No. 19-1257

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF AMERICAN CONSTITUTONAL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Arizona, like every other State, has adopted rules to promote the order and integrity of its elections. At issue here are two such provisions: an "out-of-precinct policy," which does not count provisional ballots cast in person on Election Day outside of the voter's designated precinct, and a "ballot-collection law," known as H.B. 2023, which permits only certain persons (*i.e.*, family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot. A majority of States require in-precinct voting, and about twenty States limit ballot collection.

After a ten-day trial, the district court upheld these provisions against claims under Section 2 of the Voting Rights Act and the Fifteenth Amendment. A Ninth Circuit panel affirmed. At the en banc stage, however, the Ninth Circuit reversed—against the urging of the United States and two vigorous dissents joined by four judges.

The questions presented are:

1. Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act?

2. Does Arizona's ballot-collection law violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

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STATEMENT OF AMICUS CURIAE[1]

The American Constitutional Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the integrity and honesty of elections, promoting accuracy in voter registration and vote counting. Through its Protect Military Votes and its Protect Elderly Votes projects, it seeks to defend the voting rights of two vulnerable groups of voters. In addition, the ACRU's mission includes defending the legislative role in

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[1] The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. R. 37.2(a). Pursuant to Rule 37.6, *amicus curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

redistricting, which the Constitution vests in the States. It carries out these parts of its mission by participating in redistricting and other cases that present free speech and election integrity issues in the context of elections. These cases include *Bellitto v. Snipes*, 935 F. 3d 1192 (11th Cir. 2019); *Turzai v, Brandt*, 139 S. Ct. 445 (2018); *North Carolina v. Covington*, 138 S. Ct. 974 (2018) (No. 17A790); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); and *A. Philip Randolph Institute v. Husted*, 838 F. 3d 699 (6th Cir. 2016), rev'd, 138 S. Ct. 1833 (2018).

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify the standards that apply to vote denial claims brought under the results prong of Section 2 of the Voting Rights Act. The Ninth Circuit relied, in substantial part, on an analysis of the totality of the circumstances, drawn from *Thornburg v. Gingles*, 478 U.S. 30 (1986). But *Gingles* is a redistricting case, not suitable for use in analyzing whether to count ballots cast in the wrong precinct in part or discard them or whether it is appropriate to limit the range of people who can handle another person's ballot.

Analysis of vote denial claims like those must start with the statutory text. The text of § 2 demands consideration whether a voting regulation provides "less opportunity" to minority voters than to others, not whether the outcomes are equal. The Ninth Circuit erred by focusing its attention on outcomes.

By going further, the Ninth Circuit stretched § 2 beyond its constitutional limits.

ARGUMENT

I. The Constitution does not recognize disparate impact claims, and any congressional recognition of such claims is subject to constitutional limits.

Section 2 of the Voting Rights Act is not "some all-purpose weapon for well-intentioned judges to use as they please in the battle against discrimination. It is a statute." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J. dissenting). As such, it should be interpreted according to its text. In addition, that interpretation should not be construed in a way that violates the Constitution "if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

The Ninth Circuit's understanding and application of Section 2 of the Voting Rights Act's results test fails both of these tests. The court's decision represents a free-wheeling application of disparate impact that is inconsistent with the Constitution and with the statutory text.

A. Section 2 must be restrained in order to satisfy constitutional standards.

The Court has made it clear that the Fourteenth Amendment prohibits only intentional discrimination. *Vill. of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252 (1977). There, it

noted, "our decision last term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id*. at 264-65. Likewise, a plurality of the Court held that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment empower Congress to enforce the amendments "by appropriate legislation." U.S. Const., amend. XIV § 5, amend. XV § 2. Those powers are not, however, "unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Rather, where those Fourteenth Amendment powers are exercised, "[t]here must be a congruence and proportionality between the injury to be remedied and the means adapted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

