTICE ROBERTS: Justice  
6                   Breyer.

7                   JUSTICE THOMAS: Thank you.

8                   JUSTICE BREYER: Listen, because I --  
9                   I just appreciate your comments. You've  
10                  listened to the same argument I have here, and  
11                  it seems to me lots of the parties on both sides  
12                  are pretty close on the standards.

13                  So you take the Title VII or these  
14                  other title standards. You might have to modify  
15                  it a little. I think you do have to use the  
16                  word "significant" harm because you have to out  
17                  -- you have to some way or other get rid of this  
18                  happening just by chance. Maybe you'd say it  
19                  was reasonably foreseeable that minorities would  
20                  be impacted negatively.

21                  And there's room there for, who has  
22                  the burden of proof of showing that there's a  
23                  justification? And there's a question about the  
24                  extent to which non-race-based tradition would  
25                  count as a justification.

1                   Now any comments you want to make are  
2 welcome. Any additions to what I'm seeing as  
3 open areas or not, any comment?

4                   MR. SPIVA: Yes, Your Honor. I -- I  
5 think there is not a lot of daylight between  
6 what we think the -- the -- the statute and the  
7 legislative history and this Court's precedents  
8 require in terms of a standard and say the  
9 Stephanopoulos, I think, principle that Your  
10 Honor has asked about. I do think that the --  
11 the existing standard that has been applied in a  
12 number of cases over the last several years in  
13 vote denial cases does -- generally does look at  
14 the magnitude. It doesn't require it as a  
15 threshold matter, and it shouldn't, but -- but  
16 most of the cases where plaintiffs have  
17 prevailed have actually found a significant  
18 disparity, as the Ninth Circuit found here.

19                   And -- and -- and that -- that the  
20 state's interest comes into consideration under  
21 the tenuousness factor under the totality of the  
22 circumstances, that's -- that's an appropriate  
23 thing to look at and should be looked at and was  
24 looked at here, and -- and what the Ninth  
25 Circuit found was that really the state did not

1 have a justifiable interest in -- in continuing  
2 these policies.

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE BREYER: Thank you.

5 JUSTICE ALITO: I -- I think what  
6 concerns me is that your position is going to  
7 make every voting rule vulnerable to attack  
8 under Section 2 to the same extent that the  
9 out-of-precinct policy is -- was found to -- to  
10 violate Section 2 by the Ninth Circuit, because  
11 people who are poor and less well educated on  
12 balance probably will find it more difficult to  
13 comply with just about every voting rule than do  
14 people who are more affluent and have had the  
15 benefit of more education.

16 Explain to me why that is not so.  
17 Will it not be possible to show with respect to  
18 just about every voting rule that there is the  
19 kind of statistical disparity that was shown  
20 with respect to out-of-precinct voting and that  
21 the disparity was caused by the same  
22 socioeconomic factors that you would say were  
23 sufficient here?

24 MR. SPIVA: Yes. It -- it won't  
25 result and it hasn't resulted, Your Honor -- we



1 -- we don't have to project or --

2 JUSTICE ALITO: No, not -- not whether  
3 it has up to this point. This is a new area of  
4 litigation. Tell -- explain to me why it will  
5 not result in that.

6 MR. SPIVA: Well, but this -- the  
7 standard that we support, Your Honor, has been  
8 applied in numerous cases over the last decade,  
9 and I'll give you an example.

10 Voter ID. In the League versus  
11 Virginia State Board of Elections case, voter ID  
12 was -- was upheld there because the Court found  
13 that there wasn't a disparate impact because the  
14 state provided free IDs in that context. Again,  
15 using the totality of the circumstances test,  
16 came to the conclusion that voter ID in Virginia  
17 was -- was -- was -- was permissible and Section  
18 2 didn't require it to be struck down.

19 Compare that to the Fifth Circuit in  
20 Veasey, found --

21 JUSTICE ALITO: All right. Thank you.  
22 My -- my time is up. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Counsel, should

1 there be a different burden between changing a  
2 long-established voting requirement and imposing  
3 a new one? Let's go back to the two questions  
4 -- the two practices at issue here.

5           The out-of-precinct voting is not a  
6 new law. It's always been in effect. And so  
7 where is that fact considered in the totality of  
8 circumstances as you define it? And I have an  
9 easier time understanding how the ballot  
10 collection is a change in law and one in which  
11 the information provided to the legislature and  
12 the voters -- a lot of it was racially tinged  
13 and false, correct?

14           MR. SPIVA: That's correct, Your  
15 Honor.

16           JUSTICE SOTOMAYOR: All right. So  
17 answer -- tell me how those factors get  
18 considered in your -- in your views.

