Nos. 19-1257 & 19-1258

IN THE

Supreme Court of the United States

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

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

BRIEF FOR PRIVATE PETITIONERS

BRETT W. JOHNSON
COLIN P. AHLER
TRACY A. OLSON
SNELL & WILMER L.L.P.
400 E. Van Buren St.
Suite 1900
Phoenix, AZ 85004

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
ANTHONY J. DICK
E. STEWART CROSLAND
STEPHEN J. KENNY
STEPHEN J. PETRANY
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioners

QUESTIONS PRESENTED

Section 2 of the Voting Rights Act prohibits voting practices that "result[] in a denial or abridgement of the right of any citizen ... to vote on account of race or color." 52 U.S.C. § 10301(a). Such a discriminatory "result" occurs if an election is not "equally open to participation" by racial minorities, giving them "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Arizona gives all citizens an equal opportunity to vote in person or by mail, and authorizes ballots to be turned in by a family member, household member, or caregiver. In the decision below, however, the Ninth Circuit held that Arizona violated § 2 by (1) requiring in-person voters to cast ballots in their assigned precincts; and (2) prohibiting "ballot-harvesting," *i.e.*, third-party collection and return of ballots. The court held that because racial minorities disproportionately vote out-of-precinct and use ballot-harvesting, the Act compels the State to allow those practices.

The questions presented are:

1. Whether § 2 of the Voting Rights Act compels states to authorize any voting practice that would be used disproportionately by racial minorities, even if existing voting procedures are race-neutral and offer all voters an equal opportunity to vote.

2. Whether the Ninth Circuit correctly held that Arizona's ballot-harvesting prohibition was tainted by discriminatory intent even though the legislators were admittedly driven by partisan interests and by supposedly "unfounded" concerns about voter fraud.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The Private Petitioners, who were Appellees in the Ninth Circuit, are the Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero. Arizona Attorney General Mark Brnovich and Secretary of State Katie Hobbs were also Appellees in the Ninth Circuit. The State of Arizona was an Intervenor in the Ninth Circuit.

Respondents, who were Appellants in the Ninth Circuit, are the Democratic National Committee, DSCC (Democratic Senatorial Campaign Committee), and the Arizona Democratic Party.

Pursuant to Supreme Court Rule 29.6, Petitioner Arizona Republican Party certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Section 2 of the Voting Rights Act ("VRA") forbids voting qualifications, standards, and practices that—even if not intentionally discriminatory—"result[]" in "denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. § 10301(a). As Congress elaborated, such a discriminatory result occurs if a State's political processes are "not equally open to participation" by minorities, in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

That provision was designed and historically used to challenge the dilution of minority voting strength, through political districting or "at-large" voting. But over the past decade, a proliferation of lawsuits have sought to stretch § 2 to challenge ubiquitous, race-neutral "time, place, and manner" voting regulations, such as how voters may register, when they can vote early or absentee, and what they must show to prove their identities. Although such routine rules leave the voting process equally open to everyone, the theory behind these suits—part of a concerted effort to use the federal courts to radically transform the Nation's voting practices for partisan advantage—is that unless a voting regime is proportionately utilized by racial minorities, it is a discriminatory denial of the right to vote. On that reading, the VRA *compels* states to adopt any hypothetical voting procedure that would *maximize* participation by racial minorities, even if the existing processes are race-neutral, do not block anyone from voting, serve important interests, and offer all voters an equal chance to participate in the political process.

Below, the Ninth Circuit adopted that sweeping construction. It held that a voting rule implicates § 2 if eliminating it would increase racial proportionality in voting. The court then applied that rationale to invalidate two typical, race-neutral voting rules in Arizona: one that requires in-person voters to vote at their assigned precincts, and another that forbids the dubious practice of "ballot-harvesting," the collection and return of ballots by third parties. In the court's view, Arizona must allow people to vote *outside* their precincts and must allow *strangers* (usually partisan operatives) to collect ballots from voters simply because minorities have disproportionately voted in those ways, even though Arizona's rules apply equally and impose no barrier beyond the normal "burden" of casting one's own ballot in the assigned precinct.

The Ninth Circuit's interpretation of § 2 is wrong. As other Courts of Appeals have recognized, ordinary race-neutral regulations of the time, place, or manner of voting do not "deny or abridge" the right to vote on account of race. If voters have an equal "opportunity" to vote, federal law does not require the adoption of other protocols that would maximize participation by racial minorities. Minorities may be *less likely* to vote for a host of reasons, but that does not implicate § 2 or its "opportunity" standard, which is concerned with ensuring an "open" process, not with equalizing outcomes. The Ninth Circuit's approach would subject nearly all ordinary election rules to § 2 challenge, and mandate court-ordered overhauls of state voting rules to achieve racial proportionality. A boon to one political party, to be sure, but a construction of the statute irreconcilable with its plain text—and one that would violate the Constitution.

The Ninth Circuit also erred by holding (this time by only a bare *en banc* majority) that Arizona's ban on ballot-harvesting was motivated by discriminatory intent. The trial court, whose findings govern absent clear error, found that a majority of legislators voted for the law out of sincere anti-fraud concerns. Yet the Ninth Circuit inferred a racist purpose from *partisan* motives, its belief that fear of fraud was "unfounded," and the unprecedented notion that "racially-tinged" actions of one legislator and one private individual could be attributed to the legislature under a "cat's paw" agency theory. That reasoning defies this Court's precedent and threatens to further devolve our courts into instruments of a partisan agenda.

OPINIONS BELOW

The Ninth Circuit's *en banc* opinion (JA.576) is reported at 948 F.3d 989. The district court's opinion (JA.242) is reported at 329 F. Supp. 3d 824.

JURISDICTION

The Ninth Circuit issued its *en banc* decision on January 27, 2020. JA.576. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

> **(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

> **(b)** A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members 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.

STATEMENT

A. Section 2 and Its History.

As originally enacted, § 2 of the VRA was no more than "a restatement of the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 392 (1991). The statute provided only that "[n]o voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied … to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1965); *cf.* U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged … on account of race, color, or previous condition of servitude."). Accordingly, "unlike other provisions of the Act, [§ 2] did not provoke significant debate in Congress." *Chisom*, 501 U.S. at 392.

In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), this Court, consistent with the text of § 2 and its original understanding, held that vote-dilution claims under § 2 require a finding of discriminatory *intent*, just like the constitutional standard does. *See id.* at 61.

Justice White dissented. In his view, the objective factors that the Court had identified in a prior set of vote-dilution cases were sufficient to *infer* "purposeful discrimination." *Id*. at 101 (White, J., dissenting); *see, e.g.*, *White v. Regester*, 412 U.S. 755, 765-66 (1973) (identifying history of discrimination, racial appeals, polarized voting, lack of minority officeholders, and low minority registration as bearing on whether multi-member districts were "invidiously" discriminatory).

Congress agreed with Justice White and amended the statute to codify an "objective" standard to govern "illegal dilution of the minority vote." S. Rep. No. 97-417, at 27 (1982). The amended text of § 2 is a near-verbatim transcription of *Regester*'s denunciation of rules that "effectively exclude[]" minority groups from political power. *Compare* 52 U.S.C. § 10301(b) ("violation … is established" if "political processes … are not equally open to participation" by the protected minority, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"), *with Regester*, 412 U.S. at 766-67 (invalidating "political processes leading to nomination and election [that] were not equally open to participation by the group in question," in that "its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.").

Since the 1982 amendments, this Court has heard a number of § 2 cases involving vote dilution. Beginning with *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986), this Court has held that, as amended, § 2 prohibits vote dilution, and the standard is not a legislature's intent but rather the three *Gingles* preconditions,

supplemented with the multi-factor analysis laid out in the Senate Report—which analysis was itself derived from the pre-*Bolden* vote-dilution cases. *See* S. Rep. No. 97-417, at 28-29. These factors, of course, were originally devised to smoke out multi-member districts that "invidiously excluded" minority groups by diluting their votes. *Regester*, 412 U.S. at 769.

This Court has never reviewed a time, place, or manner rule under § 2. Until recently, there were very few such § 2 cases even in lower courts. *See Frank v. Walker*, 768 F.3d 744, 752 (7th Cir. 2014) ("[M]ost case law concerning the application of § 2 concerns claims that racial gerrymandering has been employed to dilute the votes of racial or ethnic groups.").