City of Boerne addresses the powers of Congress under the Fourteenth Amendment, not the Fifteenth, but there is "no reason" to conclude that the powers of Congress under the Fifteenth Amendment are different from or greater than those under the Fourteenth Amendment. Von Spakovsky & Clegg at 3. Those authors explain that "the two post-Civil Wat Amendments were ratified within 19 months of each other, have nearly identical enforcement clauses, were prompted by a desire to protect the rights of just-feed slaves, and have been used to ensure citizens' voting rights." *Id*. Accordingly, the Enforcement

Clauses in those Amendments must be read *in pari materia*, such that a federal statute enacted pursuant to Section 2 of the Fifteenth Amendment must also be a congruent and proportional remedy to the problem identified by Congress.

Even if Congress could enact the results test in Section 2 of the VRA using its Enforcement Clauses powers, it cannot open the door to all kinds of disparate impact claims. Rather, its legislation must be tailored to "the end of ensuring no disparate treatment." Von Spakovsky & Clegg at 4. As the Court has explained, when Congress enacts "so-called prophylactic legislation" that reaches otherwise constitutional conduct, it can do so only "in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003); see also *id*. at 728 ("Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations."). Again, even such prophylactic legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id*. (quoting *City of Boerne*, 521 U.S. at 520).

With respect to Section 2's results test, that means reading it as something other than a simple disparate impact test. First, and most importantly, the "results" language must be read "to require challengers to demonstrate a close nexus between the practice in question and actual disparate treatment (action taken for a discriminatory purpose.)." Von Spakovsky & Clegg, *"Disparate Impact" and Section 2 of the Voting Rights Act* at 5 (Heritage Foundation,

2014) (emphasis in original) ("Von Spakovsky & Clegg"), available at https://report.heritage.org/lm119. In addition, the defendant must be "afford[ed] . . . a rebuttal opportunity to show that they have legitimate, nondiscriminatory reasons for a challenged practice." *Id*.

Furthermore, the test should respect the States' constitutional power to set the "Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. Const. Art. I, 4. The States also have the power to determine the qualifications of voters in federal elections. See U.S. Const. Art. I, § 2, amend. XVII. The States, thus, have substantial powers that should not lightly be overridden.

Put simply, an untethered application of the results test in Section 2 that turns it into a simple disparate impact test is at odds with the Constitution. See *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 of the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30 (1986), is consistent with the requirements of the United States Constitution.").

B. The text of Section 2 creates only a results test of limited scope.

Section 2 of the VRA begins by barring the imposition or application of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner *which results* in a denial or abridgement of the right to vote . . . *on account of race*

or color." 52 U.S.C. § 10301(a) (emphasis added). It further provides that [a] violation . . . is established if, *based on the totality of circumstances*," citizens protected by the VRA "have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added).

By including a "results" test in Section 2, Congress went farther than the Constitution. It added that test to the VRA in 1982, after the Court held that the prior language prohibited only intentional discrimination in *City of Mobile v. Bolden*.

The statutory text does not support reading the results test as an undiluted disparate impact approach. The statutory text hedges "results in" with "on account of," "the totality of circumstances," and "less opportunity." Taken together, those statutory elements "suggest that something other than a pure effects test—that is, a disparate impact test—is appropriate; surely Congress would not have used all this language had it intended *that*." Von Spakovsky & Clegg at 8 (emphasis added). Put differently, "[s]howing a disparate impact on poor and minority voters is a necessary but not sufficient condition to substantiate a Section 2 vote denial or abridgement claim." *Veasey v. Abbott*, 830 F. 3d 216, 310-11 (5th Cir. 2016) (en banc) (Jones, J., dissenting).