19           MR. SPIVA: Yes. I -- I think that it  
20 is part of the consideration. I think where  
21 you're talking about adding a new method of  
22 voting, that that is very different from taking  
23 away a method of voting that people have come --  
24 minority people have come to rely upon because  
25 the text speaks in terms of abridging a right to

1 vote, i.e., to shortening, lessen, taking  
2 something away.

3 So I think a -- I think a plaintiff  
4 would have a harder time in -- in -- in the  
5 general case advocating for a new rule, some of  
6 the hypotheticals about adding additional days  
7 of early voting and the like. I think --

8 JUSTICE SOTOMAYOR: So why don't you  
9 have --

10 MR. SPIVA: -- you know, in terms of  
11 the --

12 JUSTICE SOTOMAYOR: -- why don't you  
13 have the difficulty of that burden with respect  
14 to the out-of-precinct voting here? That's been  
15 around, working imperfectly, but it's been  
16 around for a long time.

17 MR. SPIVA: Right. And that --

18 JUSTICE SOTOMAYOR: So what makes --

19 MR. SPIVA: -- and then some --

20 JUSTICE SOTOMAYOR: -- what makes your  
21 circumstances compelling enough to justify its  
22 appearance?

23 MR. SPIVA: Right. And that -- and  
24 that, of course, is a -- is a standard that has  
25 resulted in the denial of the vote, and it has

1       been around for -- for a long time. So I think  
2       that's -- that's one difference.

3                   But -- but, secondly, I think the pass  
4       -- the passage of time here cuts the other way  
5       because where as -- as there may have at one  
6       time before such things as electronic poll books  
7       and the like that -- that made it necessary  
8       perhaps to -- to disenfranchise people if they  
9       voted in the wrong precinct, as the Secretary  
10      has stated and as the record reflects here,  
11      there is no longer any such justification for  
12      entirely disenfranchising people if they go to  
13      the wrong precinct --

14                   CHIEF JUSTICE ROBERTS: Justice Kagan.

15                   MR. SPIVA: -- considering that --

16                   JUSTICE KAGAN: Mr. Spiva, you -- you  
17      -- you spoke with Justice Breyer about the  
18      Stephanopoulos test. I would like to ask you  
19      about the old SG test. If -- if you look at the  
20      SG brief that was filed in this case, what do  
21      you think is right with what the SG said and  
22      what do you think is wrong with it?

23                   MR. SPIVA: Well, I -- I -- what I  
24      think was wrong with it, which is a little bit  
25      easier for me to -- to answer, is the proximate

1 cause standard that they were advocating, which,  
2 essentially, as I read it, was saying that you  
3 shouldn't consider the Senate factors in the --  
4 in the totality of the circumstances, that  
5 essentially that the -- the challenged standard  
6 of practice by itself must have caused the  
7 disparity, and I think the -- the -- the problem  
8 with that is that it essentially would immunize  
9 any voting rule, including literacy tests, that  
10 were not either facially or intentionally  
11 discriminatory.

12 A literacy test does not in itself,  
13 despite what my distinguished colleague on the  
14 other side said, stop anybody from voting. If  
15 you pass the test, you can vote. Everybody has  
16 an equal opportunity on its face to pass the  
17 test.

18 And this Court actually in *Lassiter v.*  
19 *Northampton* actually said that literacy tests  
20 were okay prior to the -- the passage of the --  
21 the Voting Rights Act. The problem is that  
22 because of discrimination in education and  
23 opportunity, it has a disparate impact on racial  
24 minorities.

25 JUSTICE KAGAN: And what's -- what's

1 right with it? What don't you disagree with?

2 MR. SPIVA: Well, I -- I think that  
3 they maintain the position they maintained at  
4 the Ninth Circuit, that there shouldn't be some  
5 arbitrary threshold requirement in the test,  
6 that you show that a certain number of -- of --  
7 of minorities were disenfranchised before the  
8 court proceeds to analyze under the totality of  
9 the circumstances whether it's a prohibited  
10 discriminatory result.

11 JUSTICE KAGAN: Thank you.

12 MR. SPIVA: I think that's right.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Gorsuch.

15 JUSTICE GORSUCH: Good morning,  
16 Mr. Spiva. Did you have a chance to comment on  
17 the Solicitor General's causation test? What do  
18 you think of that?

19 MR. SPIVA: Well, they -- they  
20 advocated -- they, of course, have withdrawn it,  
21 the proximate causation. And I think that  
22 that's wrong because I think but -- but-for  
23 causation is the appropriate standard, as this  
24 Court said in the Bostock case, that but-for  
25 causation is -- is the -- is the

1 appropriate standard.

