Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE GOVERNOR DOUGLAS A. DUCEY, PRESIDENT OF THE ARIZONA STATE SENATE KAREN FANN, AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES RUSSELL BOWERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici Curiae are Arizona lawmakers whose integrity the en banc Ninth Circuit impugned and whose authority that court tried to displace.

Douglas A. Ducey is the Governor of the State of Arizona, Karen Fann is the President of the Arizona State Senate, and Russell Bowers is the Speaker of the Arizona House of Representatives. All three held office in 2016, when Arizona adopted House Bill 2023, a ban on ballot harvesting, and all three supported that measure. Speaker Bowers and President Fann voted for the bill; Governor Ducey signed it into law. Their mutual objective was to guarantee the integrity of the ballot while maintaining easy access to early voting. And they succeeded. HB 2023 is a commonsense—and commonplace—law that prevents fraud by limiting who can handle a voter's early ballot, but nonetheless allows relatives, caregivers, and others to help voters in returning their ballots. HB 2023 *protects* the right to vote; it does not diminish that right.

None of the Amici were in public office decades earlier, when Arizona joined the overwhelming majority of States in adopting precinct-based voting for in-person voters on election day. But as state officers, Amici have an interest in defending Arizona's laws against an activist attack.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received timely notice of the intent to file this brief and have consented to this filing.

SUMMARY OF ARGUMENT

The en banc Ninth Circuit broke with three other circuits and created an impossible standard for state lawmakers when it invalidated two elections regulations that impose only "the usual burdens of voting." *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J., op.). Under the court's reasoning, statistical or anecdotal evidence that an election regulation correlates with any difference in voting behavior among racial groups is enough to seal the regulation's fate. That rule calls into question nearly *every* election regulation and forestalls state innovation in making elections more accessible and more secure.

The Ninth Circuit also found clear error in the district court's determination that Arizona's ballot-collection law did not have a racially discriminatory purpose. The court's rationale holds scores of legislators responsible for others' moral failings, some of them decades old.

These novel rules appear nowhere in the Fifteenth Amendment or Section 2 of the Voting Rights Act. And they would put state lawmakers in a policy straightjacket. This Court should grant certiorari to confirm that "the usual burdens of voting" do not deny or abridge the right to vote.

ARGUMENT

I. The Ninth Circuit Has Exacerbated a Circuit Split by Transforming Section 2 into a One-Way Ratchet and Shuttering the Laboratories of Democracy.

The Ninth Circuit's conclusions are legally and factually wrong, and they mark an irreconcilable split with other circuits over Section 2 of the Voting Rights Act. Of particular concern to Amici, the decision below also makes it nearly impossible for state lawmakers to regulate elections.

A. Arizona Lawmakers Have Built One of the Most Accommodating Voting Frameworks in the United States.

Under the Elections Clause, States prescribe the "time, place, and manner" for holding elections. U.S. Const. art. I, § 4, cl. 1. Consistent with its role as one of 50 "laboratories for devising solutions to difficult legal problems," *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n* (*AIRC*), 135 S. Ct. 2652, 2673 (2015) (quotation omitted), Arizona has debated and implemented various practices and procedures for running open and orderly elections.

The product of this innovation is "a flexible mixture of early in-person voting, early voting by mail, and traditional, in-person voting at polling places on Election Day." Pet. App. 316a.[2] Arizona voters need no excuse to vote early. Ariz. Rev. Stat. § 16-541. They can request an early ballot

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[2] This brief references the Petition and Petitioners' Appendix in No. 19-1258.

on an election-by-election basis or join the State's Permanent Early Voter List to receive an early ballot as a matter of course. *Id.* §§ 16-542, 16-544. In 2002, Arizona became the first State to allow citizens to register to vote online. Pet. App. 316a.

For those who vote early, Arizona provides multiple easy, straightforward ways to return their ballots. Voters in every county may mail their ballots postage-free. Pet. App. 317a. Some counties provide drop-boxes; all allow voters to return "ballots in person at any polling place, vote center, or authorized election official's office without waiting in line." *Id.*

Finally, Arizona allows early voters to enlist the help of family members, household members, caregivers, election workers, and postal workers in returning early ballots, though the State prohibits other third parties from doing so. See Ariz. Rev. Stat. § 16-1005(H). This prohibition, found in HB 2023, is one of the two regulations that Respondents challenge.

