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 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 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 have consented to this filing.

SUMMARY OF ARGUMENT

The en banc Ninth Circuit disregarded the text of the Voting Rights Act to create a new policy outlawing inconveniences associated with a State's voting process if a court identifies: (1) any statistical or even anecdotal correlation with race, and (2) any evidence of historical discrimination, even occurring before statehood. That is not the law. This Court has recognized in the related context of Fourteenth Amendment voting claims that "the usual burdens of voting" do not impair the right to vote. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J., op.). Section 2 likewise focuses on "the right . . . to vote" and protects minority voters' ability "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. The *ordinary* burdens of voting do not, by definition, threaten voting rights.

For state lawmakers like Amici, the Ninth Circuit's policy amounts to a policymaking straitjacket. While other circuits allow States to try different policies—sometimes relaxing voting procedures, sometimes tightening them—the Ninth Circuit now precludes States from changing policy direction if doing so would produce any statistical correlation with race. Yet Section 2 addresses vote denial or abridgement "on account of race." 52 U.S.C. § 10301(a). Section 2 does not forbid other, race-neutral policy motives, including protecting Arizona's electoral process for all voters. This Court should restore the States to their constitutional role as "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).

Finally, the Ninth Circuit's approach to discriminatory intent would ensnare every State in the Union. That approach began by faulting Arizona for historical instances of discrimination dating back to the Treaty of Guadalupe Hidalgo, 64 years before Arizona became a State. JA 626–27. Regarding more recent events, the Ninth Circuit impugned Arizona's entire legislature based on the theory that dozens of elected officials served as a "cat's paw" for one bad actor. JA 677–78, 680. This demeaning and implausible conclusion contradicted factual findings in the district court and further paralyzes state legislatures' ability to enact electoral regulations by imputing to the entire body the improper motives of a single member.

ARGUMENT

I. The Decision Below Created a Results Test that Makes Electoral Regulation Practically Impossible.

The Ninth Circuit created a test that every jurisdiction would fail. It finds a violation of the Voting Rights Act based on either a bare statistical disparity (out-of-precinct voting) or anecdotal evidence (ballot harvesting), combined with historical discrimination. This approach departs from the Voting Rights Act and prevents the States from experimenting with policy solutions. For state policymakers like Amici, these effects are devastating. The Court should apply the statute as written and free States to fulfill their roles as laboratories of democracy.

A. Section 2 Requires More than Bare Statistical Disparities Plus Historical Discrimination.

The circuit courts have struggled to identify a test for vote-denial cases under Section 2. The leading candidate in many circuits bears no relation to the text of the statute.

See, *e.g.*, *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). The Ninth Circuit's version goes even further afield with its hair trigger that prevents virtually all regulation. This Court, in its first vote-denial case, should announce a test that incorporates each of the elements in the statute itself. At a minimum, that would include the following:

1. the contested regulation must affect "the right to vote" and not just one particular method of voting;
2. "denial or abridgement" requires something more than the "usual burdens of voting," *Crawford*, 553 U.S. at 198; and
3. minority voters' "opportunity . . . to participate in the political process *and* to elect representatives of their choice," "based on the totality of circumstances," requires evidence that the contested provision actually affects electoral outcomes.

The current tests for vote denial under Section 2 fixate on historical discrimination and give courts wide latitude to impose their policy preferences. This Court should announce a test that follows the language of the statute.

1. The Voting Rights Act protects "the right to vote," not the right to vote however one pleases. That distinction is not new. It was the basis for this Court's holding in *McDonald* v. *Board of Election*, 394 U.S. 802 (1969). Applying the Fourteenth Amendment, the *McDonald* Court distinguished between "the right to vote" and "a claimed right to receive absentee ballots." *Id.* at 807.