2 JUSTICE GORSUCH: Well, the law  
3 sometimes uses proximate cause and other times  
4 it uses but-for cause. That was a Title VII  
5 case. This is obviously a Section 2 case.

6 Any -- any thoughts on why a proximate  
7 cause test would be inappropriate given the  
8 language of the statute?

9 MR. SPIVA: Yes, Your Honor, because  
10 the -- the -- the -- the statute and the  
11 legislative history as well call for a totality  
12 of the circumstances inquiry, which -- which  
13 requires evaluating whether the standard --

14 JUSTICE GORSUCH: Well, what evidence  
15 you use to -- is one question and what -- what  
16 test you apply that evidence against is another.  
17 So I'm not sure that that explains it.

18 MR. SPIVA: Well --

19 JUSTICE GORSUCH: What explains the  
20 need for a but-for rather than a proximate cause  
21 test --

22 MR. SPIVA: As I --

23 JUSTICE GORSUCH: -- as opposed to  
24 what evidence you look at?

25 MR. SPIVA: As I understand the

1 proximate cause standard that the SG was  
2 advocating for and that Petitioners still are,  
3 it would not look to any interacting factors to  
4 establish, i.e., the Senate factors, to  
5 establish the causal link between the disparate  
6 impact and race.

7           And I think that is countertextual and  
8 -- and -- and -- and -- and would -- would  
9 actually inappropriately limit the prohibition  
10 of Section 2 only to those circumstances where  
11 the standard was discriminatory in -- in intent  
12 or facially discriminatory.

13           JUSTICE GORSUCH: Thank you.

14           CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh.

16           JUSTICE KAVANAUGH: Good morning,  
17 counsel. Section 2's language is elusive in the  
18 wake of the Dole compromise, which created  
19 murkiness because it was a compromise that  
20 generated then overwhelming support in Congress  
21 and from President Reagan, but the statute after  
22 the Dole compromise, I think you agree, creates  
23 something of a gray area between a pure results  
24 and pure opportunity.

25           And you look at the totality of the



1 circumstances, several counsel have said,  
2 including, I think you said, the Senate factors.  
3 One of those factors is, is there a good  
4 justification for these rules?

5           And then, on the ballot collection,  
6 I'm going to repeat the question, you have the  
7 Carter-Baker recommendation. On the  
8 out-of-precinct, you have it being commonplace  
9 in other states. That on its face, at least to  
10 me, suggests a strong justification for doing  
11 these rules. How does that weigh in the balance  
12 in your view?

13           MR. SPIVA: Well, two things, Your  
14 Honor. The Carter-Baker Report was not  
15 something that the legislature here considered.  
16 And -- and even the recommendations of the  
17 Carter-Baker Report was not based on any  
18 evidence of -- of -- of ballot collection fraud  
19 anywhere in the country. The legislature -- and  
20 the district court found this -- had no evidence  
21 of voter fraud, not only in Arizona, but  
22 anywhere in the country at the time that it  
23 passed the criminal ballot collection ban.

24           In terms of it being commonplace in  
25 other states, I do think you have to look to the

1 context. It's -- it is relevant, but there are  
2 also more states that actually permit some form  
3 of ballot collection than don't. And so I think  
4 what the --

5 JUSTICE KAVANAUGH: I mean,  
6 out-of-precinct is common in other states,  
7 correct, 26 states?

8 MR. SPIVA: Well, but also 20 -- at  
9 least 20 partially count out-of-precinct  
10 ballots, and so you have to do the intensely  
11 localized analysis, to use this Court's phrase,  
12 in -- in the jurisdiction.

13 And -- and when you do that in  
14 Arizona, you find that there -- that Arizona  
15 moves its precincts around a lot, that it  
16 locates them further from minority households  
17 than from white households, that there are all  
18 these factors at -- at work in Arizona in  
19 particular that make -- that cause the policy to  
20 be discriminatory --

21 JUSTICE KAVANAUGH: Thank you,  
22 counsel.

23 MR. SPIVA: -- and have a  
24 discriminatory --

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett.

3 JUSTICE BARRETT: Mr. Spiva, I want to  
4 pick up where you left off with Justice  
5 Kavanaugh. You said there were a number of  
6 factors in Arizona that caused the  
7 out-of-precinct policy to discriminate on the  
8 basis of race, including, you know, the fact  
9 that Arizona changes its precincts often.