B. Arizona's Voting Practices.

Arizona administers one of the most convenient and open voting systems in the country. It gives voters three options for casting ballots: early voting by mail, early voting in-person, and Election Day in-person voting. The early-voting period is 27 days. JA.259. No excuse is needed to vote early, and about 80% of Arizona voters did so in 2016. *Id.* Voters can request early ballots or receive them automatically by joining a Permanent Early Voter List. *Id.* Early ballots can be returned in person or by postage-free mail. JA.260.

For in-person voting on Election Day, Arizona's counties have two options: They can use a traditional precinct-based system, which requires voters to vote at their assigned precincts. JA.262-63. Or they can use a "vote center" system, which allows voters to appear at any designated center in the county. *Id.* Like most states that use a precinct-based system—which most do, as Judge Bybee noted in his dissent

below (JA.727)—Arizona discounts in-person votes cast in the wrong precinct. JA.261-62.

Precinct-based voting serves important purposes. It ensures that voters receive ballots reflecting only the candidates and issues for which they are eligible to vote. JA.306. It also allows officials to estimate how many voters will show up at each polling place, which helps reduce waiting times. *Id.*

In Arizona, voters in precinct-based systems are assigned to polling places near where they live. JA.304. Before Election Day, registered voters receive notices by mail identifying their polling place. *Id.* Arizona also sends voters a pamphlet (in English and Spanish) on how to locate their polling places. *Id.* Several Arizona counties operate online polling-place locators. *Id.* If a polling place changes, voters are notified by mail. *Id.*

If a voter arrives at a precinct but is not on the register, officials must direct the voter to the correct precinct. JA.305. The voter may still cast a provisional ballot, but must be told that it will count only if the precinct is correct. *Id.*; Ariz. Sec'y of State, *2019 Elections Procedures Manual* 187-88 (Dec. 2019).

Maricopa County, which is Arizona's most populous, implemented this protocol by providing poll workers with access to countywide voter data and training them to advise voters in the wrong precinct of their correct polling place location. JA.119. Pima County (the second most populous) requires poll workers to contact its recorder's office to obtain a voter's correct polling place location. JA.113-14.

In the 2016 election, 2,661,497 people voted in Arizona; only 3,970 (or 0.15%) voted out of precinct.

JA.298. Some 665,374 voters were minorities, 1,924 of whom voted out-of-precinct. *See* JA.200, 205. Thus, roughly 99.7% of minority voters voted without going to the wrong precinct.

C. Ballot-Harvesting and H.B. 2023.

In 2016, Arizona joined many other states by prohibiting "ballot-harvesting." Under Arizona's law, known as H.B. 2023, voters may submit a ballot via a caregiver, family member, household member, mail carrier, or election official only. A.R.S. § 16-1005(H). Otherwise, nobody may "knowingly collect[] voted or unvoted early ballots from another person." *Id*.

Experts have long recognized the opportunity for fraud created by absentee voting and ballot-harvesting. In 2005, former President Jimmy Carter and former Secretary of State James Baker chaired a bipartisan Commission on Federal Election Reform, which called absentee ballots "the largest source of potential voter fraud." Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005). "Absentee balloting is vulnerable to abuse in several ways." *Id*. Among other things, "[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id*.

The Carter-Baker Report therefore recommended that, with narrow exceptions, states "should prohibit [third parties] from handling absentee ballots." *Id*. at 47. In particular, "[t]he practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated." *Id*. Many experts also recognize the need for restrictions. For example, election-law scholar Richard L. Hasen

has recommended "tighten[ing] rules related to the handling of absentee ballots" by third parties. *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy* 134 (2020).

This is not merely a theoretical risk, and fraud need not be widespread to be consequential. Many well-documented episodes of voter fraud associated with ballot-harvesting, including recently, have resulted in overturning elections:

- A ballot-harvesting operation resulted in invalidation of a May 2020 city council election in Paterson, New Jersey. *See McKoy v. Passaic Cnty. Bd. of Elections*, No. PAS-L-1751-20 (N.J. Super. Ct. Aug. 19, 2020).
- Ballot-harvesting fraud in North Carolina caused a 2018 congressional election to be invalidated. JA.745-46.
- In 2004, Indiana ordered a new primary in East Chicago after rampant ballot fraud that involved "inducing ... the infirm, the poor, and those with limited skills in the English language, to engage in absentee voting." *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145 (Ind. 2004).
- Miami's 1997 mayoral election was invalidated due to a "pattern of fraudulent, intentional and criminal conduct" in relation to absentee ballots. *In re Election for City of Miami*, 707 So. 2d 1170, 1171 (Fla. Dist. Ct. App. 1998).
- Absentee-ballot fraud caused a Philadelphia election to be overturned in 1994. *Marks v. Stinson*, 19 F.3d 873, 877 (3d Cir. 1994).

- There are numerous other recent examples of documented absentee-voting fraud across the United States.[1]

Because of such risks, numerous states have banned or restricted ballot-harvesting. JA.739-42. Arizona's legislature likewise passed H.B. 2023 to reduce the opportunity for such fraud. JA.352.

D. This Litigation, the Ninth Circuit's Early Injunction, and This Court's Stay Order.

In April 2016, Plaintiffs—the Democratic National Committee, DSCC (Democratic Senatorial Campaign Committee), and Arizona Democratic Party—filed suit challenging Arizona's policy of not counting out-of-precinct ballots and H.B. 2023's prohibition of ballot-harvesting. Plaintiffs claimed that both policies have a discriminatory "result" under § 2 of the VRA, and

---

[1] Patricia Mazzei et al., *Hialeah Absentee-ballot Broker Cabrera Arrested; State Attorney Recuses Herself from Ongoing Case*, MIAMI HERALD (Aug. 2, 2012); Patricia Mazzei, *Jeffrey Garcia, Ex-aide to Rep. Joe Garcia, Pleads Guilty, Will Serve 90 Days in Jail*, MIAMI HERALD (Oct. 21, 2013); Press Release, *Work of AG Paxton's Election Fraud Unit Results in Arrests of 4 Members of Organized Voter Fraud Ring in North Fort Worth*, Office of Tex. Att'y Gen. (Oct. 12, 2018); Sue Necessary, *Gregg County Commissioner, Others Arrested in Alleged 'Ballot Harvesting' Scheme*, KLBK (Sept. 25, 2020); David A. Fahrenthold, *Selling Votes Is Common Type of Election Fraud*, WASHINGTON POST (Oct. 1, 2012); Press Release, *Former Hoboken City Council Candidate Convicted of Conspiring to Use Mail to Promote Voter Bribery Scheme*, U.S. Dep't of Justice (June 25, 2019); Press Release, *Former Mayor of Martin Sentenced to 90 Months for Civil Rights Offenses, Fraud, Vote Buying and Identity Theft*, U.S. Dep't of Justice (Dec. 16, 2014); Nataly Keomoungkhoun & Marc Ramirez, *Carrollton Mayoral Candidate Jailed on 109 Felony Counts in Vote Fraud Case*, DALLAS MORNING NEWS (Oct. 8, 2020).

alleged that the ban on ballot-harvesting constituted discrimination based on political party. The Arizona Republican Party and several elected officials (private petitioners here) intervened as defendants.

Plaintiffs sought a preliminary injunction, but the district court denied it. *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074 (D. Ariz. 2016). In late October 2016, a divided panel of the Ninth Circuit affirmed. 840 F.3d 1057. But then, less than a week before the election, the Ninth Circuit voted to rehear the case *en banc* and, two days later, preliminarily enjoined the enforcement of H.B. 2023. *Feldman*, 843 F.3d 366. This Court stayed that injunction the next day. 137 S. Ct. 446.

Plaintiffs subsequently abandoned their partisan discrimination claim and replaced it with a claim that the ban on ballot-harvesting was enacted with *racial* discriminatory intent. Dkt. 233, *DNC v. Reagan*, 329 F. Supp. 3d (D. Ariz. 2018) (No. 2:16-cv-01065).

E. The District Court's Decision.

After a ten-day bench trial in October 2017, the district court ruled in Defendants' favor on all counts.

First, the court found that Arizona's policy of not counting out-of-precinct ballots did not result in less voting opportunity for minorities compared to non-minorities. In the 2016 election, only 3,970 out of 2,661,497 voters (or 0.15%) had ballots invalidated for voting out-of-precinct. JA.334. Although this small sample included disproportionately more minorities, Arizona did not "cause the observed disparit[y]" by giving minorities less *opportunity* to vote in their assigned precincts. JA.336. Plaintiffs offered "no evidence" that, *e.g.*, "precincts tend to be located in

areas where it would be more difficult for minority voters to find them, as compared to non-minority voters." *Id.* In fact, Plaintiffs did not challenge *at all* "the manner in which Arizona and its counties allocate or relocate polling places, inform voters of their assigned precincts, or train poll workers." JA.302.