Textually, the Voting Rights Act reflects the same basic insight. Its first subsection speaks in terms of the "right to vote." The second subsection then defines violations in terms of "the totality of circumstances" and minority voters' ability "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). This holistic standard requires courts to consider the cumulative effect of voting regulations, which necessarily encompasses both restrictive and permissive features of a State's voting system. JA 616 (O'Scannlain, J., dissenting); JA 705 (Bybee, J., dissenting).

Here, the record shows that Arizona provides a "flexible mixture" of opportunities to vote—including in-person voting on election day, early in-person voting, voting by mail, and in-person drop-off of early ballots. JA 259. For in-person voters in precinct-based counties, the district court found after a 10-day trial that locating the correct precinct is easy. JA 303. And both the district court and the Ninth Circuit panel correctly focused on the statutorily protected "right to vote." JA 319–21; JA 400–04. The en banc court, in contrast, narrowed its gaze to two voting *practices* that Arizona law forbids—voting in the wrong precinct and giving a ballot to unauthorized ballot harvesters. As a matter of text and logic, those two practices are not what Section 2 protects. Any standard that faithfully applies the statute must focus on "the right to vote."

2. Congress did not pass the Voting Rights Act to combat inconvenience. As its text says, the Act addresses a "denial or abridgement of the right . . . to vote." 52 U.S.C. § 10301(a). Any orderly electoral system necessarily entails a degree of inconvenience. Fortunately, the

mechanism for separating denials and abridgements from mere inconveniences is already in place. The safe harbor announced in *Crawford* for "the usual burdens of voting," 553 U.S. at 198, logically applies to Section 2 as well.

In vindicating the right to vote under the Fourteenth Amendment, this Court held that a State may require voter identification because 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." *Ibid.* (emphasis added). The language of a "substantial burden" is specific to the Fourteenth Amendment. See *Burdick* v. *Takushi*, 504 U.S. 428, 444 (1992). The lesser standard—"usual burdens of voting"—applies to a species of regulation that cannot burden the right to vote in a legally cognizable way. After all, what is "usual" cannot be a denial or abridgement.

The circuit courts have already recognized the logic of extending *Crawford*'s safe harbor to Section 2. The Fourth Circuit, for example, applied *Crawford* to a Section 2 vote-denial claim, 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*). Judge O'Scannlain, dissenting below, applied the same logic, criticizing the en banc majority for failing 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." JA 704.

The en banc majority was silent on how voting in the correct precinct or submitting a ballot without the help of unauthorized third parties compares to the usual burdens of voting. The district court, however, had already found that neither contested regulation represents more than the

"usual" and "ordinary burdens traditionally associated with voting." JA 279 (ballot harvesting), JA 305 (out-of-precinct). It is impossible to characterize that finding as clear error, and the Ninth Circuit did not reach Respondents' Fourteenth Amendment claims. JA 584. But while this maneuver avoids the impossible conclusion that the district court clearly erred, it leaves in place the district court's factual finding. All that remains is the legal question whether *Crawford*'s logic applies to Section 2 as well.

The scope of "usual burdens" should take guidance from practices in other States to create a safe harbor for policymakers. Both at the time of the Voting Rights Act's adoption and continuing to the present, most States require voters to cast ballots in their correct precinct. JA 729–30 & n.5 (Bybee, J., dissenting). Numerous States limit ballot harvesting, JA 739–42 (Bybee, J., dissenting), and all 50 of them include some regulation for the handling of absentee ballots, JA 768-830 (Bybee, J., dissenting). Some States require a justification for obtaining a mail-in ballot in the first place. All of these regulatory programs are "usual," and a State must be free to choose any of them—whether that choice represents an easing or tightening of rules for that particular jurisdiction. See Part I.B *infra*.