The other challenged regulation affects only part of the small and dwindling share of Arizona voters who choose to vote in person on Election Day. For decades, "Arizona has required [those] voters . . . to cast their ballots in their assigned precinct and has enforced this system by counting only those ballots cast in the correct precinct." Pet. App. 318a.

B. The Ninth Circuit's Decision Disables States from Experimenting with Election Regulations.

The en banc Ninth Circuit's decision threatens to foreclose future innovation in elections regulation. It does so first by reading Section 2's "results test" to require States with imperfect histories of racial equality to achieve racial parity in voting behavior before they can regulate particular voting practices. No legislature can meet this standard. Second, the Ninth Circuit imposed a one-way ratchet that allows States to experiment with relaxing their election laws but prevents them from correcting course and tightening their rules. This structure discourages innovation and allows one legislature to bind the hands of all future legislatures.

1. The Ninth Circuit opinion demands a perfection that no legislature could deliver and no Congress would impose. The court below invalidated Arizona's precinct-voting rule based on evidence that 99% of minority voters and 99.5% of white voters cast their ballots in the correct precincts—evidence the court characterized as "establish[ing] that minority voters in Arizona cast [out-of-precinct] ballots at twice the rate of white voters." Pet. App. 41a. Combined with a "history of discrimination" starting 64 years before statehood, with the 1848 Treaty of Guadalupe Hidalgo, the en banc majority concluded that Arizona's precinct-voting rule results in a race-based denial of the right to vote. Pet. App. 49a–50a, 81a.

The court reached the same conclusion about HB 2023. The district court had noted that "no individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote," let alone impossible to do so. Pet. App. 386a. The

Ninth Circuit filled that evidentiary hole by pointing back to "Arizona's long history of race-based discrimination in voting," and to anecdotal evidence that more minorities than white voters have their ballots collected by third parties. Pet. App. 82a–85a.

The Ninth Circuit's approach not only clashes with precedent from other circuits, see Part II infra, but it would invalidate legislation based on even the barest racial disparities in voting behavior or preferences, so long as they can be connected—however tenuously—to historical discrimination. At a practical level, this approach would doom nearly all state election regulations.

As the Seventh Circuit has explained, "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank* v. *Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (Easterbrook, J.). For the Ninth Circuit, then, nearly any measure of racial inequality could be deployed to invalidate an election regulation, no matter how benign. For example, "[m]otor-voter registration, which makes it simple for people to register 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 less likely to get drivers' licenses." *Ibid.*

"[I]t would be implausible to read § 2 as sweeping away almost all registration and voting rules," *ibid.*, but that is where the Ninth Circuit's approach leads. This result signals that something is amiss in that court's reading of Section 2. And indeed several canons of construction weigh against the Ninth Circuit's approach. In the Elections Clause context, this Court demands textual evidence of Congress's preemptive intent: "Because the power the

Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013). Furthermore, under the major questions doctrine, if Congress had intended to foreclose any election regulation that correlates with race, it would have said so more explicitly. See *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626–27 (2018) (presuming "that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions'" (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U.S. 457 (2001)). The text of Section 2 indicates no intent to preempt a policy field as wide as the Ninth Circuit has cleared. A limitless interpretation of that statute cannot be a faithful one.

2. The Ninth Circuit's "theory of disenfranchisement," particularly as concerns HB 2023, also "creat[es] a 'one-way ratchet' that . . . discourage[s] states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances." *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (upholding the Ohio legislature's decision to end an experiment in early voting even though it disproportionately affected black voters).

Under the Ninth Circuit's approach, once a State permits a voting method that minority voters disproportionately prefer—here, third-party collection of early ballots—the State becomes powerless to regulate that practice even if countervailing concerns emerge. But policy revisions and re-revisions are exactly what States are

supposed to do under the Elections Clause. See *AIRC*, 135 S. Ct. at 2673. And to hamstring States in this way not only discourages innovation; it forbids States to fix problems as they arise.

The ability to change laws in response to changing circumstances and priorities is, of course, central to the policymaking work of every legislature in the country. As Chief Justice Warren observed five decades ago, "a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald* v. *Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) (quotation omitted). Amici know from experience that, with each policy experiment, lawmakers discover new "phase[s] of the problem." Some of those lessons require returning to former policies. The Ninth Circuit, however, has replaced the process of trial and error with an allowance for trials but no opportunity to admit even partial error. The result will be less policy innovation.