Second, the court rejected Plaintiffs' challenge to H.B. 2023 because the ban on ballot-harvesting applied equally to all voters and did "not impose burdens beyond those traditionally associated with voting." JA.331. Not a single voter "testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." *Id.* There were "no records of the numbers of people who, in past elections, have relied on" third-party ballot collection, and "no quantitative or statistical evidence comparing the proportion that is minority versus non-minority." JA.321. Even crediting merely anecdotal evidence that, in past elections, "minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties," that disparity did not show that they lacked equal "opportunity" to vote. JA.330-31. Rather, if minorities were more likely to vote through ballot-harvesting, it was because "[t]he Democratic Party and community advocacy organizations" had targeted their "ballot collection efforts" toward minority voters. JA.329.

Third, the court also rejected Plaintiffs' claim that H.B. 2023 was enacted with discriminatory intent. The court found that "the majority of H.B. 2023's proponents were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-

person voting." JA.350. Some legislators were motivated by *partisanship* and others were perhaps mistaken about the existence and scope of voter fraud in Arizona, but the court found "the legislature acted in spite of opponents' concerns that the law would prohibit an effective GOTV strategy in low-efficacy minority communities, not because it intended to suppress those votes." JA.358.

F. The Ninth Circuit's Decision.

While a divided Ninth Circuit panel affirmed, the *en banc* court then reversed.

The majority held that Arizona's practices impose a "disparate burden" on minorities under § 2 because they vote out-of-precinct and use ballot-harvesters at a higher rate than whites. Accordingly, not counting out-of-precinct votes results in a "higher percentage of minority votes than white votes [being] discarded," and prohibiting ballot-harvesting likewise "results in a disparate burden on minority voters" because "third parties collected a large and disproportionate number of early ballots from minority voters" in the past. JA.622, 659, 662.

Having found these "disparate burdens," the court proceeded to a second step of analysis, looking for a "legally significant relationship" to the "social and historical conditions" affecting minority voters in the state. JA.613. The court considered "factors ... laid out in the Senate Report accompanying the 1982 amendments to the VRA." *Id.* Disagreeing with the district court's application of these factors, the court discerned a discriminatory result based on "Arizona's history of discrimination dat[ing] back to 1848," the existence of "racially polarized voting," the "effects" of

historical discrimination, the existence of "racial appeals" in campaigns, the low "number of minorities in public office," and officials' lack of "responsiveness to the needs of minority groups." JA.625-54.

Finally, the Ninth Circuit found clear error in the district court's finding that no discriminatory purpose tainted H.B. 2023. The court did not disturb the factual finding that most legislators voted for the ban for a "sincere," "non-race-based" purpose of combating "fraud in third-party ballot collection." JA.677. Nevertheless, a bare majority of the *en banc* court attributed racially discriminatory intent to the bill "under the familiar 'cat's paw' doctrine," based on supposedly racial motives of a state senator and a private individual who had helped sparked the debate over ballot-harvesting fraud. *Id*. The Ninth Circuit imputed what it saw as their "discriminatory purpose" to the entire legislature. *Id.*

Judge O'Scannlain dissented. With respect to in-precinct voting, he rejected "the suggestion implicit in the majority opinion that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory." JA.709. Voting in one's own precinct imposes only "burdens traditionally associated with voting." JA.701. On ballot-harvesting, Judge O'Scannlain agreed with the trial court that Plaintiffs had "no evidence" that "minority voters have less opportunity" to elect representatives of their choice "than non-minority voters now that ballot collection is more limited." JA.711. He would have held that they did not satisfy the threshold § 2 inquiry.

With respect to discriminatory intent, Judge O'Scannlain criticized the majority for ignoring the clear-error standard of review, for inferring *racial* motives from one senator's *partisan* motives, and for imputing those motives to the entire legislature as a "cat's paw." JA.715-20.

Judge Bybee dissented separately, noting that the challenged practices are ordinary "[t]ime, place, and manner restrictions" that do not deny or abridge the right to vote and thus "stand on different footing from status-based restraints on vote qualifications and legislative malapportionment." JA.723. By ignoring that basic distinction, the majority endangers countless ordinary election rules. JA.726.

SUMMARY OF ARGUMENT

I. Ordinary race-neutral regulations of the time, place, and manner of voting do not violate § 2.

A. By its plain terms, § 2 applies only to voting practices that result in "denial or abridgement" of the right to vote on account of race. 52 U.S.C. § 10301(a). But ordinary rules that set the time, place, and manner of voting do not "deny" or "abridge" the right to vote. They simply define the process by which all voters must *exercise* that right. As long as those rules are race-neutral and impose nothing more than the ordinary burdens traditionally associated with voting, there is no "denial" or "abridgement." And as long as the rules are equally applied, the electoral system is "equally open" and gives everyone equal "opportunity" to participate. *Id.* § 10301(b). It does not matter if different racial groups vote at different rates under the equally open system, because § 2 guarantees only equal *opportunity*, not equal *outcome*.

B. Under the Ninth Circuit's contrary reading, a discriminatory "result" can be shown any time a voting practice can be connected to a racial disparity in voting rates. That is untenable not only because it violates the text of § 2, but also because it threatens to sweep away all manner of ordinary voting rules for the sake of racial balancing. Any ordinary time, place, or manner rule must be eliminated if doing so would reduce racial disparities. That is the only way the court below could reach the remarkable conclusion that § 2 compels Arizona to allow voters to vote outside their assigned precincts, and to authorize the dubious practice of ballot-harvesting. In essence, the Ninth Circuit's reading transforms § 2 from a sensible ban on voting rules that *discriminate* against minorities into a radical mandate to adopt any rules that *maximize* minority turnout. That is not what the statute says, and not what the statute does.

C. The history of the "results test" confirms that the Ninth Circuit's reading is wrong. Congress enacted the test to target invidious vote *dilution*, not ordinary time, place, and manner rules. In-person and in-precinct voting rules were ubiquitous in 1982; nobody dreamed they could be attacked under § 2 based on equally-ubiquitous racially disparate voting rates. To the contrary, Congress made clear that it wanted the results test to require only an equally open system, not racially proportionate outcomes.

D. The Ninth Circuit's reading also renders § 2 unconstitutional. Forcing states to alter ordinary race-neutral election rules in order to achieve racial proportionality would exceed Congress's power to enforce the Fifteenth Amendment's ban on intentional discrimination. It would also violate Equal Protection

principles by requiring states to engage in constant race-conscious tinkering to comply with § 2. In the vote-dilution context, the Court has sought to avoid these problems by limiting § 2 violations to *deviations* from ordinary districting principles that have a clear dilutive effect, which at least arguably supports an inference of invidious discrimination. But if § 2 is construed to target *ordinary* time, place, and manner rules to achieve racial balancing even where no invidious intent can be plausibly inferred, it crosses the line of what the Constitution allows.

II. The Ninth Circuit erred in overturning the trial court's finding that Arizona's ban on ballot-harvesting was not enacted with discriminatory intent. The trial court found the legislature enacted the ban for sincere anti-fraud purposes; that was certainly not clearly erroneous, and it legally defeats Plaintiffs' claim. But the Ninth Circuit relied on an inapposite "cat's paw" theory to attribute the supposed discriminatory intent of one or two people who *argued in favor* of the law to the entire state legislature that *enacted* it. That vicarious imputation of discriminatory intent has no basis in the law. Compounding the error, the Ninth Circuit's unfounded inference of discriminatory intent wrongly conflated *partisan* motives with *racial* ones. That would condemn any rule motivated by political concerns (which is to say, virtually any rule) that has a racially disparate impact. The Court should reverse this aspect of the judgment below too.

ARGUMENT

I. ARIZONA'S ELECTION RULES COMPLY WITH § 2'S RESULTS TEST BECAUSE THEY PROVIDE EQUAL OPPORTUNITY TO ALL VOTERS.

This case concerns the meaning and application of § 2 of the VRA, which prohibits the use of any "voting qualification or prerequisite," or any voting "standard, practice, or procedure," that "results in a denial or abridgement of the right ... to vote on account of race or color." 52 U.S.C. § 10301(a). Elaborating on that test, Congress directed that a violation is established if the "political processes leading to nomination or election ... are not equally open to participation by members of a class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

As the "opportunity ... to elect" language suggests, and as the statutory history confirms, this "results" test was designed and adopted by Congress principally to address claims of vote *dilution—i.e.*, the structuring of electoral systems or districts in a way that reduces the electoral strength of minority voting blocs. *See supra* at 4-6. Since the 1982 amendments to the VRA, this Court has confronted vote-dilution claims many times and has developed a familiar (albeit not uniformly accepted) framework to govern them. *See Gingles*, 478 U.S. 30; *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Holder v. Hall*, 512 U.S. 874, 891-92 (1994) (Thomas, J., concurring in the judgment) (rejecting premise that § 2 prohibits "dilutive election methods"). This case, however, is not about vote dilution.