The Voting Rights Act does not purport to eliminate every burden around voting, however minor. "The Voting Rights Act of 1965 was enacted to remedy the systematic exclusion of blacks from the polls by the use of poll taxes, literacy tests, and similar devices." *Delgado* v. *Smith*, 861 F.2d 1489, 1492 (11th Cir. 1988). These wicked devices leveraged failures by the States (*e.g.,* to educate minorities or permit them to earn a living) in order to preclude high

percentages of racial minorities from voting. They also often included "grandfather clauses" and "good character" tests to extend the franchise to white citizens who would otherwise fail the test. See *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 220 (2009) (Thomas, J., concurring in part and dissenting in part). For a citizen whom the State has purposefully deprived of economic and educational opportunities, a poll tax or literacy test is a significant or even insuperable barrier to the franchise. Traditional burdens like voting in one's own precinct or returning one's no-justification-required early ballot during a month-long window, on the other hand, are unremarkable and represent features of orderly elections. Under *Crawford*, these requirements fall comfortably within the safe harbor for the "usual burdens of voting" and therefore do not amount to a denial or abridgement.

3. The en banc court eschewed Judge Ikuta's insistence on evidence "show[ing] that the state election practice has some material effect on elections and their outcomes." JA 400. Instead, it settled for anecdotal evidence that minority voters were "more likely" to give their ballots to third-party ballot collectors than were white voters, JA 597–98, and that minority voters were one half of one percentage point more likely to vote in the wrong precinct, JA 617. The statute favors Judge Ikuta's approach. It speaks in terms of minority voters' ability to "participate in the political process *and* to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). Those are the "results" that a "results test" must require.

Respondents' evidence of disparate utilization does not establish the disenfranchisement that Section 2 requires. On ballot harvesting, the district court found that "prior to

HB 2023's enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." 329 F. Supp. 3d at 870. This fact was insufficient in the opinion of the district court and the Ninth Circuit panel to establish a violation of Section 2. Applying the statutory language, those courts insisted on "a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." *Id.* at 871; see also 904 F.3d at 713. The en banc Ninth Circuit reversed, rejecting Section 2's focus on electoral outcomes to focus instead on the mere fact that racial groups use different voting procedures to different degrees. JA 659–62. In changing the statutory definition of a violation—which is the whole purpose of Section 2's second paragraph—the en banc court rewrote half of Section 2.

Regarding out-of-precinct voting, the district court found that 99% of minority voters and 99.5% of white voters cast their ballots in the correct precinct. JA 333. Applying the statutory command to consider the "totality of circumstances," the district court concluded that the minimal statistical disparity in out-of-precinct voting was not a violation of Section 2. JA 334–37. The en banc Ninth Circuit, however, never mentioned the actual percentages. Instead, it produced a new statistic to suit its desired outcome, dividing the percentages to find that minority voters cast out-of-precinct ballots at a "ratio of two to one." JA 618. Of course, the same "ratio of two to one" would exist if 99.999998% of minority voters and 99.999999% of white voters voted in the correct precinct. And in either case, the data reveals near parity in voters' ability to comply with the regulations at issue. The Seventh Circuit addressed exactly this "misuse of data" in an election case,

concluding that "[t]hat's why we don't divide percentages." *Frank* v. *Walker*, 768 F.3d 744, 752 n.3 (7th Cir. 2014).

These examples highlight Congress' wisdom in defining a Section 2 violation to encompass only "political processes" that "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(b). This definition might be a mouthful, but its unmistakable focus is on elections as a whole. The Ninth Circuit erred in reducing it to a dubious calculation of relative impact, detached from the broader fact that voters of all races have little trouble complying with the law.

* * *

Whatever test this Court announces should rely on the language of Section 2. The current test employed by a number of circuits overlooks the statutory features discussed here; the Ninth Circuit's test is even more detached. It magnifies even the slightest discrepancy in *methods* of voting to create a violation, whereas the statute requires something like Judge Ikuta's insistence on a "material effect on elections and their outcomes." JA 400. At the very least, a safe harbor based on *Crawford*'s "usual burdens of voting" will allow States to continue regulating elections in search of the best "solutions to difficult legal problems." *AIRC*, 135 S. Ct. 2673.