10 Let's assume that we adopt a but-for  
11 standard of causation, as you propose. I want  
12 to ask you a question that Judge O'Scannlain  
13 raised in his dissent to the Ninth Circuit's en  
14 banc decision, which is why isn't it the  
15 precinct system itself rather than the policy of  
16 discounting votes that causes the disparity?  
17 Because, as you described it, it's the fact that  
18 the, you know, precincts change, the locations  
19 move around, but you've expressly disavowed any  
20 challenge to the precinct policy itself, am I  
21 right?

22 MR. SPIVA: Well, we -- we have  
23 challenged -- the reason -- to answer your  
24 question directly, the -- the -- but -- the  
25 reason that we challenged and the reason it's

1 the but-for cause, the -- the policy of not  
2 counting the votes is that is what causes  
3 minority groups to be disenfranchised by two to  
4 one --

5 JUSTICE BARRETT: But it's not --

6 MR. SPIVA: -- by the policy.

7 JUSTICE BARRETT: -- what causes them,  
8 as opposed to the ballot collection, where the  
9 argument is the inability to vote by relying on  
10 a third party actually reduces the opportunity  
11 to vote.

12 Here, it's not the -- the discounting  
13 of the votes. It's the inability to locate and  
14 show up at the right precinct that causes the  
15 disparity, correct?

16 MR. SPIVA: Well, but the -- but the  
17 result -- what causes the result is the fact  
18 that Arizona doesn't partially count those  
19 ballots. I don't -- I don't quarrel at all with  
20 the -- the fact that Arizona's practices  
21 contribute to that, and that is -- that was and  
22 is part of our -- our challenge.

23 But -- but the -- the claim, though,  
24 is focused on the practice that causes not only  
25 an abridgement but actually the outright denial

1 of the right to vote in this case.

2 JUSTICE BARRETT: Okay. Thank you,  
3 counsel.

4 CHIEF JUSTICE ROBERTS: Mr. Spiva, a  
5 minute to wrap up.

6 MR. SPIVA: Thank you, Mr. Chief  
7 Justice.

8 This Court said in Shelby County that  
9 Section 2 remained as a permanent nationwide ban  
10 on voting discrimination, and the Court  
11 acknowledged that voting discrimination still  
12 exists. No one doubts this.

13 This is proven not just an accurate  
14 description of the times in 2013 but also  
15 prophetic. More voting restrictions have been  
16 enacted over the last decade than at any point  
17 since the end of Jim Crow.

18 The last three months have seen an  
19 even greater uptick in proposed voting  
20 restrictions, many aimed squarely at the  
21 minority groups whose participation Congress  
22 intended to protect.

23 Rigorous and fair enforcement of  
24 Section 2 is as critical to the protection of  
25 minority voting rights today as it was when

1 Congress passed the 1982 amendment. The test  
2 used by the majority of circuits has not  
3 undermined a large swath of neutral voting  
4 restrictions. Rather, it has been used to  
5 carefully review and, where necessary, strike  
6 down discriminatory voting laws.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Carvin,  
9 rebuttal.

10 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN  
11 ON BEHALF OF PETITIONERS IN 19-1258

12 MR. CARVIN: Thank you, Mr. Chief  
13 Justice.

14 I think the colloquy makes clear that  
15 we're the only people who are providing a clear  
16 rule that can be applied by the lower courts.  
17 To clarify, any ambiguity in this, both at  
18 argument and in our brief, we've been making the  
19 same argument. Does the voting system provide  
20 different opportunities to minorities than it  
21 does to non-minorities? Has the voting system  
22 stacked the deck to favor non-minorities?

23 If it hasn't, if it doesn't treat  
24 minority neighborhoods differently than  
25 non-minority neighborhoods, then there's no

1 problem. If it does, that's what gets at it.

2 Now figuring out whether there's this  
3 kind of differential treatment, you need to look  
4 at population or, stated differently,  
5 demographic reality. One precinct with five  
6 people in it is quite different than one polling  
7 place with 5,000 people in it because the latter  
8 has much less opportunity.

9 But, if there's no differential  
10 treatment of that kind, socioeconomic factors,  
11 contribution to minorities' ability to utilize  
12 that same opportunity is irrelevant.

13 Finally, I want to get back to the  
14 colloquy that Justice Alito was having with Mr.  
15 Spiva. Given the ubiquity of socioeconomic  
16 disparities, this would clearly put states in a  
17 straightjacket. This case brilliantly  
18 illustrates that.

19 They claim that there's a lot of  
20 problem for minorities to get to precincts  
21 relative to non-minorities. What does Arizona  
22 do? Has this free mail system for 27 days  
23 that's utilized by 80 percent of the people, the  
24 very system that the DNC went around the country  
25 advocating as an expansion of the franchise.