Section 2, of course, is not limited to vote *dilution* (opportunity "to elect"). It also prohibits vote *denial or abridgement* (opportunity "to participate"). Most obviously, § 2 forbids the use of "voting qualifications" that "den[y]" the right to cast a vote, if their impact falls adversely on minorities. Limiting the franchise to people who own a home or hold a college degree, for example, would run afoul of § 2 if minority voters have lower home ownership or graduation rates. Whatever their intent, those criteria would "result" in racially disparate denial of the right to vote, as minority voters as a group would have "less opportunity" than whites to "participate in the political process." But this case is not about voting qualifications either.

So what is this case about? Rather than the design of the electoral system, or the requirements for voter eligibility, this case asks how § 2 applies to the rules that govern *how* citizens vote—the time, place, and manner of exercising that right. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8, 16 (2013) (distinguishing regulation of "*how* federal elections are held" from regulation of "*who* may vote in them"). In the statutory parlance, when does a voting "practice" or "procedure" render the process "not equally open," and deprive minority voters of the "opportunity ... to participate" in that political process?

Petitioners' position is simple: Race-neutral time, place, or manner regulations that are *equally applied* and impose only the *ordinary burdens of voting* do not implicate § 2—period. Those rules do not "deny" the right to vote to any eligible voter. Nor can they be said to "abridge" the right to vote relative to any objective benchmark; they simply direct how, when, and where the right can be exercised. And if those rules treat all

citizens equally, they are, by definition, "equally open" and do not afford minority voters "less opportunity" to participate. Importantly, that holds true regardless of the rates at which voters of different races end up participating. Disparate *participation* does not imply disparate *opportunity*, and § 2 is an equal-opportunity statute, not an equal-outcome mandate.

Plaintiffs' view, however—adopted by the Ninth Circuit majority below—is dramatically different. On their construction, *any* voting rule implicates § 2 if it can be tied to racially disproportionate *outcomes*. Every detail of the process—whether it is registration protocols, early-voting availability, rules for voting by mail, absentee-ballot eligibility, polling times and locations, or anything else—is subject to § 2 challenge if plaintiffs can show that more minorities would vote under alternative rules. The only thing that stands between bare disparate impact and § 2 liability, on the Ninth Circuit's approach, is a court's application of the "Senate Factors"—a set of subjective, non-exclusive considerations that were designed for vote-dilution cases and usually have nothing at all to do with the voting practices being challenged. *Gingles*, 478 U.S. at 36-37 (listing nine factors).

The difference between these two interpretations of § 2 controls this case. On Petitioners' view, there is no serious question: It does not violate § 2 for Arizona to require voters to cast ballots in their own precincts or to limit third-party collection of ballots. Those race-neutral rules apply equally to everyone and impose only the ordinary, inherent burdens of voting. They neither abridge the right to vote nor deprive minorities of an equal opportunity to participate.

Meanwhile, according to the Ninth Circuit, the fact that minority voters were historically more likely to vote in the wrong precinct and to have their ballots targeted for harvesting was enough to constitute a discriminatory "result," which must be invalidated if an unidentified number of wholly inapposite Senate Factors (*e.g.*, racially polarized voting, or lack of health insurance for children) are satisfied.

With the legal issue and its results in this case now framed, Petitioners explain below why their view of the law is correct and the Ninth Circuit's is wrong. *First*, § 2's plain text forecloses the "equal-outcome" interpretation. *Second*, the lack of a limiting principle on the Ninth Circuit's construction would plunge the courts into never-ending micromanagement of state election protocols for the purpose of racial balancing. *Third*, the statute's history and context demonstrate that ordinary, race-neutral time, place, and manner rules were not its target. *Fourth*, the Court should not read § 2 to exceed Congress's power or to set the VRA on a collision course with the Equal Protection Clause.

A. Section 2's Text Requires Inquiry into Voter Opportunity, Not Outcomes.

The question that divides the parties here is what constitutes a proscribed "result" under § 2—*i.e.*, what may a voting "standard" not "result" in. The Ninth Circuit opined that voting practices may not result in less than proportionate *participation* by minority voters. Thus, if minorities disproportionately vote in the wrong precinct or with ballot-harvesting, then the rules requiring in-precinct voting and banning ballot-harvesting have a forbidden, disparate "result."

That interpretation is at war with § 2's language. The statute does not prohibit voting practices that "resul[t]" in disproportionate participation, only those that result in a "denial" or "abridgement" of the right to vote. 52 U.S.C. § 10301(a). It targets laws that render the "political processes" not "equally open" by giving minorities "less opportunity." *Id.* § 10301(b). So the question is whether the system is "equally open" to minorities, not whether they proportionately avail themselves of the equal opportunity. Stated differently, § 2 asks whether the voting practice gives minorities "less opportunity" to vote *than non-minorities*, not whether they have "less opportunity" *than under some alternative regime.* If a voting rule disproportionately affects minorities because they disproportionately fail to comply with it, that is of no moment as long as they had an equal "opportunity" to vote under an "equally open" system. A more detailed analysis of subsections (a) and (b), set forth below, makes this clear.

1. As noted, subsection (a) forbids only practices that "resul[t] in a *denial or abridgement* of the right ... to vote." 52 U.S.C. § 10301(a) (emphasis added). The word "denial" refers to *qualifications* to vote, which quite literally exclude individuals from the franchise. By contrast, a rule governing the time, place, or manner of voting cannot be said to "deny" anyone the right to vote; it just directs *when, where, and how*. As this Court explained in *Inter Tribal Council*, there is a difference between "*how*" elections occur and "*who*" may vote in them. 570 U.S. at 16. Indeed, there are distinct constitutional provisions that govern these two separate areas in the context of federal elections. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and

Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...."); *id.* § 2, cl. 1 (outlining the "Qualifications" for the federal electorate).

Since time, place, or manner rules do not result in "denial," that leaves "abridgement." But, as this Court has explained, "abridge"—"whose core meaning is 'shorten'—necessarily entails a comparison" to some objective benchmark. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333-34 (2000) ("*Bossier II*"). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* at 334; *see also Holder*, 512 U.S. at 880 (opinion of Kennedy, J.) (explaining, in vote-dilution context, that the court "must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system"). In other words, the court must evaluate the challenged practice "relative to what the right to vote *ought to be*." *Reno*, 528 U.S. at 334.

How should courts define what the right to vote *ought* to be? There are only two workable, justiciable approaches (and they complement one another). One is to look to what this Court has called, in the related context of constitutional challenges invoking the right to vote, "the usual burdens of voting." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op.). Unless a time, place, or manner rule imposes burdens markedly beyond the "usual" ones, the right to vote has not been *abridged*. The rule merely defines the process for *exercising* it. There must always be some such process, because voting is a right that (unlike, for example, the right to speech) can only be exercised within a state-regulated system.

Accord Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("[T]here 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.").

In other words, "[e]lection laws will invariably impose some burden upon individual voters," as the state must determine when and where voting will occur, how voters must register, what kind of ballots they must use, etc. *Burdick*, 504 U.S. at 433. Because such "usual burdens of voting" are an inherent *part* of the right to vote, they cannot be said to *abridge* the right to vote. *Crawford,* 553 U.S. at 198; *cf. Sandin v. Conner*, 515 U.S. 472, 484 (1995) (prisoners' liberty interests under Due Process Clause must be measured "in relation to the ordinary incidents of prison life").

There is another way in which time, place, or manner rules might cognizably "abridge" the right to vote: If they are not race-neutral, either facially or as applied. In that scenario, the right to vote has been abridged relative to how it is defined by the state itself for non-minorities. *See, e.g.*, *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968) (officials took steps to help white voters cast absentee ballots, but did not make similar efforts to help similarly situated black voters). If all polling places are open from 8 a.m. until 8 p.m., there is no "abridgement" of the right to vote, even if holding the polls open until 10 p.m. would increase minority participation. But if polling places are open until 8 p.m. in white neighborhoods, even as they close at 4 p.m. in minority neighborhoods, one could

reasonably characterize the earlier closure as *abridging* the right, compared to the benchmark the state has set in white neighborhoods.