The Eleventh Circuit, sitting *en banc*, agreed, endorsing a reading of Section 2 with a "linguistic conclusion . . . supported by the fact that any other reading might well render section 2 outside the limits of Congress' legislative powers and therefore

unconstitutional." *Nipper v. Smith*, 39 F. 3d 1494, 1515 (11 th Cir. 1994) (*en banc*); see also *Chisom v. Roemer*, 501 U.S. at 417 (Kennedy, J., dissenting) (noting the unsettled question of the constitutionality of § 2 as construed in *Gingles*). Under the Eleventh Circuit's reading, "The existence of some form of racial discrimination . . . remains the cornerstone of section 2 claims." *Id*. "[T]o be actionable, a deprivation of a minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race, not on account of some other racially neutral cause." *Id*. As the court explained, a straight disparate impact test reads "on account of race or color" out of the statute and, in vote dilution cases, "create[s] a de facto right to proportional representation, a result expressly prohibited by section 2 itself." *Id*. at 1516.

Other courts have concluded that statistical disparities unlinked to intentional discrimination are insufficient to warrant relief where they have been external to voting. The alternative would leave no generally-applicable race neutral voting regulation immune from a disparate impact challenge. The Seventh Circuit pointed to that prospect in rejecting a challenge to Indiana's photo ID law, when it noted:

> At oral argument, counsel for one of the two groups of plaintiffs made explicit [what a free-wheeling disparate impact theory] implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout

> on election day is 2% higher, then the requirement of in-person voting violates § 2.

Frank v. Walker, 768 F. 3d 744, 754 (7th Cir. 2014); see also *id*. ("Motor-voter registration, which makes it simple for people to register to vote by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore to get drivers' licenses.").

In *Smith v. Salt River Project Agricultural & Power Improvement District*, 109 F. 3d 586 (9th Cir. 1997), for example, the court rejected a § 2 based challenge to a land-owning condition on eligibility to vote in an agricultural improvement district. While there was a statistical disparity between the rates of home ownership of whites and others, there was no "causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Id*. at 595 (quoting *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F. 3d 306, 315 (3d Cir. 1994)). In *Ortiz*, the Third Circuit rejected the contention that Pennsylvania's voter-purge law violated § 2 because it affected more inactive minority voters than inactive majority voters. The voters were removed from the rolls because they did not vote, not because of their race. 28 F. 3d at 313-14.

In vote denial cases, the text of § 2 mandates consideration whether the opportunity to participate in the election processes is equal, not whether more minorities fail to take advantage of an otherwise equal opportunity.

C. The Ninth Circuit's application of Section 2's results test fails these standards.

In essence, the Ninth Circuit, joining several other circuits, transferred *Gingles* and its analysis of redistricting and vote dilution claims to the vote denial context. It recognized that "the jurisprudence of vote-denial claims is relatively underdeveloped in comparison to vote-dilution claims." *Democratic National Committee v. Hobbs*, 948 F. 3d 989, 1012 (9th Cir. 2020) (en banc); see also *Veasey*, 830 F. 3d at 305 (Jones, J., dissenting) ("In transitioning from redistricting cases . . . to the new generation of 'vote abridgement cases, courts have found it difficult to apply the Section 2 results test.").

The Ninth Circuit's two-step analysis starts by asking "whether the challenged standard, practice results in a disparate burden on members of the protected class." *DNC v. Hobbs*, 948 F. 3d at 1012. Then, it considers "whether, under the 'totality of the circumstances,' there is a is a relationship between the challenged 'standard, practice or procedure,' on the one hand, and 'social and historical conditions' on the other." *Id*. That second step leads to the consideration of "factors such as those laid out in the Senate Report accompanying the 1982 amendments" to the Voting Rights Act. *Id*.

That test is not appropriate for use in vote denial cases. For Section 2 to be violated, "the challenged regulation, . . . rather than 'socioeconomic conditions' or a 'history of discrimination,' . . . must cause the disparate impact." *Veasey*, 830 F. 3d at 311 (Jones, J., dissenting). But the *Gingles*-guided

analysis of the totality of the circumstances focuses the attention of courts and litigants on socioeconomic conditions and a history of discrimination. Those Senate factors are now almost 40 years old and no longer represent current conditions in a legally compelling way when used as the basis for a challenge to unremarkable and common voting regulations that are generally applicable and race neutral. This Court should use this case to make it clear that *Gingles* does not apply to vote denial cases.