B. The Ninth Circuit's Interpretation of Section 2 Creates a One-Way Ratchet that Cripples State Policymaking.

Because the Ninth Circuit requires only a (vanishingly small) burden to find a Section 2 violation, its results test amounts to a ban on any regulation that tightens election security. This one-way ratchet will chill policy experimentation as lawmakers realize that any step toward liberalization will be impossible to undo.

States experiment with various electoral regulations, knowing that future legislators can reverse course if the experiment proves less than successful or opens the door to fraud. Until now, courts have not viewed this policy dynamism with suspicion. In Ohio, for example, the legislature initially allowed 35 days for early voting, including a six-day "golden week" when individuals could register and vote on the same day. *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 623 (6th Cir. 2016). Four legislative terms later, policymakers eliminated the golden week to allow just 29 days for early voting. *Id.* at 624. This slight tightening of electoral regulations impacted African American voters more than other groups. *Id.* at 625. Nevertheless, the Sixth Circuit declined to construe the Voting Rights Act to "create a 'one-way ratchet' that would discourage 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." *Id.* at 623.

In the Ninth Circuit, however, Ohio's reconsideration of the golden week would violate Section 2, because African American voters were more likely to employ same-day registration and voting. *Id.* at 628. Add to that disparity

the fact that Ohio's history doubtless includes racially unjust chapters, see Part II *infra*, and the Ninth Circuit would have everything it needs to find a Section 2 violation. But if the Ninth Circuit's approach were the rule, Ohio likely would never have created the golden week in the first place—or experimented with early voting at all. The unintended consequence of forbidding any effort to tighten regulations is that States will not relax those regulations. If legislators face a one-way ratchet, the safest course is not to turn it.

An additional consequence is that one legislature can tie the hands of its successors. Lawmakers who might otherwise hesitate to enact policies that would be vulnerable to future repeal or revision—*i.e.*, those with limited public support or known downsides—would have every incentive to charge ahead, knowing that course correction is impossible, even as legislative majorities change.

The ability to change laws in response to changing circumstances and priorities is, of course, central to the 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*, 394 U.S. at 809 (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 Ninth Circuit's hair-trigger test for racial discrimination under Section 2 will subvert the States' legislative process. It allows one legislature to bind the hands of future policymakers and discourages policy experimentation. Far from identifying bad legislative actors, the Ninth Circuit's version of the Voting Rights Act discourages lawmakers from doing what they should.

C. States Cannot Fulfill Their Work as Laboratories for Policy Experimentation under the Ninth Circuit's Test.

State policymakers like Amici lead "laboratories for devising solutions to difficult legal problems." *AIRC*, 135 S. Ct. at 2673 (quotation omitted). In the field of election law, the Ninth Circuit would make that work impossible. Both statutes at issue in this case respond to important concerns around the administration of elections. Other States may not respond in the same way, but "a single courageous State may, if its citizens choose, serve as a laboratory." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Innovative States like Arizona are operating laboratories within the laboratory. For example, Arizona law allows counties to choose whether to use a traditional precinct-based model or a vote-center model, in which a registered voter can vote at any polling place in the county. Ariz. Rev. Stat. § 16-411. For counties that choose the precinct-based system, out-of-precinct voting is undesirable for both practical and principled reasons. For starters, voting in the incorrect precinct undermines the democratic process by reducing participation in local elections. A voter who arrives at the wrong precinct but still within his congressional district, for example, may be able to vote in

statewide races and the congressional race but not in contests for county offices or the state legislature. And if, as Respondents hypothesize, out-of-precinct voting is slightly more common among minority voters, then the resulting exclusion from local races will disproportionately impact precisely the voters Respondents claim to represent. In Arizona's judgment, the better policy is to encourage in-precinct voting by disallowing out-of-precinct ballots.

The Ninth Circuit suggested several different (and occasionally confusing) policy options, including "counting or partially counting" out-of-precinct ballots. JA 584. "Partially counting" those ballots by identifying races for which the voter was entitled to vote might be a creative approach, but it is not required by Section 2. It belongs instead to the policy realm, where Amici and their counterparts in other States have worked for years to develop "solutions to difficult legal problems." *AIRC*, 135 S. Ct. at 2673.