In short, § 2 refers only to a denial or abridgement of the right to vote, and a time, place, or manner rule neither denies nor abridges that right so long as it is race-neutral and consistent with the ordinary burdens of voting. Under that rule, Plaintiffs' claims fail: Arizona's rules are race-neutral both on their face and as applied (*any* vote cast in the wrong precinct is rejected, and *nobody* may engage in ballot-harvesting) and impose only the ordinary burdens of voting (*i.e.*, going to an assigned precinct or transmitting a ballot via mail, caregiver, or family or household member). On the latter point, it should be dispositive that both in-precinct rules and ballot-harvesting bans are common, and that 99.7% of minorities voted in Arizona without going to the wrong precinct. *See supra* at 8.

In contrast, Plaintiffs' baseline for abridgement is some hypothetical alternative that benefits minorities relative to the status quo. Their challenge compares Arizona's law to a hypothetical set of rules that *allows* for voting out of precinct and ballot-harvesting. That cannot possibly be correct, or else *every* voting rule would count as an "abridgement" of the right to vote relative to some hypothetical universe in which the rule did not exist. The requirement to register would abridge the right relative to a system without registration. Allowing 23 days of early voting would abridge compared to 35 days. An 8 p.m. closure of the polls would abridge the right relative to a 9 p.m. closure. That construction of "abridgment" has no limiting principle and would force the state to facially prefer minorities on account of race by adopting any

and every hypothetical regime that would increase minority voting. Yet, as this Court has admonished, "[f]ailure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

For these reasons, a race-neutral time, place, or manner rule that imposes only the ordinary burdens of voting neither denies nor abridges the right to vote under § 2, regardless of the rates at which different racial groups happen to participate under that system or would participate under an alternative regime.

2. Subsection (b)'s text reinforces that conclusion. Critically, it requires a § 2 plaintiff to establish that the "political processes" are "not *equally open* to participation" by members of a racial group, in that they have "less *opportunity*" than other voters "to participate in the political process." 52 U.S.C. § 10301(b) (emphases added). The statutory focus on procedural openness and equal "opportunity" confirms that the usual race-neutral rules governing the when, where, and how of voting are outside § 2's scope.

Section 2 "speaks in terms of an opportunity—a chance—to participate and to elect, not an assured ability to attain any particular result." *Holder*, 512 U.S. at 925 (Thomas, J., concurring in the judgment); *see also* Random House Dictionary of the English Language 1359 (2d ed. 1987) (defining "opportunity" as "chance, or prospect"). The "most natural reading" is thus that minorities must be "given the same free and open access to the ballot as other citizens and their votes [must be] properly counted." *Holder*, 512 U.S. at 925 (Thomas, J., concurring in the judgment). Section 2 is accordingly satisfied if every voter has "the same chance as others to register and to cast his ballot." *Id.*

Again, the statute's reach is thus more robust in the context of voter qualifications. If an individual is "denied" the ability to vote—for example, because he owns no property in the district—then, by definition, he has less "opportunity" to participate in the process. And if that eligibility standard has a disparate racial effect, then members of that group lack "the same" access to the ballot as other citizens. *Id.*

Moving to time, place, or manner regulations, it is possible to imagine (rare) practices that would erect greater barriers to minority participation. If a state sends unsolicited ballot applications to residents of white neighborhoods, for example, but not to residents of black neighborhoods, that would amount to giving the latter less "opportunity" to participate, even if race was not the motive for the disparity. *See Brown*, 279 F. Supp. 60. Or, as noted above, the same would be true if black neighborhoods had shorter hours to vote than white neighborhoods; the political process would then not be "equally open" to all voters. In these examples, the state's rules are giving white voters a greater "opportunity" to participate in the process, by treating different voters *differently*.

When it comes to race-neutral time, place, or manner rules, however, the state is not providing any disparate opportunities and its political processes are "equally open" to all voters. If everyone must register to vote, fill out an absentee request by a particular date, or—as relevant here—show up to the right precinct, or deliver a ballot only through certain agents, the state is not depriving anyone of an equal chance to participate. It is simply defining the process *all* voters must follow to participate, consistent with the ordinary burdens inherent in the process.

The Ninth Circuit's core fallacy was conflating the *opportunity* to vote with ultimate *participation* in the process. In its view, the fact that minorities tended to vote out-of-precinct more often than non-minorities (albeit in miniscule amounts), and the fact that minorities' ballots were harvested more often than whites' ballots (because Plaintiffs had targeted their communities for such harvesting), meant that Arizona's rules gave less "opportunity" to minority voters and left its political system not "equally open" to them. *See* JA.622, 659, 662.

That effectively writes out of the statute the words "equally open" and "opportunity." An opportunity is just a "chance." *Holder*, 512 U.S. at 925 (Thomas, J., concurring in the judgment). There is a difference between *having* an opportunity and *taking* it. Every person has an equal "opportunity" to attend free public high school through graduation, even though some might choose, for any number of reasons, to drop out before completion. Likewise, a racial disparity in voting rates does not mean there exists a disparity in opportunity to vote—only that some racial groups took advantage of the opportunity to a greater degree. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*") (in vote-dilution case, a Latino-preferred candidate's loss did not prove the district "was not a Latino opportunity district," because fact that "group does not win elections does not resolve the issue"). Again, the "ultimate right" that § 2 protects "is equality of opportunity," not equality of outcome. *De Grandy*, 512 U.S. at 1014 n.11. A system can be "equally open" regardless of *utilization* rates.

The difference between opportunity and outcome is textually significant. Had Congress wanted disparate participation alone to trigger § 2, it could have referred to processes with "equal participation," rather than those "equally *open to* participation." And it could have spoken of "less participation," rather than "less *opportunity* ... to participate." The lower court reading leaves those terms superfluous. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'"). And it wrongly turns an "equal-treatment requirement" into an "equal-outcome command." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020).

The Ninth Circuit might more charitably be read as construing "opportunity" to encompass not only *legal* entitlement to vote but also the practical *likelihood* of voting. On that account, the requirement to vote in an assigned precinct would deprive minorities of an equal "opportunity" because socioeconomic conditions make it harder for them to identify the correct precinct (*e.g.*, they move more frequently or face language barriers). This is akin to saying that lower-income individuals have a reduced "opportunity" to attend public high school, notwithstanding that it is open to all, because they are less likely to complete their education for socioeconomic reasons.

But "opportunity" cannot bear that linguistic stretch, particularly given the surrounding text. Section 2 reaches only situations where the "*State*" has enacted a voting "*standard, practice, or procedure*" that "results in"—*i.e.*, causes—"less opportunity" for minorities, or causes the voting system not to be "equally open." 52 U.S.C. § 10301 (emphasis added). Thus, § 2 forbids only unequal opportunity resulting

from the voting practice itself, not from external socioeconomic or other factors. Section 2 requires the "political process" to be "equally open"—but imposes no requirement to alter "equally open" systems to ameliorate extrinsic factors that disparately inconvenience minorities. In short, as Justice Brennan explained, § 2 protects only against inequality "proximately caused by" the challenged electoral practice. *Gingles*, 478 U.S. at 50 n.17.

Consequently, so long as voting rules do not reduce minority voters' "(legal) opportunity to participate," it does not matter if those rules "reduce the likelihood that they will use the opportunities" available to them. *Luft*, 963 F.3d at 672-73. Section 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Frank*, 768 F.3d at 753. Any other rule would require states to actively *prefer* minority voters by structuring electoral systems to maximize their participation. Such a preferential regime is not required by § 2 and would in fact be unconstitutional, because preferences cannot be used to ameliorate societal discrimination. *See infra* Part I.D.

* * *

Reading subsections (a) and (b) together leaves no doubt about § 2's scope. The statute is offended when the state disproportionately renders minority voters ineligible to participate in the process or subjects them to different rules that yield a lesser "opportunity" to participate. By contrast, when race-neutral time, place, or manner rules define the process for exercising the right to vote, and impose only the usual burdens of voting, there has been no "denial or abridgement" of

the right and no reduction in anyone's "opportunity" to participate in the process, regardless of race or color. Contrary to the opinion below, racially disparate participation rates do not alter that conclusion, because § 2 does not require the states to equalize voter convenience or to guarantee equality of outcome. Again, the statute is concerned only by state rules that deprive minorities of an equal chance to participate; it does not authorize global inquiries into whether different groups, for reasons having nothing to do with the challenged voting practice, are more or less likely to *exercise* their equal rights. For these reasons, the Arizona rules at issue do not run afoul of § 2, and this Court should reverse the decision below.