1           Now we're told that a mail system  
2           somehow discriminates against minorities, which  
3           is completely untrue under the facts. But the  
4           only fact you need to know is anybody whose  
5           ballot is harvested received the ballot through  
6           the mail. This is all people who have already  
7           got the ballots, and they're picked up after  
8           they're voted.

9           Well, how did they get the ballots?  
10          They received them through the mail. So, for  
11          that reason, the district court was quite  
12          correct to hold that there's no connection  
13          between access to mail and the need for ballot  
14          harvesting. They couldn't produce a single  
15          voter who said it was more difficult to vote  
16          without ballot harvesting.

17          Same thing in terms of precincts. The  
18          notion that socioeconomic disparities make it  
19          difficult to find a precinct has nothing to do  
20          with this case because everybody involved here  
21          found a precinct. They simply found the wrong  
22          precinct. So transportation and work schedules  
23          had no inhibiting effect on minorities.

24          And, finally, of course, they didn't  
25          challenge the arrangement of precincts. The



1 Court found at Joint Appendix 336 precincts are  
2 no harder to find. And, indeed, plaintiffs'  
3 expert at Joint Appendix 109 said that precincts  
4 were closer to Latinos in Maricopa County than  
5 to non-minorities.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel. The case is submitted.

9 (Whereupon, at 11:54 a.m., the case  
10 was submitted.)

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## Official - Subject to Final Review

<b>\$</b>	<b>6</b>	<b>ADA</b> <sup>[1]</sup> 14:19	<b>ambiguity</b> <sup>[1]</sup> 117:17
<b>\$150,000</b> <sup>[1]</sup> 85:15	<b>6</b> <sup>[1]</sup> 60:24	<b>add</b> <sup>[1]</sup> 30:19	<b>Amendment</b> <sup>[2]</sup> 9:15 117:1
<b>1</b>	<b>60</b> <sup>[4]</sup> 75:3,7,12,24	<b>added</b> <sup>[1]</sup> 87:8	<b>Amendments</b> <sup>[2]</sup> 62:5 63:4
<b>1</b> <sup>[3]</sup> 41:15,17 70:4	<b>60-day</b> <sup>[1]</sup> 75:16	<b>adding</b> <sup>[2]</sup> 105:21 106:6	<b>American</b> <sup>[9]</sup> 20:6 54:13 65:14 68:1 71:6 80:23 89:23 92:25 94:16
<b>1,000</b> <sup>[3]</sup> 55:2,4 72:16	<b>63</b> <sup>[1]</sup> 3:11	<b>addition</b> <sup>[3]</sup> 39:7 98:24 100:1	<b>Americans</b> <sup>[3]</sup> 62:22 67:21 68:20
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<b>10:00</b> <sup>[2]</sup> 1:24 4:2	<b>8</b>	<b>address</b> <sup>[1]</sup> 44:2	<b>AMUNSON</b> <sup>[53]</sup> 2:7 3:10 63:20,21,23 66:7,10 67:6,19 68:4,13 69:2,4,7,18 70:3 71:3 72:25 75:5,9,17 76:11 77:5,25 78:21 79:4,20 81:9 82:17,21,25 83:5,23 84:4,8,11,20 85:5,9,15,25 86:7,22 88:23 90:1,9 91:15 92:4,15,18 93:5,14,19
<b>100</b> <sup>[2]</sup> 55:1 72:15	<b>8</b> <sup>[1]</sup> 26:24	<b>addresses</b> <sup>[1]</sup> 85:20	<b>analogous</b> <sup>[2]</sup> 5:8 32:18
<b>109</b> <sup>[1]</sup> 120:3	<b>80</b> <sup>[3]</sup> 48:3 96:15 118:23	<b>adjective</b> <sup>[1]</sup> 73:8	<b>analysis</b> <sup>[10]</sup> 7:9 33:20 36:12 41:18 53:1,9,14 54:10 95:23 113:11
<b>11:54</b> <sup>[1]</sup> 120:9	<b>9</b>	<b>admission</b> <sup>[1]</sup> 50:14	<b>analyze</b> <sup>[8]</sup> 41:23 45:5 62:7 98:23 99:4,6,21 109:8
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<b>15</b> <sup>[2]</sup> 24:4 27:5	<b>99.8</b> <sup>[1]</sup> 32:10	<b>adopting</b> <sup>[1]</sup> 96:9	<b>another</b> <sup>[7]</sup> 14:12,15 25:22 48:24,24 84:3 110:16
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