On the other hand, "counting" out-of-precinct ballots implies that voters would cast ballots for offices for which they are not entitled to vote. JA 584, JA 707 n.7 (O'Scannlain, J., dissenting) (noting the absurdity of "counting or partially counting"). If election integrity means anything, it must prevent voters from choosing other people's representatives. Still, even the Ninth Circuit's ill-advised policy suggestion illustrates a useful point: flaws that might slip past the judiciary are more likely to be purged in the crucible of democratic policymaking.

The stifling effect of the Ninth Circuit's holding for state policymakers is difficult to overstate. If that decision

stands, any change in election laws is certain to bring litigation and impractical "solutions" imposed by a judiciary with no special expertise in administering elections. That is not the vision embodied in either America's federal structure or the Voting Rights Act.

II. The Ninth Circuit's Approach to Historical Discrimination and Legislative Intent 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 may reveal areas of contention or uncertainty, but they cannot 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 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 lawmakers 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. JA 584. The district court rejected Respondents' theory of invidious legislative intent. JA 357–58. It concluded that the legislature acted on "a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting."

JA 357. 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." JA 357–58 (emphasis added). As a result, the district court found "that H.B. 2023 was not enacted with a racially discriminatory purpose." JA 350.

2. "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").

Here, the district court found after a 10-day bench trial that HB 2023 was enacted without discriminatory intent. The court heard testimony of "current and former lawmakers, elections officials, and law enforcement officials," including both supporters and opponents of the law. JA 258. 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 H.B. 2023 was enacted with the intent to suppress Hispanic voting." JA 352. It was not, and the district court agreed. JA 350.

3. A bare majority of the en banc Ninth Circuit upended that 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. JA 677–78, 680.[2] By both measures, the Ninth Circuit wrongly attributed to Amici and their many colleagues views and intentions that they do not hold.

a. The "long history" chronicled by the Ninth Circuit stretches back 172 years—that is, 64 years before Arizona entered the Union. Even assuming that historical account is accurate, 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 legislatures because their predecessors acted badly. Just as one legislature's laws cannot bind another, so future lawmakers cannot be 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

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[2] Judge Watford did not join the "intent test" portion of the en banc panel's opinion. JA 692.

different composition of legislators." JA 354-55. Yet the en banc majority scoured those earlier "efforts to outlaw third-party ballot collection" for some evidence of sinister intent. JA 671.

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.'" JA 603. But "[i]n 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 Chan 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." JA 604. Indeed, HB 2305 was the fourteenth of 34 bills voted on during a 14-hour legislative day, and it was one of several that day that broke along partisan lines. That is not suspicious or unusual—it 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. JA 605. 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 enacted 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." JA 677; compare JA 357. 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. JA 677.

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 hears 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 be signed by the governor before it becomes law. The process is cumbersome by design. And the notion that it could be controlled by a single legislator is farcical.[3]

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 task of smoking out all its members' 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." JA 601; see also JA 689 ("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

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[3] 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.

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, [who] strongly favored H.B. 2023 and expressed concern about stories of ballot collectors misrepresenting themselves as election workers." JA 352; see also JA 412 (citing Sen. Steve Smith's testimony "that ballot fraud is 'certainly happening,'" and Sen. Sylvia Allen's floor speech "express[ing] concern that 'we do not know what happens between the time the ballots are collected and when they're finally delivered.'").

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." JA 669. Other jurisdictions wrestled with the dangers of ballot harvesting in the years preceding HB 2023's enactment. And recent history provides an additional example in North Carolina's 2018 election. See JA 745.

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." JA 689. 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.'" JA 679. 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." JA 356 (emphasis added). True, the district court found that "some individual legislators and proponents were motivated in part by partisan interests." *Ibid.* But the court determined 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 Court should reverse the decision below.

Respectfully submitted.

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