B. The Ninth Circuit's Construction Would Enlist the Courts in a Partisan Project of Maximizing Minority Voting Rates.

For reasons just explained, an "abridgement" of the right to vote under § 2 properly invites comparison to the baseline of voting's usual burdens (and the norm of race-neutrality), and the law's focus on "opportunity" is properly construed to refer to legal access to the ballot. The contrary reading adopted below—treating the baseline as any *hypothetical* regime, and looking broadly to any extrinsic factors that affect voter *convenience*—also would carry radical consequences. Indeed, the implications of the Ninth Circuit's approach are already being felt, as that decision and its rationale are exploited for partisan gain by a barrage of lawsuits challenging nearly every aspect of states' voting procedures. The Court should reject the misguided construction of § 2 that spawned this cynical effort to turn federal civil rights laws into a get-out-the-vote program for one political party.

On the Ninth Circuit's construction, § 2 is triggered whenever minority voters—for whatever reason—do not participate to the same extent as non-minorities. That would "swee[p] away almost all registration and voting rules" across the nation. *Frank*, 768 F.3d at 754. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Id.* And it is always easy enough to hypothesize an alternative that would mitigate the disparate impact. Section 2 is thus transformed from a *prohibition* on voting rules that treat minorities *worse* into a *mandate* to adopt any rules that *maximize* participation by minorities.

For example, "if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2," and the VRA would compel its elimination. *Id.* Likewise, "if white turnout on election day is 2% higher, then the requirement of in-person voting" is discriminatory under § 2, and must be replaced with an alternative (*e.g.*, voting by mail). *Id.* If minorities are less likely to vote on election day, § 2 would entitle them to the privilege of early voting—as many days as it would take to equalize participation across races. And if all of that does not succeed in eliminating the disparate impact, the state could be required to send civil servants, census-style, to each home to collect ballots. All of these radical changes would be compelled by federal law.

This is particularly true because § 2's text does not authorize any justification or exemption for practices with a proscribed "result" if they serve a necessary or compelling government interest, analogous to Title VII's "business necessity" inquiry. Thus, the Ninth Circuit's radical interpretation of adverse results

cannot be ameliorated by excusing practices if they are sufficiently essential; nothing in the statute appears to allow for such an affirmative defense.

Nonetheless, the Ninth Circuit, in its continuing voyage away from the text, added a "second step" to the first step of adverse impact, whereby the court applies the "Senate Factors" to evaluate "social and historical conditions" of discrimination. *See Gingles*, 478 U.S. at 47. Plaintiffs claim that this second step ameliorates the draconian consequences of the first, because it means that § 2 liability is not *automatic*.

But it may as well be. The first step—identification of a disparate burden—is a "near-perfect" predictor of bottom-line result. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1592 (2019). And that is not surprising, because the second step is a "totality of [the] circumstances" inquiry involving nine factors that are "neither comprehensive nor exclusive"; no particular factor or number of them need be satisfied. JA.616. As explained above, Congress drew these factors from this Court's vote-dilution cases; they were "designed" to smoke out "alleged dilution." S. Rep. No. 97-417, at 2, 29-30. In vote-denial cases, they have no conceivable relevance to whether the challenged procedure is discriminatory, and operate instead as a grab-bag of inapt grievances, ripe for outcome-oriented picking. In short, in the ballot-access context, the factors "are nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome ... rests upon a reasoned evaluation of a variety of relevant circumstances." *Holder*, 512 U.S. at 939 (Thomas, J., concurring in the judgment).

This case is the best illustration. Below, the Ninth Circuit invoked: Arizona's mistreatment of Indians in territorial times; a literacy test repealed *fifty years ago*; disparities in "employment, home ownership, and health"; the fact that minorities "hold [only] 25 percent" of public offices in the state; "underfund[ing]" of Arizona's "public schools" and lack of robust "health insurance coverage for children"; and racial disparities in *registration*, even though the policies at issue inherently affect only registered voters. JA.625, 629, 644, 647, 652, 653.

Beyond finding no support in the statutory text or common sense, this "second step" is so manipulable as to confirm the dangers of adopting the Ninth Circuit's wide-ranging "first step." If any voting rule that has an adverse impact on participation triggers liability, subject only to a judge's assessment of this inapposite checklist and evaluation of amorphous "social and historical conditions," then every commonplace voting rule is indeed under serious threat.

And this is not merely an academic risk. Different political affiliation among racial groups is a reality across the country. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 221-22 (4th Cir. 2016). As a result, virtually any change in voting rules that increases Democratic turnout will increase minority turnout as a byproduct, and vice versa. Construing § 2 to require changes in voting rules that increase minority participation would thus effectively mandate any change that would help Democrats—and ban any change that would help Republicans. It is no accident that the Democratic Party has undertaken a well-funded, coordinated effort to weaponize § 2 for partisan gain by targeting all sorts of routine time,

place, and manner rules. Indeed, at least a dozen such lawsuits have been launched this year alone, arguing that § 2 requires same-day registration, early voting, late voting, no-fault absentee voting, straight-ticket voting, and extension of deadlines for mail-in ballots, among other things.[2]

There is no question that Congress has the power to supplant state laws regulating the time, place, and manner of federal elections, and may act to enforce the constitutional prohibitions of racial discrimination in this context. But the background default under the Constitution is "that state legislatures ... bear primary responsibility for setting election rules," and federal judges should not be "tinkering" with the details of electoral administration. *Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, 2020 WL 6275871, at *2 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application). And the dangers of federal judicial intrusion increase when federal law is construed to consistently benefit one political party. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2498-99 (2019). The Court therefore properly exercises "great caution" before approving any "intervention in the American political process." *Vieth v. Jubelirer*, 541

[2] *Bruni v. Hughs*, No. 5:20-cv-35 (S.D. Tex.); *Conn. State Conf. of NAACP Branches v. Merrill*, No. 20-cv-909 (D. Conn.); *Clark v. Edwards*, No. 3:20-cv-308 (M.D. La.); *People First of Ala. v. Merrill*, No. 2:20-cv-619 (N.D. Ala.); *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C.); *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C.); *Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla.). *League of Women Voters v. Va. State Bd. of Elections*, No. 6:20-cv-24 (W.D. Va.); *Edwards v. Vos*, No. 3:20-cv-340 (W.D. Wis.); *Tex. Democratic Party v. Abbott*, No. 5:20-cv-438 (W.D. Tex.); *Harding v. Edwards*, No. 3:20-cv-495 (M.D. La.); *Yazzie v. Hobbs*, No. 3:20-cv-08222 (D. Ariz.).

U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment). Thankfully, Congress did not authorize, by enacting § 2, the one-way ratchet of intrusion that the Ninth Circuit endorsed.

C. Section 2 Was Not Aimed at Race-Neutral Time, Place, or Manner Rules.

The statute's history and context confirm that race-neutral regulations of the where, when, and how of voting do not implicate § 2. Section 2 originally captured only intentional discrimination, as it was an uncontroversial "restate[ment]" of the Fifteenth Amendment. *Bolden*, 446 U.S. at 61. When Congress amended § 2, it cast a wider net, principally to catch vote dilution, but it did not transform § 2 into a statute that would, unbeknownst to anyone, blow up nearly every election administration system in the country.

The 1982 amendments were specifically "designed" to undo this Court's vote-dilution decision in *Bolden* and "codify[] the leading pre-*Bolden* vote dilution case, *White v. Regester*." S. Rep. No. 97-417, at 2, 15. *Regester* looked to a series of factors (indicative of intentional discrimination) to identify dilutive voting structures that "invidiously excluded [minorities] from effective participation in political life." 412 U.S. at 769. *Bolden* held that those factors were insufficient without a specific finding of intent, but Justice White (the author of *Regester*) dissented and argued that intentional discrimination could be inferred from those factors. 446 U.S. at 101 (White, J., dissenting). Congress sided with Justice White and amended § 2 to impose an "objective" results test derived from this Court's earlier cases. S. Rep. No. 97-417, at 27. The Senate Report emphasized that the amendments were

directed at vote dilution, flatly declaring *Regester*'s multi-factor test to "be indicative of … dilution." *Id.* at 29. Indeed, the new statutory text was taken nearly verbatim from *Regester*. *See supra* at 5.