C. The Ninth Circuit's Interpretation of Section 2 Erodes the Statutory Requirements.

The decision below not only creates insuperable hurdles for state lawmakers, but its reading of Section 2 is also wrong and conflicts with the decisions of at least three other circuits.

In applying Section 2, the Ninth Circuit asked the wrong question and looked to the wrong evidence for its answer. Rather than examine the "right . . . to vote" and voters' "opportunity . . . to participate in the political process," 52 U.S.C. § 10301, the Ninth Circuit examined in isolation two *methods* of voting—out-of-precinct voting and

third-party ballot collection. But the right to vote is not a right to vote wherever or however one chooses. That was the Court's premise in *McDonald*, which distinguished the "ability to exercise the fundamental right to vote" from "a claimed right to receive absentee ballots." 394 U.S. at 807. And had the Ninth Circuit followed the Fourth, Sixth, and Seventh Circuits, it would have upheld the challenged regulations.

1. Following the text of Section 2, a court must first ask whether a contested regulation affects the right to vote. As this Court and others have recognized, exercising the right to vote is not completely effortless. In the related context of the Fourteenth Amendment, for example, this Court held that a State may require voter identification, and that doing so "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. Other courts have carried that insight the short distance to Section 2's protection of "the right . . . to vote." 52 U.S.C. § 10301(a). The Fourth Circuit, for example, applied *Crawford* to Section 2, noting that the "'usual burdens of voting'" do not amount to a denial or abridgement of the right to vote. *Lee* v. *Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016) (quoting *Crawford*, 553 U.S. at 198); see also Pet. App. 126a (O'Scannlain, J., dissenting) (noting the en banc majority's failure to explain "how or why the burden of voting in one's assigned precinct is severe or beyond that of the burdens traditionally associated with voting"). Borrowing *Crawford*'s "usual burdens" test in this context makes sense. After all, what is "usual" cannot be a denial or abridgement.

The Ninth Circuit, however, dodged Respondents' Fourteenth Amendment claim, Pet. App. 9a, because it was irreconcilable with *Crawford*. Then, when applying Section 2, the court ignored *Crawford*'s essential insight that the ordinary burdens of voting cannot, by definition, deny or cut short the right to vote. The Ninth Circuit's silence on "usual burdens" has one upside: it leaves in place the district court's factual findings that neither contested regulation represents more than the "usual" and "ordinary burdens of voting." Pet. App. 336a (HB 2023), 361a (out-of-precinct). Thus, all that remains is for this Court to resolve the circuit split on whether such usual burdens of voting can constitute a denial or abridgement under Section 2. The Court should grant certiorari to resolve that legal division.

2. Assuming that a regulation denies or abridges the right to vote, the next question under Section 2 is whether the denial is "on account of race or color." 52 U.S.C. § 10301(a). On this point, the Ninth Circuit professed to require more than a bare statistical disparity, and "to assume . . . that more than a de minimis number of minority voters must be burdened before a Section 2 violation based on the results test can be found." Pet. App. 37a, 43a. In fact the court did no such thing, instead creating a hair trigger for racial discrepancies that forecloses benign explanations like geography, economic class, or education.

In so doing, the Ninth Circuit cemented its split with the Fourth, Sixth, and Seventh Circuits. The en banc majority limited its earlier decision in *Gonzalez* v. *Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), on the grounds that it "does not tell us that the predicate disparity, and its effect, are the same in vote denial and vote dilution cases."

Pet. App. 107a. What that means is far from clear, but other circuits have not shared the same concern. The Sixth Circuit cited *Gonzalez* in holding that a vote-denial claim requires "proof of a disparate impact—amounting to denial or abridgement of protected class members' right to vote—that *results from the challenged standard or practice*." *Husted*, 834 F.3d at 623. The same is true in the Fourth and Seventh Circuits, which rejected bare statistical disparities attributable to other factors. *Lee*, 843 F.3d at 600; *Frank*, 768 F.3d at 753.