1. *Gingles* and the 1982 Senate Factors should not be transferred to the vote denial context.

Since *Gingles* was decided in 1986, it has guided States and localities in the redistricting process. In particular, it has told them when the creation of a minority-majority district is required. It says nothing, other than *dicta* taken out of context, about vote denial cases. Accordingly, the courts should be told to start with the text of § 2.

As Judge Jones explains, the "salient guidance" for considering challenges to voting regulations is "the statute itself." *Veasey*, 830 F. 3d at 310 (Jones, J., dissenting). The challenged practice must cause the disparate impact, not a history of discrimination, socioeconomic conditions, or both. *Id*. at 311. As the Seventh Circuit noted, "Section 2(b) tells us that Section 2(a) does not condemn a voting practice just because it has a disparate effect on minorities. (If things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive factors in vote-dilution cases.)." *Frank v. Walker*, 768 F. 3d 744, 753 (7th Cir. 2014). Focusing on the practice at issue

to the exclusion of the *Gingles* factors has the advantage of reading § 2 as an "'equal treatment requirement (which is how it reads) rather than 'an equal-outcome command.'" *Veasey*, 830 F. 3d at 311 (Jones, J., dissenting) (quoting *Frank v. Walker*, 768 F. 3d at 754.). After all, Section 2 is violated when processes are not "equally open," and minorities have "less opportunity" than the majority. 52 U.S.C. § 10301(b).

As Judge Jones notes, this analysis "dispenses with the *Gingles* factors" in vote denial cases. *Veasey*, 830 F. 3d at 311 (Jones, J., dissenting). She points to three reasons for "dispens[ing] with them. First, "[t]he Senate report cannot claim the same legal status, if any as that of the enacted law." *Id*. at 306. Tying social and historical conditions to the discriminatory effect "does not distinguish discrimination by the defendants from other persons' discrimination." *Id*. (quoting *Frank v. Walker*, 768 F. 3d at 755). Second, the totality of the circumstances analysis in *Gingles* is to be used only after the plaintiff satisfies the first three criteria. *Id*. (citing *Thornburg v. Gingles*, 478 at 48-51 (1986)); cf. *Bartlett v. Strickland*, 556 U.S. 1 (2009) (importance of satisfying the first *Gingles* criterion). Third, the *Gingles* factors are "non-exclusive and non-mandatory." *Id*. (citing *Gingles*, 478 U.S. at 45).

Put simply, any test for identifying a results-based violation of Section 2 must be consistent with the statutory text. The Ninth Circuit's test fails to meet that standard.

2. If applicable to vote denial claims, any totality of the circumstances analysis must focus on current conditions.

Separate and apart from the text of Section 2 and the *Gingles*-based reasons for limiting the reach of the 1982 Senate Factors, they are problematic because they drive the analysis of vote denial claims in the wrong direction. They inexorably lead to a focus on social and historical conditions that are unrelated to generally applicable, race-neutral voting regulations.

More generally, the 1982 Senate factors no longer represent current conditions. In 2009, the Court warned that, with respect to Section 5 of the Voting Rights Act, its "past success alone . . . is mot adequate justification to retain the preclearance requirement." *Northwest Austin Municipal Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009). Rather, "current burdens . . . must be justified by current needs." *Id*. at 203. Four years later, the Court returned to this theme when it concluded that § 4(b) of the VRA, which looked at voter participation in the 1964, 1968, and 1972 presidential elections, was unconstitutional noting that the formula did not reflect current conditions. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). As it explained, "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between Sates in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story." *Id*. at 2630-31.