The statutory history shows not only what Congress *wanted* to do in 1982, but also what it did *not* want to do—namely, mandate proportionality. This forecloses Plaintiffs' position too. The version of the 1982 amendments proposed by the House would have prohibited "all discriminatory 'effects' of voting practices," but "met stiff resistance in the Senate," which feared that it would "lead to requirements that minorities have proportional representation." *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). So Congress changed the wording. In implementing the "results" test, it made explicit that it was access to *opportunity*, not the ultimate *outcome*, that was guaranteed. As explained by Senator Dole (who offered the compromise text, *id.* at 1010-11), § 2 would "[a]bsolutely not" threaten voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting." 128 Cong. Rec. 14133 (1982). The amended text makes this clear by relying on *Regester*'s "opportunity" language and explicitly *rejecting* a requirement of proportionality. 52 U.S.C. § 10301(b). Seeing as Congress explicitly disavowed proportionality in vote-dilution cases—the set of cases it was specifically contemplating—the statute cannot be read to mandate proportionality in *non*-dilution cases. Plaintiffs' position thus rejects the "balance Congress struck." *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment).

Perhaps even more striking, Plaintiffs' construction would mean that nearly every electoral system in the country has been under a cloud of illegality since 1982. At that time, there were material racial disparities in voter registration and participation. *See* U.S. Census Bureau, *Historical Reported Voting Rates*, Table A-1. And voting rules were far stricter and more inflexible than today. In 1982, virtually every state required advance registration. Mark Thomas Quinlivan, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2372 (1989). Only three allowed no-excuse absentee voting.[3] And some states that permitted limited absentee voting prohibited ballot-harvesting.[4] Not until the decision below did any court suggest that *all* of these rules were invalid. *Cf. Chisom*, 501 U.S. at 396 n.23 ("[J]udges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

Indeed, this theory was never even *imagined* before recent years. Every § 2 case in this Court has related to vote dilution; even lower courts have rarely seen § 2 cases involving time, place, and manner regulations. Those challenges have recently become common, but only as a result of a concerted effort to use voting laws to favor partisan interests. *Supra* Part I.B. Section 2's history makes clear that it was meant to guarantee equal access, not to ensure proportionate outcomes, and certainly not to secure partisan advantage.

---

[3] Cal. Elections Code § 1003 (1978); Haw. Rev. Stat. § 15-2 (1981); Wash. Rev. Code § 29.36.010 (1974).

[4] *E.g.*, Ark. Stat. Ann. § 3-910 (1981); N.H. Rev. Stat. Ann. § 657:17 (1979); Ohio Rev. Stat. § 3509.05 (1980).

D. The Ninth Circuit's Construction Would Render § 2 Unconstitutional.

Congress enacted § 2 under its power to enforce the Fifteenth Amendment, which prohibits only "purposeful discrimination," not laws that merely "resul[t] in a racially disproportionate impact." *Bolden*, 446 U.S. at 63, 70. The statutory "results" test thus goes well beyond the constitutional provision that it purports to enforce, and this Court has never addressed whether that expansion "is consistent with the requirements of the United States Constitution." *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting); *see also De Grandy*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in the judgment) (same). Whatever the answer to that question may be in the abstract, the expansive interpretation of § 2 advanced by Plaintiffs in this case would render it plainly unconstitutional, and that alone is enough to reject it.

First, even if Congress may use its enforcement power to proscribe certain discriminatory "results," it may do so only as a "congruen[t] and proportional[] ... means" to "remedy or prevent" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). After all, the enforcement power does not allow Congress to "alter[] the meaning" of the Constitution by changing the substantive standard from intentional discrimination to disparate impact. *Id.* at 519. Accordingly, to ensure that § 2 stays within the bounds of the Fifteenth Amendment, the results test must be "limited to those cases in which constitutional violations [are] most likely." *Id.* at 533.

In the vote-dilution context, for example, § 2 is properly interpreted to invalidate voting schemes only where there is a strong inference of discriminatory purpose. As Justice White explained in his dissent in *Bolden*, the original results test was designed to target "objective factors" from which "discriminatory purpose can be inferred." 446 U.S. at 95. The amendments to § 2 were meant to "restore" that test. *Gingles*, 478 U.S. at 43-44 & n.8. That is why the first *Gingles* "pre-condition" requires showing that minority voters could constitute a "geographically compact" majority under "traditional districting principles." *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997). Districts *normally* encompass "geographically compact" groups, so failure to draw such a district for a minority community creates an inference of intentionally discriminatory dilution. Conversely, the Court has made clear that § 2 does not require states to engage in *preferential* treatment by *deviating* from traditional districting principles in order to *create* majority-minority districts. *LULAC*, 548 U.S. at 434.

The same must hold true in the vote-denial context: Section 2 must remain congruent and proportional to the Fifteenth Amendment by forbidding voting rules that would generate a fair inference of intentional discrimination. Properly interpreted, the results test is legitimate enforcement legislation, because it prohibits only voting practices that depart from an objective benchmark by imposing more than the usual burdens of voting or proximately depriving minorities of the equal "opportunity" to vote. If such practices "remain unexplained," one arguably "can infer" they are purposefully "discriminatory." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

But § 2 cannot be a freestanding ban on ordinary voting laws that lead to racially disparate outcomes. If § 2 were interpreted, in line with the Ninth Circuit's approach, to require departure from ordinary race-neutral election rules to *enhance* minority voting, that is plainly not a "congruent and proportional" means of combating purposeful discrimination. It would require racial discrimination in *favor* of minorities.

Second, interpreting § 2 to require states to boost minority voting participation would also violate the Equal Protection Clause by compelling race-conscious state action. Again, vote-dilution cases mark the path: Subordinating "traditional race-neutral districting principles" to enhance minority voting strength violates the Constitution. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). By the same token, § 2 cannot displace race-neutral voting procedures for the "predominant" purpose of maximizing minority-voter convenience. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Yet, on the Ninth Circuit's view, any ordinary voting law that is less convenient for minorities presumptively constitutes a discriminatory "result"; and § 2's text flatly prohibits all such "results," *regardless* of the state's justification. That interpretation would thus prioritize race *uber alles*, banning even the most strongly justified electoral procedures if minorities do not proportionately utilize them. That too is constitutionally impermissible. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

Moreover, requiring states to adjust race-neutral voting laws to compensate for underlying social inequalities would violate the basic constitutional requirement that race-based remedial action cannot be undertaken for the sake of racial balancing, and

must be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality op.) (emphasis added). By contrast, "remedying past societal discrimination does not justify race-conscious government action." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007).

For these reasons, Plaintiffs' sweeping construction of § 2 raises (at a minimum) serious constitutional questions and must be rejected if "fairly possible." *NFIB v. Sebelius*, 567 U.S. 519, 563 (2012). That is particularly true because the Constitution expressly grants the states the primary power to establish the time, place and manner of holding elections (and enforce voter qualifications). *Inter Tribal Council*, 570 U.S. at 8, 16. Because Plaintiffs' interpretation dramatically intrudes on this realm and rearranges "the usual constitutional balance of federal and state powers," it must be rejected unless Congress's intent to achieve this result is "unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Congress did not provide any clear indication that it meant § 2 to authorize federal judges to override ordinary race-neutral election procedures. As explained above, just the opposite is true. The Court should reverse.

II. ARIZONA'S BALLOT-HARVESTING LAW IS NOT INTENTIONALLY DISCRIMINATORY.

In a misguided effort to insulate its decision from review, a bare majority of the *en banc* Ninth Circuit alternatively held that Arizona's legislature enacted H.B. 2023 with discriminatory *intent*. The court so held despite the district court's explicit, unchallenged

finding that the legislature was motivated by a "sincere belief" that the bill was a necessary anti-fraud "prophylactic." JA.357. Bypassing the benign motivation of the legislature, the court relied on the supposed bias of two people (one not even a legislator) who helped start the debate that led, in turn, to the bill's enactment. This theory of vicarious legislative discrimination has no basis in law, is foreclosed by this Court's precedents, and would be unworkable. It also has no application to the facts found by the district court, subject to review for clear error only.

1. The Fifteenth Amendment and § 2 of the VRA prohibit intentional racial discrimination. But as this Court has made clear, a law is not discriminatory just "because it may affect a greater proportion of one race than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). The legislature instead must act "'because of,' not merely 'in spite of,'" a disparate effect on a minority. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). The inquiry into legislative intent is guided by a series of familiar factors, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), against the fundamental backdrop principle that the "good faith of a state legislature must be presumed," *Miller*, 515 U.S. at 915.

Whether there is an "intent to discriminate" is "a pure question of fact," subject to clear-error review on appeal. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982). The district court's findings on intent thus cannot be disturbed unless "the reviewing court … is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). And this Court's review asks "not whether the [Ninth] Circuit's

interpretation of the facts was clearly erroneous, but whether the *District Court's* finding was clearly erroneous." *Id.* at 577 (emphasis added).