The Ninth Circuit, however, assumed that (tiny) disparities in electoral behavior must be attributable to and caused by state law. The district court found the opposite: that Arizona's laws did not cause the "observed disparities." Pet. App. 391a. In the Seventh Circuit, this finding alone would have been enough to affirm the verdict in favor of the State. As that court explained in *Frank*, showing "a disparate outcome [does] not show a denial of anything *by Wisconsin*, as § 2 requires." 768 F.3d at 753 (emphasis added). Instead, the court credited the district court's factual finding that "'the reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty.'" *Ibid.* (quoting *Frank* v. *Walker*, 17 F. Supp. 3d 837, 877 (E.D. Wisc. 2014)).

Here, concerning HB 2023, the Ninth Circuit brushed aside a number of alternative explanations for disparate outcomes other than "race or color." One of Respondents' witnesses identified several non-racial categories of voters who might find it challenging to return early mail ballots, including voters who "lack easy access to outgoing mail services; the elderly, homebound, and disabled voters;

socioeconomically disadvantaged voters who lack reliable transportation; voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services; and voters who are unfamiliar with the voting process." Pet. App. 22a (quoting Pet. App. 335a). But there was no evidence that *the State* caused the exogenous conditions that might make ballot collection appealing to some voters. Indeed, pointing to this same testimony, the district court concluded that "[t]he evidence available largely shows that voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways." Pet. App. 335a. Under the Seventh Circuit's approach, there could be no showing that the *State* denied anything, and thus no Section 2 violation. See *Frank*, 768 F.3d at 753.

The same error infects Respondents' effort to show that the precinct-voting rule creates an unequal opportunity to vote "on account of race." The district court found that Respondents "have not shown that Arizona's policy to not count [out-of-precinct] ballots causes minorities to show up to vote at the wrong precinct." Pet. App. 391a. Again, absent a showing of causation, this case would have concluded differently in the Seventh Circuit.

In sum, small differences may exist in the rates at which different groups use ballot collectors or vote outside their precincts. But those differences arise "on account of" traits other than "race or color," and independent of any state action. 52 U.S.C. § 10301(a). In the Fourth, Sixth, and Seventh Circuits, this case would be an easy one. In the Ninth Circuit, however, bare statistical disparities doom

even neutral regulations. The implication of this rule is that state legislators and governors must eliminate racially correlated differences that they did not create—a nearly impossible task. Cf. *Frank*, 768 F.3d at 753 ("[U]nits of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." (citing *Milliken* v. *Bradley*, 418 U.S. 717 (1974))). This call for social and economic transfiguration goes well beyond the language of Section 2. This Court should grant certiorari to resolve the split and relieve the States in the Ninth Circuit from an impossible prerequisite for passing election laws.

3. Finally, for courts asking the correct question under Section 2, the relevant evidence is not whether minority voters are more likely to engage in a certain practice, but whether curtailing that practice means that the "political processes . . . are not equally open" to them. 52 U.S.C. § 10301(b). The Ninth Circuit's failure to undertake that inquiry is most glaring in the context of the precinct-voting rule, where the court seized on a single data point and misused statistics to exaggerate the effect of out-of-precinct voting, in direct conflict with the Seventh Circuit.

The text of Section 2 states that a voting qualification abridges or denies the right to vote on account of race or color if it results in "political processes . . . not equally open to participation by a [protected] class of citizens." 52 U.S.C. § 10301(b). This determination must consider "the totality of circumstances." *Ibid.* That standard makes sense because legislators and governors craft their election reform measures in the context of the complete regulatory landscape and evolving threats to election integrity.

The Sixth Circuit has approached this holistic inquiry by examining overall voter participation rates and insisting on statistical significance before invalidating a state law. Comparing different registration rates for African American and white voters, for example, the Sixth Circuit noted that "both groups' registration numbers are statistically indistinguishable." *Husted*, 834 F.3d at 639. The Seventh Circuit likewise considered overall registration and turnout rates as part of the totality of the circumstances. *Frank*, 768 F.3d at 752.

The Ninth Circuit ignored the big picture and instead seized on a single piece of evidence that it could reinterpret in a nonsensical way. As noted, the record establishes that 99.5% of white voters and 99% of minority voters voted in-precinct. Pet. App. 388a. But rather than acknowledge the obvious—that this difference is statistically insignificant—the Ninth Circuit divided the percentages to produce a new statistic to suit its desired outcome. Pet. App. 41a. Thus, the en banc panel could assert that out-of-precinct voting occurs at a "ratio of two to one." *Ibid.* Of course, the same "ratio of two to one" would apply if 99.999998% of minorities voted in the correct precinct while 99.999999% of white voters did the same. The Seventh Circuit addressed exactly this "misuse of data," concluding that "[t]hat's why we don't divide percentages." *Frank*, 768 F.3d at 752 n.3.

The Ninth Circuit's holding includes a second, even greater detachment from the "totality of circumstances." The court chided the district court for considering the consequences of out-of-precinct voting in the context of voting overall—rather than among in-person voting alone. Pet. App. 42a–43a. In the larger context, the importance of

out-of-precinct becomes vanishingly small. In the 2016 general election, just 0.15% of ballots were cast in the wrong precinct. Pet. App. 354a. Also relevant to the district court's approach was the fact that the number of out-of-precinct ballots has been falling. Pet. App. 354a–356a. This fidelity to the statute did not escape the Ninth Circuit, which decried the "misleading numbers and percentages cited by the district court." Pet. App. 43a.

* * *

State lawmakers enact election regulations as part of their State's overall statutory scheme. Congress designed Section 2 with two paragraphs of conditions that plaintiffs must satisfy before invalidating state laws. To give effect to those conditions, this Court should grant certiorari and apply the "usual burdens" standard from *Crawford* (for which a factual finding already exists), insist that courts consider factors that might explain statistical disparities *not* "on account of race or color," and affirm the meaning of "totality of circumstances" against the Ninth Circuit's bizarre manipulation of statistics.

II. The Ninth Circuit's Approach to Historical Discrimination and Lawmakers' Motives Would Convict Every Current Legislature in the Nation.

Amici know from experience that divining legislative intent is nearly impossible. What drives one legislator is irrelevant to another and a drawback in the eyes of a third. Yet all three might eventually support the same bill. Compounding this divergence in motives are the incomplete records of legislative proceedings. Floor and committee transcripts reveal areas of contention or uncertainty; they do not document each legislator's various motives or their relative importance.

If "legislative intent" is discoverable at all, the record in this case falls far short of establishing a discriminatory intent behind HB 2023. The district court correctly rejected that contention, and the en banc Ninth Circuit had no basis for finding clear error. For the decent men and women who supported this legislation, erasing the Ninth Circuit's slander is of utmost importance.

1. Legislative intent entered this case through two theories: the "intent test" for Section 2, and the Fifteenth Amendment. Pet. App. 8a. Treating these arguments together, the district court rejected Respondents' theory of invidious legislative intent. Pet. App. 412a. It concluded that the legislature acted on "a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." *Ibid.* While some legislators "also harbored partisan motives . . . in the end, the legislature acted in spite of opponents' concerns that the law would prohibit an effective [get-out-the-vote] strategy in low-efficacy minority communities, not because it intended to suppress those votes." *Ibid.* As a result, the district court found "that H.B. 2023 was not enacted with a racially discriminatory purpose." Pet. App. 404a.

"Legislative motivation or intent is a paradigmatic fact question." *Prejean* v. *Foster*, 227 F.3d 504, 509 (5th Cir. 2000) (citing *Hunt* v. *Cromartie*, 526 U.S. 541, 549 (1999)); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287–288 (1982) ("intent to discriminate on account of race . . . is a pure question of fact").

2. Here, the district court's finding that HB 2023 was enacted without discriminatory intent followed a 10-day bench trial. The court heard testimony of "current and former lawmakers, elections officials, and law enforcement

officials," including both supporters and opponents of the law. Pet. App. 315a. Among those who testified was Representative Charlene Fernandez, the current Democratic Minority Leader of the Arizona House of Representatives. Rep. Fernandez opposed HB 2023 in 2016, but she testified at trial that she had no "reason to believe that HB 2023 was meant to suppress Hispanic votes." Pet. App. 407a. The district court agreed. Pet. App. 404a.

3. A bare majority of the en banc Ninth Circuit upended that factual finding based on "Arizona's long history of race-based voting discrimination," prior legislatures' efforts to limit third-party ballot collection, and a novel "cat's paw" theory under which the court imputed one senator's supposedly race-based motives to all of his colleagues. Pet. App. 99a, 101a.[3] All of these attacks share a common theme of attributing to Amici and their many colleagues views and intentions that they do not hold.

a. As noted, the "long history" chronicled by the Ninth Circuit stretches back 172 years—64 years before Arizona entered the Union. Even accepting as true Respondents' expert testimony on that point, the Ninth Circuit erred in faulting contemporary legislators based on distant history. See *Shelby County* v. *Holder*, 570 U.S. 529, 553 (2013) (rejecting the coverage formula in Section 4 of the Voting Rights Act because it rested on "decades-old data relevant to decades-old problems"). Every State has historical failures in racial equality. But neither the Fifteenth Amendment nor Section 2 disables current

[3] Judge Watford did not join the "intent test" portion of the en banc panel's opinion. Pet. App. 114a.

legislatures because their predecessors acted badly. Just as one legislature's laws cannot bind another, so future lawmakers are not bound to the moral defects of their forbearers. As this Court recently reaffirmed, "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbot* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980)).

b. The Ninth Circuit's reliance on prior legislatures' efforts to limit third-party ballot collection was misplaced for similar reasons. The district court correctly discounted those earlier efforts—Senate Bill 1412 (2011) and HB 2305 (2013)—because "they involve[d] different bills passed during different legislative sessions by a substantially different composition of legislators." Pet. App. 409a. The en banc majority, by contrast, scoured those earlier "efforts to outlaw third-party ballot collection" for some evidence of sinister intent. Pet. App. 82a.

Regarding SB 1412, for example, the court misleadingly quoted Arizona's former elections director, Amy Bjelland Chan, as "admit[ting] that the provision was 'targeted at voting practices in predominantly Hispanic areas.'" Pet. App. 27a–28a. "In context," as the district court earlier explained, the report "describes the 'practice' targeted by S.B. 1412 not as ballot collection, generally, but as voter fraud perpetrated through ballot collection, which Bjelland believed was more prevalent along the border because of perceived 'corruption in the government and the voting process in Mexico,' and the fact that 'people who live close to the border are more impacted by that.'" Dist. Ct. Dkt. 204 at 13.

As for HB 2305, the Ninth Circuit darkly noted that the bill "was passed along nearly straight party lines in the waning hours of the legislative session." Pet. App. 28a. But that describes *many* bills passed at the end of *every* legislative session. The court also noted that the Legislature subsequently repealed the bill rather than face a citizen referendum. Pet. App. 29a. But that says nothing about the intent of the legislators who voted for the bill itself.

Even the en banc majority could not go so far as to conclude that either SB 1412 or HB 2305 was enacted with discriminatory intent. But even if it had, "this is [not] a case in which a law originally acted with discriminatory intent [was] later reenacted by a different legislature," so "what matters . . . is the intent of the" legislature that enacted HB 2023. *Abbott*, 138 S. Ct. at 2325.

b. As for HB 2023, the Ninth Circuit adopted a "cat's paw" theory of legislative intent that is unsupported in law and unconnected to the realities of policymaking. The en banc court purported to "accept the district court's conclusion that some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed." Pet. App. 99a; compare Pet. App. 405a. But because that "sincere belief" was the product of a single legislator's "false allegations" and a "racially-tinged" video, the Ninth Circuit tortuously reasoned, "a discriminatory purpose" could be imputed to the 50 other legislators who "did not themselves have" a malign purpose, but were nonetheless duped into voting for the bill. Pet. App. 100a.

No other court has adopted this demeaning "cat's paw" theory of legislative intent, and for good reason. It turns the presumption of legislative good faith on its head and is irreconcilable with this Court's commonsense observation that "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 217 (1983).

Indeed, the Ninth Circuit's "cat's paw" hypothesis bears no resemblance to the realities of policymaking. The Arizona Legislature consists of two chambers with 90 members—60 representatives and 30 senators. Typically, after a member introduces legislation, one or more committees hear the bill, including public testimony, before the full chamber votes on it. If a majority of the first chamber approves the bill, then the process repeats itself in the second chamber. The bill may be amended several times along the way. And if it clears both chambers, then it must earn the governor's signature before it becomes law. The process is cumbersome by design. And the notion that a single legislator could control it is farcical.[4]

Even if this level of manipulation were possible, adopting the Ninth Circuit's approach would cast suspicion on nearly all election-related policymaking. If a single legislator's undisclosed racist motives can be attributed to all his colleagues, then any elections bill he advocates or votes for may violate Section 2's intent test or the Fifteenth Amendment. No legislature can be put to the

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[4] Ironically, the legislator whom the Ninth Circuit promoted to Svengali-like status was expelled from the Arizona House of Representatives in 2018 by a bipartisan supermajority of his colleagues.

task of smoking out every member's secret intentions before it can regulate elections.

4. The Ninth Circuit's conclusion regarding legislative intent rests on an additional error of fact and law. That court insisted repeatedly that "[t]here is no evidence of any fraud in the long history of third-party ballot collection in Arizona." Pet. App. 25a; see also Pet. App. 111a ("there is a long history of third-party ballot collection with no evidence, ever, of any fraud").

That is false. Jim Drake, a former Assistant Secretary of State, testified at trial about his investigation of an individual who collected other people's ballots, opened them, and then disqualified them by "overvot[ing] them if things weren't going the right way." Dist. Ct. Dkt. 400 at 213. While it was considering HB 2023, the House Elections Committee heard testimony from numerous witnesses, including "Michael Johnson, an African American who had served on the Phoenix City Council, strongly favored H.B. 2023[,] and expressed concern about stories of ballot collectors misrepresenting themselves as election workers." Pet. App. 407a; see also Pet. App. 222a (citing Sen. Steve Smith's testimony "that ballot fraud is 'certainly happening.'").

The legislature also considered the Carter-Baker Report, which instructed that States "should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." Pet. App. 351a. As the Petition points out, other jurisdictions wrestled with the dangers of ballot harvesting in the years preceding HB 2023's enactment. Pet. 7–8. And recent history provides an

additional example in North Carolina's 2018 election. See Pet. App. 166a.

Moreover, as a matter of law, the Ninth Circuit erred in concluding that "protect[ion] against potential voter fraud . . . is not necessary, or even appropriate." Pet. App. 111a. That conclusion directly contravenes this Court's decision in *Crawford*, which reiterated that States can enact legislation to prevent election fraud even before it occurs. 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). Unlike here, the Indiana legislature in *Crawford* had no evidence of the particular misconduct that it legislated to prevent. *Id.* at 194. The same was true when Washington's lawmakers, in order to avoid voter confusion, required minor-party candidates to demonstrate support to qualify for the ballot. *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195 (1986). Here, in contrast, Arizona lawmakers had evidence of the fraud they sought to prevent. But even if they had not, their foresight would not have violated Section 2 or the Fifteenth Amendment.

5. The en banc majority found further proof of the legislature's supposedly illicit motive in the district court's finding "that the legislature 'was aware' of the impact of H.B. 2023 on what [the district] court called 'low-efficacy minority communities.'" Pet. App. 101a. But the Ninth Circuit ignored the district court's finding that "the legislature enacted H.B. 2023 *in spite of* its impact on minority [get-out-the-vote] efforts, not because of that impact." Pet. App. 410a (emphasis added). The only other motive credited by the district court was that "some individual legislators and proponents were motivated in

part by partisan interests." *Ibid.* But the court found that "partisan motives did not permeate the entire legislative process." *Ibid.* "Instead, many proponents acted to advance facially important interests in bringing early mail ballot security in line with in-person voting security[.]" *Ibid.*

Again, *Crawford* is instructive. The voter-identification law there was uniformly supported by Republican legislators and opposed by Democratic legislators, and so "[i]t is fair to infer that partisan considerations may have played a significant role." *Crawford*, 553 U.S. at 203. But where, as here, "a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." *Id.* at 204. In any event, partisan interests are not themselves illicit, whether in regulating elections or redistricting, both of which are constitutionally committed to the States. See *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2497 (2019) ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities.").

CONCLUSION

The en banc Ninth Circuit began its otherwise flawed opinion by stating that "[t]he right to vote is the foundation of our democracy." Pet. App. 1. Precisely because the right to vote is so important, States must be able to ensure that elections are orderly and secure, and that fraud does not diminish legitimate votes. The decision below threatens States' ability to discharge their duty based on an interpretation of Section 2 and the Fifteenth Amendment

that is faithful to neither. The Court should grant the Petition.

Respectfully submitted.

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