The 1982 Senate factors that form the basis for Section 2's analysis of the totality of the circumstances are now 38 years old, almost as old as the 40-year-old presidential elections used in § 4(b). As such, they tempt courts to focus on the past to the exclusion of the present. In this case the Ninth Circuit's consideration of Arizona's history of discrimination started in the territorial period almost 175 years ago, spending 8 pages before getting to the present. *Democratic National Committee v. Hobbs*, 948 F. 3d at 1017-25.

In addition, as Justice Scalia explained, an appellate court's reliance on the totality of the circumstances to explain its decision means the court "is not so much pronouncing law in the normal sense as engaging in the less exalted function of fact-finding." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (Fall 1989), at 1180-81. The framing of the 1982 Senate factors can also lead courts to make policy judgments for States.

Such policymaking is inherent in the Ninth Circuit's rationale. It observed, "Twenty States, including Arizona's neighboring States of California, Utah, and New Mexico, count [Out of Precinct] ballots." *Democratic National Committee v. Hobbs*, 948 F. Supp. 3d at 1031. As Judge Bybee noted in his dissent, though, "twenty-six states, the District of Columbia, and three U.S. territories disqualify ballots cast in the wrong precinct." *Id.* at 1064 (Bybee, J., dissenting). Thus, Arizona's rule disqualifying out-of-precinct ballots is "nothing unusual" *Id.* at 1063 (Bybee, J., dissenting). This begs the question why the Ninth Circuit compels Arizona to make the same

policy choice that California did, but not the one that Nevada did. *Id*. at 1064 (Bybee, J., dissenting).

In a similar way, when considering Senate Factor 8, the State's responsiveness to the needs of minority citizens, the Ninth Circuit turns its disagreement with Arizona's policy choices into a thumb on the scale. It may be the case that Arizona was the last State to join the Children's Health Insurance Program and may be seen to be behind on school funding and state services. *Democratic National Committee v. Hobbs*, 948 F. 3d at 1030. Those are policy choices to be made in a political manner, not rights. The Ninth Circuit has no business telling the Arizona Legislature which laws it must pass or which political decisions it should make. Those policy choices also have no direct connection to whether the opportunity Arizona's laws provide to voters is equal for all or lesser for some.

Accordingly, the totality of the circumstances analysis cannot focus on past wrongs to the exclusion of present circumstances. In addition, that test should not make the State responsible for any discrimination other than its own. *Frank v. Walker*, 768 F. 3d at 753. As the Seventh Circuit explained, § 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id*.

II. The Ninth Circuit erred in rejecting Arizona's justifications for its generally applicable, race-neutral voting regulations as tenuous.

> "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualification of voters, the selection or eligibility of candidates, or the voting process itself, inevitably affects—at least in some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)(interior citation and quotation omitted).

This case involves two such race-neutral, generally applicable voting restrictions that are designed to bring order out of potential chaos. The Ninth Circuit declared that Arizona can no longer discard ballots that have been cast in the wrong precinct and may no longer limit the range of people who may legally handle another voter's ballot. As Judge O'Scannlain pointed out, Arizona has required voters to cast their ballots in their assigned precinct

since 1970 and has restricted the number of people who can handle other voters' ballots since 1992. *Democratic National Committee v. Hobbs*, 948 F. 3d at 1047-48 (O'Scannlain, J., dissenting). The Ninth Circuit found the rationale for these long-standing voting regulations to be tenuous. Those conclusions are wrong because the policies supporting Arizona's policies cannot be dismissed as tenuous.

1. Arizona law's discarding of out-of-precinct ballots provides an equal opportunity to all voters and protects the precinct system.

The Ninth Circuit declared, "[C]ounting or partially counting [out-of-precinct ballots] would [not] threaten the integrity of Arizona's precinct-based system." *Democratic National Committee v. Hobbs*, 948 F, 3d at 1065, 1065 (Bybee, J., dissenting). The court reasoned that, because Respondents said they were not challenging the precinct system, what mattered was the number of minorities who voted out-of-precinct, who had their ballots discarded. *Id*. at 1031.

In so doing, the court gave Arizona voters the right to vote wherever they want to. As Judge Bybee noted, "Under the majority's new rule, a voter from Tucson may cross precinct lines and vote in any precinct in Arizona—for instance, in Phoenix." *Id*. at 1065 (Bybee, J., dissenting). Judge Bybee explained that the partial counting of such a voter's ballot overvalues national elections and undervalues local contests. "[T]he majority has lowered the cost to voters of determining where they are supposed to

vote, but only as to presidential, U.S. Senate, and statewide races." *Id*. But it is local elections "that most directly affect the daily lives of ordinary citizens, and often provide the first platform by which citizen-candidates, not endowed with personal wealth or name recognition, seek on the path to obtaining higher office." *Id*. at 1066 (Bybee, J., dissenting).

It is not only that voters are free to vote where they want to under the Ninth Circuit's rule, they can do so for any reason. But, as Judge Bybee explains, "[U]nder Arizona law, no voter should inadvertently vote at the wrong precinct without some indication that something is amiss." *Id*. at 1066, n. 9 (Bybee, J., dissenting). Now, instead of learning of from a mistaken understanding of where to vote, voters can persist in their error. Cf. *id*. (Bybee, J., dissenting) ("Under Arizona's current [out-of-precinct] rules, a voter, having gone to the trouble of having to fill out a provisional ballot, is less likely to make the same mistake the next year. A voter who has been disqualified is more likely to figure out the correct precinct the next time—or, better yet, sign up for the convenience of early voting, a measure that avoids the conundrum of {out-of-precinct] altogether.").

The effect, whether Respondents claim it or not, is to undermine the precinct system. But, that system, which is well-established:

> caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent, federal, state, and local elections, referenda, initiatives, and

> levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and generally puts polling places in closer proximity to voter residences.

Sandusky Cty. Democratic Party v. Blackwell, 387 F. 3d 565, 569 (6th Cir. 2004); see also *Democratic National Committee v. Reagan*, 329 F. Supp. 3d 824, 860 (D. Ariz. 2018). The precinct system also assists in the allocation of voting machines; already, in some elections where turnout is unexpectedly high, the hours for voting have had to be extended by court order. But that should be the exception, not the rule.

Finally, the Ninth Circuit upsets the precinct system for a marginally small number of voters. In so doing, it erroneously looked at the results of Arizona's policy to the exclusion of the fact that the policy provides an equal opportunity to all voters. That said, in presidential election years, the number of out-of-precinct votes cast has declined from 0.47% of the total in 2012 to 0.15% in 2016. *Id*. at 872. For voters casting ballots in person on Election Day, 99% of minority voters cast their votes in the right precinct, while 99.5% of the majority did so too. *Id*. And, the vast majority of Arizona's voters take advantage of early voting options. As Judge O'Scannlain explained, "[T]he small number of voters who choose to vote in-person and the even smaller number who fail to do so in the correct precinct demonstrate that nay minimal burden on racial minorities does not satisfy the challenger's burden." *Democratic National Committee*

v. Hobbs, 948 F. 3d at 1052 (O'Scannlain, J., dissenting),

2. Arizona's law limiting the range of people who may lawfully handle another person's ballot deters vote fraud.

The Ninth Circuit en banc majority concluded that Arizona's justification for its restrictions on ballot harvesting were tenuous. In so doing, it rejected the district court's conclusion that limiting ballot harvesting prevents fraud by "creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction." *Democratic National Committee v. Hobbs*, 984 F. 3d at 1035 (quoting *Democratic National Committee v. Reagan*, 329 F. Supp. 3d at 852). The court also dismissed Arizona's reliance on the federal bipartisan Commission on Federal Election Reform and the recent events in North Carolina relating to its congressional district 9 (CD 9). *Id*. at 1036. The court explained that it had to "make an 'intensely local appraisal'" and that appraisal supported the "long and honorable history" of ballot harvesting in Arizona before the Arizona Legislature limited it. *Id*. at 1037 (quoting *Gingles*, 478 U.S. at 78).

The Ninth Circuit got it wrong. If an "intensely local appraisal" means that only Arizona's experience matters, the court limits Arizona, and every other State, from learning from the experience of others. That's plainly not the case, as the Arizona Petitioners note. See Pet., No. 19-1257, at 24.

More to the point, not only the bipartisan Commission's recommendation and North Carolina CD 9 are pertinent. Alabama's experience in its 1994 elections and a recent Texas referral support Arizona's concern with the potential for fraud. Both demonstrate the potential for fraud arising from the collection and completion of ballots in the name of other voters.

In Alabama, Frank Smith and Connie Tyree were convicted of voting the absentee ballots of other voters without the knowledge or consent of those voters in the 1994 elections. See *United States v. Smith*, 231 F. 3d 800, 805, 812 (11th Cir. 2000). The evidence demonstrated that Tyree fraudulently applied for, completed, or both, ballots of seven voters, and that Smith did the same for three voters. *Id*. at 812. In addition, the evidence showed that Tyree knowingly or willfully gave false information to establish the ability to vote in the name of six voters, and that Smith did the same for three. *Id*.

The 1994 election in Alabama was marked by unusual spikes in the use of absentee ballots in several thinly populated rural counties; in Greene County, for example, which is where Smith and Tyree acted, 30% of the votes in 1994 were absentee, where only 5% were two years later. Winthrop E. Johnson, Courting Votes in Alabama: When Lawyers Take Over a State's Politics (Prescott Press, 1999), at 85 (Courting Votes). Part of that spike was facilitated by a glitch in Alabama's absentee voting law, which allowed voters to receive ballots where they customarily received mail. In Greene County, 14 ballots were sent to the Post Office box of the local

Democratic Committee, 24 to the acting chair of the local Democratic Committee, and 8 to the county Sewer and Water Authority. *Id*. at 78.

One Witness testified that, on election day, men bearing suitcases opened them and handed absentee ballots to the postal clerks in the post office in Eutaw, the county seat of Greene County. The witness said that five men walked into the post office with three suitcases containing absentee ballots. Id. at 85. Another said that 500 ballots in a single suitcase showed up at the post office the day of the election for delivery to a nonexistent post office box. *Id*. at 137.

The Eleventh Circuit rejected Smith's and Tyree's contention that they were the victims of selective prosecution. It explained

> [F]or Smith and Tyree to establish selective prosecution, they must show that there are other individuals who voted twice or more in a federal election by applying for and casting fraudulent absentee ballots, and who forged the voter's signature or knowingly gave false information on a ballot affidavit or application, and that the voter whose signature those individuals signed denied voting.

United States v. Smith, 231 F. 3d at 811. The evidence showed that Tyree, on of Smith's election assistants, supervised the "assembly line" completion of nearly 100 absentee ballots at the Eutaw Community Center shortly before election day. Courting Votes at 278.

Further, in early May 2020, the Texas Secretary of State referred a complaint regarding alleged ballot harvesting to the State's Attorney General. See Holly Hansen, *Alleged Ballot Harvesting in Harris County Prompts Investigation Request by Secretary of State*, The Texan (May 8, 2020), available at https://thetexan.news/alleged-ballot-harvesting-in-harris-county-prompts-investigation-request-by-secretary-of-state. The complaint relates to a precinct in Houston in which 32 ballot applications appear in the same handwriting, and all of those applications were returned in the same preprinted envelope with the same stamp style. Even though there were more than 150 offices on the ballot, several of the ballots included votes for only two candidates, Representative Sheila Jackson Lee (D) and State Representative Harold Dutton (D). One of the alleged ballot harvesters said she was working for the Sheila Jackson Lee campaign.

Plainly, the Ninth Circuit underestimated the potential for fraud when third parties are permitted to handle the ballots of other voters.

CONCLUSION

For the reasons stated in the Petition and this amicus brief, this Court should grant the writ of certiorari and, on review, reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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