2. In this case, the district court found—after a full trial—that the "legislature was motivated by … a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." JA.350, 357. In enacting the bill, the "legislature as a whole" acted "*in spite of* opponents' concerns about [H.B. 2023's] potential effect on [get out the vote] efforts in minority communities," not *because of* those effects. JA.350 (emphasis added). Thus, the court concluded, "H.B. 2023 was not enacted with a racially discriminatory purpose." *Id.*

The district court's careful analysis of the record defies any suggestion of clear error. *First*, considering "the historical background" of the bill, the court explained that Senator Shooter and an anti-ballot-harvesting video created by a private citizen named LaFaro played a prominent role in "spurr[ing] a larger debate" about mail voting. JA.350-51. Although neither made entirely accurate allegations, the legislature as a whole developed a "sincere belief that mail-in ballots lacked adequate prophylactic safeguards." JA.357. *Second*, the district court found no problematic "substantive or procedural departures from the normal legislative process." JA350, 353. For instance, the court found nothing abnormal about the substance of H.B. 2023, which was in some ways more restrictive and in some ways less restrictive than past bills aimed at ballot-harvesting (and was similar to laws in many other states, JA.739). JA.355. *Third*, as to "the relevant legislative history," the district court found that, even though there was no specific, "direct"

evidence of ballot-collection fraud in Arizona, its supporters were "sincere in their beliefs that this was a potential problem that needed to be addressed." JA.352. *Fourth*, the court explicitly found that the "legislature enacted H.B. 2023 *in spite* of" potential disparate impact on minorities, "not *because of* that impact." JA.356 (emphasis added).

To be sure, the district court opined that a few individual legislators (including Senator Shooter) had pursued "partisan interests." *Id.* But "both the Fifteenth Amendment and § 2 … address *racial* discrimination, not *partisan* discrimination." JA.357. (emphasis added). And in any event, the court found that "many proponents acted to advance facially important interests in bringing early mail ballot security in line with in-person voting security." *Id.*

Overall, the court found that the legislature was motivated by "a sincere belief"—whether correct or "misinformed"—that "mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." *Id.* Nothing in the record suggests these factual findings were erroneous, much less "implausible." *Anderson*, 470 U.S. at 575. And they legally defeat the intentional discrimination claim.

3. The Ninth Circuit nonetheless reversed. In its view, the legislature's admittedly non-racial motives were tainted by the supposed racial motives of the individuals who brought the ballot-harvesting issue to its attention. Specifically, Senator Shooter was supposedly motivated by racial animus in opposing ballot-harvesting, as was LaFaro, who created the anti-ballot-harvesting video. Because Senator Shooter and the LaFaro video played a role convincing the

legislature that ballot-harvesting was facilitating fraud, the Ninth Circuit *imputed* their supposedly racist motives to the entire legislature. That is, while accepting the district court's finding that the legislature acted out of a "sincere," non-racial motivation, the *en banc* majority still found discriminatory intent, because the "reason[]" that legislators came to this "sincere" belief depended on arguments pressed by allegedly racially motivated actors. JA.675-77. That novel theory of intentional discrimination is foreclosed by both the applicable law and the factual findings.

a. The Ninth Circuit's rationale of imputed racial intent is, legally, a non-starter. To reach the paradoxical conclusion that legislators who acted for admittedly benign reasons nonetheless intentionally discriminated on the basis of race, the court invoked a wholly inapposite doctrine developed in *employment discrimination cases*. JA.677-78. Under a "cat's paw" or "rubber stamp" theory, the improper motivation of one employee can (sometimes) taint the activities of an unbiased employee of the same company. But that is because when "an agent of the employer … causes an adverse employment action[,] the *employer causes it*." *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011) (emphasis added).

This type of agency-based theory makes no sense in the legislative context, where the legislators are not "agents" of the legislature such that the motives of individual legislators (much less private citizens like LaFaro) can be imputed to the legislature as a whole. Each legislator acts on behalf of the constituents who elected them, not on behalf of the legislature. And what "motivates one legislator to

make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

In short, evidence of *how* legislators came to a particular, good-faith, non-discriminatory motivation cannot taint that motive or the resulting bill. Here, the district court found that the legislature acted based on a sincere concern that prophylactic anti-fraud measures were necessary to protect the integrity of the democratic process in Arizona. JA.357. That should be the end of it.

The Ninth Circuit's theory is not only unheard of, it would run afoul of this Court's precedents and be a nightmare both in "concept[] and practic[e]." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906 (2019). "Proving the motivation behind official action is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). And those inevitable difficulties would become insurmountable (and the inquiry exceedingly abstract) if plaintiffs could hunt for animus lurking in *every* distant but-for cause that potentially contributed to a good faith, race-neutral motive for a legitimate, race-neutral action. That inquiry would also diminish "the presumption of legislative good faith." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Given that legislatures are not bound by the intent of *past legislatures*, *see id.*, it is untenable to think they can be hamstrung by the supposedly racial intent of political activists.

b. Even if this outlandish theory could apply *somewhere*, the Ninth Circuit improperly ignored the district court's findings in applying the theory *here*.

To start, the Ninth Circuit conflated partisanship with race. Although it referred to "racial polarization" in voting when ascribing "discriminatory" motives to Shooter, LaFaro, and their unidentified "allies," JA676, 678, that phrase simply denoted stronger Latino identification with the Democratic Party. The court had no justification for inferring that *race* rather than *partisanship* was at play. The district court explicitly found the *latter*. JA.356 ("Rather, some individual legislators and proponents were motivated in part by partisan interests."). Of course, race often "correlates closely with political party preference," *Abbott*, 138 S. Ct. at 2314, but plaintiffs must prove *racial* discrimination, so it is their burden to "disentangle race from politics," *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017). That did not happen here. For instance, "Shooter was … motivated by a desire to eliminate what had become an effective *Democratic* … strategy." JA.351 (emphasis added). Maybe so, and maybe in opposing that strategy he pressed false allegations for selfish reasons, but the Ninth Circuit did not even attempt to explain how the factual finding of *partisan* motive was implausible or somehow implied *racial* motive. *See Luft*, 963 F.3d at 671. Likewise, although the district court noted that the LaFaro video could be understood as "racially-tinged," the district court made no finding that LaFaro (who was not even a legislator) was motivated by racial animus. JA.351.

To fill that gap, the Ninth Circuit reasoned that "there was 'no direct evidence of ballot collection fraud,'" so any preventive measure was "not necessary, or even appropriate," and thus must have been illicitly motivated. JA.675, 689. It is not the court's role to

second-guess policymakers about the necessity or wisdom of anti-fraud measures. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). States may "respond to potential deficiencies in the electoral process with foresight rather than reactively" and need not "sustain some level of damage before … tak[ing] corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Indeed, in *Crawford*, this Court held that an Indiana voter-ID law was valid, even though the "record contain[ed] no evidence of [voter impersonation] fraud actually occurring in Indiana at any time." 553 U.S. at 194. *Crawford* refutes the Ninth Circuit's view that, absent direct evidence of Arizona-based fraud, the legislative motive must have been illicit. There is plentiful evidence regarding the dangers of ballot-harvesting fraud, as the Carter-Baker Commission found, and as recent events around the Nation have shown. JA.742-46; *supra* at 9-10. The Arizona legislature need not labor under the illusion that its state is uniquely immune.

The other evidence on which the Ninth Circuit relied was no better. For instance, the court cited a "long history of race-based voting discrimination" "dating back to Arizona's territorial days." JA.674, 679. But "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). This Court properly refuses to "accept official actions taken long ago as evidence of current intent." *Id.* This and similar evidence—which the district court considered and rejected as establishing improper intent—casts no doubt on the district court's findings, and certainly does not justify a holding of "clear error."

* * *

Arizona's legislature enacted H.B. 2023 based on a sincere belief that prophylactic measures were needed to prevent fraud. No one has challenged that fact, nor could they. This Court should not permit the Ninth Circuit's creative attempts to circumvent that clear, correct finding, which dictates rejection of Plaintiffs' intent challenge to the statute.

CONCLUSION

The Court should reverse the decision below.

November 30, 2020

Respectfully submitted,

BRETT W. JOHNSON
COLIN P. AHLER
TRACY A. OLSON
SNELL & WILMER L.L.P.
400 E. Van Buren St.
Suite 1900
Phoenix, AZ 85004

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
ANTHONY J. DICK
E. STEWART CROSLAND
STEPHEN J. KENNY
STEPHEN J. PETRANY
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioners