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.*

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ARIZONA REPUBLICAN PARTY, ET AL.,
*Petitioners*,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
*Respondents.*

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

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI


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July 1, 2020

## QUESTIONS PRESENTED

**1.** Whether the Court should review a decision that creates no circuit split, and that carefully applies the standard for evaluating a vote denial claim under Section 2 of the Voting Rights Act based on the text of the statute and this Court's precedent.

**2.** Whether the Court should review a decision that faithfully applies the factors set forth in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) to hold that Arizona's criminalization of most ballot collection violates the United States Constitution and Section 2 of the Voting Rights Act.

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners in 19-1257 are Mark Brnovich, in his official capacity as Arizona Attorney General, and the State of Arizona (collectively, the "Brnovich Petitioners").

Petitioners in 19-1258 are Intervenors the Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero (collectively, the "Republicans").

Respondents in 19-1257 and 19-1258 are the Democratic National Committee, the DSCC, the Arizona Democratic Party, and Katie Hobbs, in her official capacity as Arizona Secretary of State.

Pursuant to Supreme Court Rule 29.6, Petitioners Democratic National Committee, the DSCC, and the Arizona Democratic Party certify that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

## STATEMENT OF RELATED PROCEEDINGS

*Democratic Nat'l Comm. v. Hobbs*, No. 18-15845 (9th Cir. en banc January 27, 2020) (judgment entered)

*Democratic Nat'l Comm. v. Reagan*, No. 2:16-cv-01065, (D. Ariz. May 8, 2018) (judgment entered)

*Feldman v. Arizona Secretary of State's Office*, No. 16-16698 (9th Cir. June 1, 2018) (judgment entered)

*Feldman v. Arizona Secretary of State's Office*, No. 16-16865 (9th Cir. June 1, 2018) (judgment entered)

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The en banc Ninth Circuit opinion is reported at 948 F.3d 989. App. 1-255.[1] The vacated Ninth Circuit panel opinion is reported at 904 F.3d 686. App. 256-388. The district court's opinion is reported at 329 F. Supp. 3d 824. App. 389-506.

[1] All appendix citations are to the Brnovich Petitioners' Appendix in No. 19-1257.

## JURISDICTION

The Ninth Circuit entered judgment on January 27, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment, U.S. Constitution: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2 of the Voting Rights Act, in pertinent part:

> (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.

## INTRODUCTION

The en banc Ninth Circuit decision does not warrant review. This Court's precedents and the text of Section 2 of the Voting Rights Act (VRA) compelled the court to conclude that Arizona's wholesale rejection of ballots cast out-of-precinct (OOP Policy) and its criminalization of ballot collection (HB2023) violated the VRA. After faithful application of *Arlington Heights*, it also found that HB2023 violated the intent prong of Section 2 and the Fifteenth Amendment. The court's decision creates no circuit split. Nor is there a need for "clarification": it employs the same Section 2 vote denial test applied by every other circuit that has addressed the issue, and it does not err in applying *Arlington Heights*. Moreover, it is a poor vehicle for certiorari: Arizona's Secretary of State—the state official designated by the people of Arizona to oversee its election laws—supports the decision below, and this Court need not entangle itself in thorny questions over who speaks for Arizona. The Attorney General does not have standing to defend the OOP policy on appeal, and the Republicans lack standing to appeal any portion of the Ninth Circuit's

ruling. At bottom, there is nothing about the decision below that merits this Court's attention.

Petitioners' mischaracterization of the Ninth Circuit's en banc decision bears no resemblance to the nearly 50-page decision itself. The Ninth Circuit did not find that Section 2 is violated anytime more than a de minimis number of minority voters are disparately affected by a voting policy. Rather, it applied a fact-intensive, two-part test rooted in the plain language of Section 2 and this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and adopted by all sister circuits that have evaluated Section 2 vote denial claims.

The first step of this test examines whether the challenged law disparately burdens minorities, which the Ninth Circuit plainly found here. Contrary to Petitioners' assertions, however, the Ninth Circuit's analysis did not end there. The court then moved to the second step of the test and considered, under the "totality of the circumstances," including relevant Senate Factors, whether the challenged laws interact with historic and social conditions such that minorities have less opportunity to participate in the political process. The court performed a careful, "intensely local appraisal" of the challenged practices, determining that they did indeed result in less opportunity for minorities to participate in the political process.

While the test the Ninth Circuit applied is uniform across all circuits that have considered Section 2 vote denial claims, given the "intensely local appraisal"

prescribed by this Court in *Gingles*, the outcomes are not. *See Gingles*, 478 U.S. at 78. But no circuit has found Section 2 liability based on a bare statistical disparity alone. This test has therefore not automatically invalidated all voting laws for which plaintiffs could show such a disparity. To the contrary, courts applying the two-part test regularly reject such challenges under the totality of the circumstances, demonstrating that the analysis is not a wrecking ball to all purportedly neutral, non-discriminatory time, place, and manner regulations, but rather a careful, contextual evaluation of such laws' impact on minority voting rights.

Given the Ninth Circuit's careful application of the Section 2 vote denial test adopted uniformly across the circuits, its plain adherence to *Arlington Heights* in reaching its intent finding, and the dispute over who properly speaks for Arizona and has standing to sue, this case presents a poor vehicle for certiorari review, and the Court should deny the Petitions.

## STATEMENT

The Ninth Circuit found that Arizona's OOP Policy violated Section 2. Arizona's OOP Policy disenfranchises minority voters twice as often as non-Hispanic whites, no "bare" statistical disparity, and it consistently disenfranchises more voters than any other OOP Policy in the country. The burden on minority voters is plainly "in part [] caused by or linked to 'social and historical conditions that have or currently produce discrimination against [minorities].'" *League of Women Voters of N.C. v. North*

*Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) ("*LWV*"); App. 12-14, 42, 83-84. The Ninth Circuit also held, largely based on the district court's factual findings, that ballot collection was disproportionately needed (and used) in minority communities, as well as directly linked to Arizona's long history of discrimination and the on-going effects thereof, such that HB2023 deprived minority voters of equal voting opportunities. App. 95-96. Correctly applying this Court's test in *Arlington Heights*, the Ninth Circuit further held that the legislature passed HB2023 based, in part, on a racially discriminatory motive in violation of both Section 2 and the Fifteenth Amendment.

### A. The Ninth Circuit's Section 2 Analysis

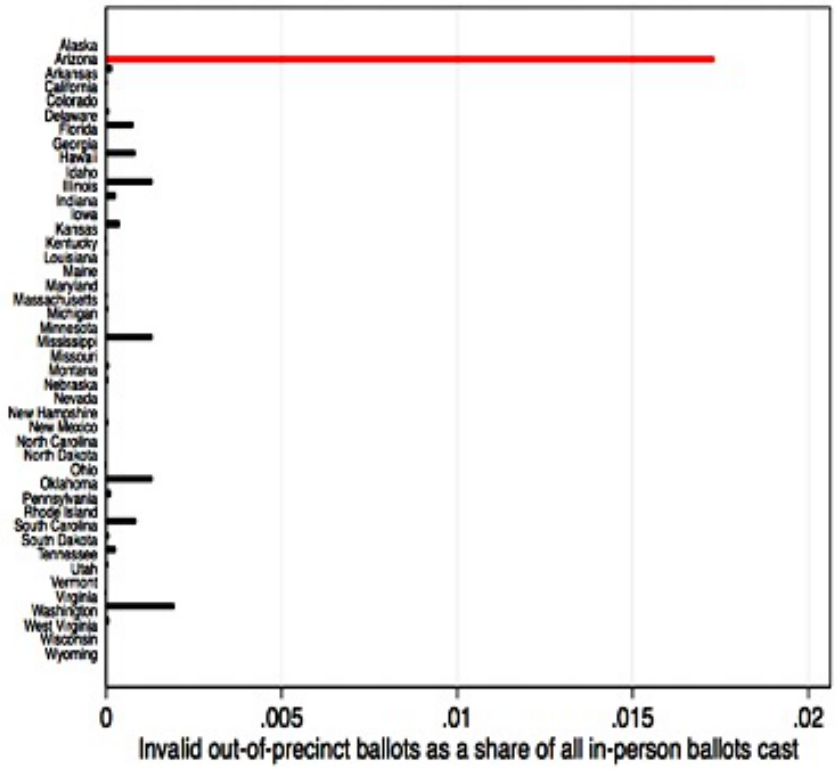
In evaluating Arizona's OOP Policy and HB2023 under Section 2, the Ninth Circuit applied the same two-part vote denial test its sister circuits have applied—a test rooted in the text of Section 2 and this Court's precedents, beginning with *Gingles*. First, the court asked whether the challenged laws result in disparate burdens on members of a protected class, confirming that "[t]he mere existence—or 'bare statistical showing'—of a disparate impact on a racial minority, in and of itself, is not sufficient." App. 37-38 (citing *Smith v. Salt River Project Agric. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)). Finding this element satisfied, it proceeded to step two: determining whether "under the 'totality of the circumstances,' there is a relationship between the challenged [law] on the one hand, and 'social and historical conditions' on the other." App. 38 (quoting *Gingles*, 478 U.S. at 47). This requires determining

whether "there is a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them." *Id.* Thus, the court conducted a "searching practical evaluation of the 'past and present reality'" using "factors such as those laid out in the Senate Report accompanying the 1982 amendments to the VRA." App. 38, 41 (citing *Gingles*, 478 U.S. at 43).

### 1. *Disparate Burden — OOP Policy*

If an Arizona voter casts a ballot in the incorrect precinct, Arizona rejects the ballot in its entirety, even for races for which the voter was otherwise eligible. Between 2008 and 2016, Arizona discarded 38,335 OOP ballots in general elections—all of which were cast by registered, eligible voters. App. 11-13. Arizona is consistently "an extreme outlier" among states in rejecting OOP ballots, as reflected in the figure below. App. 13.

**Figure 6: Rejected out-of-precinct ballots as a share of in-person ballots cast according to 2012 EAC Report**



Based wholly on findings made or credited by the district court, the Ninth Circuit found that OOP voting had three distinct causes, all resulting from either state actions or the on-going effects of Arizona's history of discrimination. App. 14-19.

*First*, officials disproportionately changed minority voters' polling places with unusual frequency. App.15. "[C]hanges in polling place locations are associated with higher rates of out-of-precinct voting, and [minority voters] are substantially more affected by this than whites." *Id.*

*Second*, officials frequently located polling places counterintuitively such that voters easily made mistakes. In 2012, approximately 25 percent of OOP voters lived closer to the polling place where they cast their OOP ballot than to their assigned polling place. App. 17-18. Voters living further away were 30 percent more likely to vote OOP; Hispanic and American Indians disproportionately live farther from their polling places than whites. *Id.*

*Third*, minorities own homes at lower rates than whites, resulting in higher rates of residential mobility and repeated changes in assigned polling places—a direct consequence of Arizona's history of discrimination. App. 18-19. And "OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently. These groups, in turn, are disproportionately composed of minorities." App. 19.

With this as background, the Ninth Circuit found under step one that, "[e]xtensive and uncontradicted evidence in the district court established that American Indian, Hispanic, and African American voters are over-represented among OOP voters by a ratio of two to one" *and* "the number of OOP ballots cast in Arizona's general election in 2016—3,709 ballots—is hardly de minimis," and thus, the district court clearly erred in holding Arizona's OOP Policy did not impose a disparate burden. App. 43-45. The Ninth Circuit did not suggest that any voting practice that disenfranchised more than a de minimis number of minority voters would automatically trigger Section 2 liability, as Petitioners contend, s*ee* Brnovich Pet. 21; Reps. Pet. 21; rather, the Ninth Circuit's finding that the OOP Policy disenfranchised thousands of minority voters in one year, App. 45, served as a predicate to it proceeding to step 2 of the test.

### 2. *Totality of the Circumstances — OOP Policy*

The Ninth Circuit explained: "The question at step two is whether, under the 'totality of circumstances,' the disparate burden on minority voters is linked to social and historical conditions in Arizona so as 'to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives' or to participate in the political process." App. 48 (quoting *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b)). The court evaluated evidence demonstrating numerous relevant Senate Factors, including: the effects of discrimination on minorities' access to voting, tenuousness of the justification for

the challenged voting practices, and the history of official discrimination. App. 48-49. It found that all of these factors weighed in plaintiffs' favor. App. 83.

In reviewing Arizona's lengthy and undisputed history of discrimination, the Ninth Circuit emphasized two recent concerning examples of discrimination against minorities relating to OOP voting. *First*, recent disparate poll closures forced Hispanic and African American Arizonans to travel much farther than their white counterparts to reach assigned polling places, and wait in exorbitant lines—up to five hours—to cast ballots. App. 68. *Second*, Maricopa County (where 60 percent of the state's voters live) election officials "repeatedly misrepresented or mistranslated key information in Spanish-language voter materials." *Id.*

It was undisputed that minority group members "'bear the effects of discrimination in areas such as education, employment and health, which hinder their ability to participate effectively in the political process.'" App. 72 (quoting *Gingles*, 478 U.S. at 37). The Ninth Circuit noted the district court's findings of "'[r]acial disparities between minorities and non-minorities,'" *id.* (quoting *Reagan*, 329 F. Supp. 3d at 876), in at least four key areas—education, poverty and employment, home ownership, and health—that directly affect OOP voting. App. 72. For example, the district court found that "due to 'lower levels of [English] literacy and education, minority voters are more likely to be unaware of certain technical [voting] rules.'" App. 74 (quoting *Reagan*, 329 F. Supp. 3d at 868). The district court also found that minority voters

are "more likely to work multiple jobs, less likely to own a car, and more likely to lack reliable access to transportation," App. 74 (citing *Reagan*, 329 F. Supp. 3d at 869), "all of which," the Ninth Circuit noted, "make it more difficult to travel to a polling place—or between an incorrect polling place and a correct polling place," *id.* Lower rates of homeownership and correspondingly higher rates of renting and residential mobility contribute to higher rates of OOP voting. *Id*. And health conditions, especially disabilities, are far more prevalent in Arizona's American Indian community, which on their own and in combination with transportation disparities, make traveling to and between polling locations more difficult. App. 75.

In finding the district court erred in evaluating the tenuousness of the justification for the policy, the Ninth Circuit explained that the district court failed to evaluate the justifications for entirely discarding OOP ballots and instead examined justifications for the existence of Arizona's precinct system, a policy not at issue in this case. The Ninth Circuit explained: "there is no finding by the district court that would justify, on any ground, Arizona's policy of entirely discarding OOP ballots." App. 80. On the other hand, the court noted that the district court specifically found "[c]ounting OOP ballots is administratively feasible." App. 81 (citing *Reagan*, 329 F. Supp. 3d at 860).

The Ninth Circuit agreed with the district court's finding that voting in Arizona has long been racially polarized and continues to be today (Senate Factor 2).

App. 74. It noted the district court found that "Arizona's racially polarized voting has resulted in racial appeals in campaigns," and there were numerous examples of such appeals, especially about Hispanics (Senator Factor 6). App. 75. It found that "it is undisputed that American Indian, Hispanic, and African American citizens are underrepresented in public office in Arizona" (Senate Factor 7). App. 77. Finally, it corrected the district court's holding regarding the state's responsiveness to minority needs (Senate Factor 8), noting that the district court ignored its own observation that Arizona's "'political culture [] simply ignores the needs of minorities.'" App. 79 (quoting *Reagan*, 329 F. Supp. 3d at 876).

Thus, the Ninth Circuit held that because Arizona's OOP Policy imposes both a significant disparate burden on minorities that is caused by or linked to social and historical conditions that result in an inequality between minorities and whites to participate in the political process, it violates Section 2. App. 84 (citing *Gingles*, 478 U.S. at 47).

### 3. *Disparate Burden — HB2023*

Arizonans have a statutory right to vote by early ballot. A.R.S. § 16-541. Today, mail voting in Arizona is the most popular voting method, accounting for approximately 80 percent of all ballots cast in the 2016 election. App. 21.

Many Arizonans lack access to outgoing mail service, but must still rely on mail voting because, for a variety of socioeconomic-related reasons, in-person

voting is difficult or impossible. App. 22-24. For example, Arizona contains vast American Indian lands with little public or private transportation. American Indian voters' precincts are often far from their homes. App. 23-25. Thus, thousands of Arizonans—a disproportionate share of whom are Hispanic, American Indian, and African American—came to rely upon friends, neighbors, activists, and campaigns to collect and deliver their voted mail ballots. App. 23-25, 84-85. HB2023 criminalized this longstanding practice, making non-fraudulent collection of absentee ballots by most third parties a felony. App. 33.

The Ninth Circuit explained: "[u]ncontested evidence in the district court established that, prior to the enactment of H.B. 2023, a large and disproportionate number of minority voters relied on third parties to collect and deliver their early ballots." App. 96. Likewise, the district court found that white voters did not significantly rely on third-party ballot collection. App. 86. The Ninth Circuit held the district court erred in deeming the thousands of ballots previously collected by third parties from minority voters, which "surpasses any de minimis number," App. 87, insufficient to demonstrate a disparate burden.

Contrary to the Republicans' assertions, these stark, disparate impacts of HB2023, while undisputed, were hardly the "sole basis upon which" the Ninth Circuit made its decision. Reps. Pet. 21. Instead, the court again proceeded to step two of the Section 2 vote denial test to determine "whether the

political processes are 'equally open'" to minority voters and meticulously conducted the "intensely local appraisal" and "searching practical evaluation" of the "totality of [the] circumstances," as required by Section 2 and *Gingles*. App. 41 (citing S. Rep. No. 97-417 at 30 (1982) & *Gingles*, 478 U.S. at 78).

#### 4. *Totality of the Circumstances — HB2023*

In addition to the Senate Factors examined in relation to OOP, *see* App. 85—additional considerations led the Ninth Circuit to hold that HB2023 violated Section 2.

The Ninth Circuit concluded, based on the district court's fact finding, that the same socioeconomic disparities that contribute to OOP voting contribute to HB2023's disparate impact on minorities. App. 23-25. These discriminatory conditions hinder many minority voters' ability to return mail ballots without the assistance of third-party ballot collection. App. 23-25. Moreover, in addition to the racial appeals that are part and parcel of Arizona's elections, HB2023's enactment "was the direct result of racial appeals in a political campaign." App. 90.

Finally, the tenuousness of the State's justification for the law weighed in Respondents' favor. First, there was no evidence supporting the State's fraud justification for the law: no third-party absentee ballot fraud was identified before passage, despite extensive efforts to do so. App. 92. In fact, in Arizona, "third-party ballot collection has had a long and honorable history." App. 94. On the other hand, "[t]he history of

H.B. 2023 shows that its proponents had other aims in mind than combating fraud." App. 93. And numerous Arizona laws already criminalized fraudulent ballot collection. *Id*. Finally, the Ninth Circuit found that to the extent HB2023 was intended to instill confidence in elections, any need to do so was the direct result "of the fraudulent campaign mounted by proponents of H.B. 2023." *Id*. As the Ninth Circuit observed, "[i]t would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation." App. 95.

### B. *Intentional Discrimination*

The Ninth Circuit applied the Court's well-established *Arlington Heights* test to evaluate whether discriminatory purpose was a motivating factor behind HB2023's passage. App. 96-106. Recognizing that "because 'outright admissions of impermissible racial motivation are infrequent plaintiffs often must rely upon other evidence,' including the broader context surrounding passage of the legislation," App. 97 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (alterations omitted)), the court conducted "'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" App. 97-98 (quoting *Arlington Heights*, 429 U.S. at 266).

HB2023 was the final incarnation of one legislator's efforts to eliminate ballot collection specifically because Hispanic voters had come to rely on the practice. Senator Don Shooter's original bill targeting this practice was "'motivated by a desire to eliminate' the increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted." App. 101 (quoting *Reagan*, 329 F. Supp. 3d at 879). This was because of—not in spite of—"the 'high degree of racial polarization in his district.'" *Id*. To garner support for his intentionally discriminatory bill, "Senator Shooter made 'demonstrably false' allegations of ballot collection fraud." *Id.* (quoting *Reagan*, 329 F. Supp. 3d at 880).

That first attempt to restrict ballot collection failed to obtain preclearance from the U.S. Department of Justice in 2011. App. 28. When DOJ requested more information to determine if the ballot collection provision was discriminatory, Arizona repealed the bill and withdrew its request for preclearance because "[a]ccording to DOJ records, Arizona's Elections Director, who had helped draft the provision, had admitted to DOJ that the provision was 'targeted at voting practices in predominantly Hispanic areas.'" *Id.* (quoting *Reagan*, 329 F. Supp. 3d at 881). "Withdrawing a preclearance request was not common practice in Arizona. Out of 773 proposals that Arizona submitted for preclearance over almost forty years, the ballot collection provision . . . was one of only six that Arizona withdrew." *Id.* Two years later, Arizona tried again. The next version "was passed along nearly straight party lines in the waning hours of the legislative session." App. 29 (citing *Reagan*, 329 F.

Supp. 3d at 881). Although the bill, enacted after *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013), was not subject to preclearance, the legislature faced a new hurdle—its own citizens. Arizonans organized a referendum that would forbid its enactment without a supermajority vote. App. 29-30. Instead of answering to their constituents, Republican legislators repealed their own legislation along party lines. App. 30.

The Ninth Circuit noted that the district court found that Republican legislators were motivated to pass HB2023 by two pieces of "evidence": first, Senator Shooter's "'demonstrably false'" and "'often farfetched allegations of ballot collection fraud'" rooted in his desire to suppress minority voters; and second, a "'racially tinged' video" produced by Maricopa County Republican Chair, A.J. LaFaro. App. 30 (quoting *Reagan*, 329 F. Supp. 3d at 880). The video showed "a man of apparent Hispanic heritage" purportedly dropping off ballots at a polling place. App. 31 (citing *Reagan*, 329 F. Supp. 3d at 876). LaFaro's voice-over narration included unfounded and racist statements, "'that the man was acting to stuff the ballot box'" and that LaFaro "'did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug.'" App. 31 (quoting *Reagan*, 329 F. Supp. 3d at 876). The video "'became quite prominent in the debates over H.B. 2023'" and viewed widely by HB2023's supporters "at Republican district meetings, posted on Facebook and YouTube, and incorporated into [former Secretary of State Reagan's] television advertisement." App. 32 (citing *Reagan*, 329 F. Supp. 3d at 877).

The Ninth Circuit found that the district court clearly erred in dismissing this unquestionably racially discriminatory evidence behind HB2023's passage. App. 108. It explained: "The good-faith" of some legislators does not show a lack of discriminatory intent behind H.B. 2023. Rather, it shows they were "[c]onvinced by the false and race-based allegations of fraud," and "used to serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies." App. 103. Because the district court "specifically found that H.B. 2023 would not have been enacted without Senator Shooter's and LaFaro's false and race-based allegations of voter fraud," App. 105, the Ninth Circuit held that HB2023 was intentionally discriminatory.

## REASONS FOR DENYING THE PETITION

### I. THE NINTH CIRCUIT'S APPLICATION OF THE SECTION 2 VOTE DENIAL TEST DOES NOT WARRANT REVIEW

#### A. The Ninth Circuit's decision is grounded in the text of Section 2 and *Thornburg v. Gingles*.

Petitioners' mischaracterization of the en banc court's decision is untethered from the nearly 50-page decision itself. Contrary to Petitioners' proclamation, the court did not find that Section 2 is violated anytime "more than a de minimis number of minority voters are disparately affected by a voting policy." Brnovich Pet. 11. Rather, it applied a fact-intensive, two-part test rooted in Section 2's plain language, in line with the now-familiar test articulated by this Court in *Gingles*, and adopted by all sister circuits that have evaluated Section 2 vote denial claims. The first step of this test examines whether the challenged law disparately impacts minorities. App. 37. The Ninth Circuit found that far more than a de minimis number of voters were burdened by the challenged laws here. The OOP Policy disenfranchised almost 40,000 voters over the course of eight years, and nearly 4,000 voters in 2016 alone—a group that was comprised of minorities at double the rate of whites. App. 84. Likewise, uncontested evidence showed that thousands of voters relied on third parties to submit their absentee ballots and that minorities disproportionately depended on such assistance. *Id.* Though Petitioners admit these figures are

"substantial," e.g., Reps. Pet. 21, they nonetheless argue that disenfranchising thousands of minority Arizonans is "de minimis," and of no concern under Section 2. This is both legally and factually wrong.

Petitioners falsely state that the Ninth Circuit's analysis ended there, even though it emphasized that under its own long-standing precedent, the "mere existence—or 'bare statistical showing'—of a disparate impact . . . is not sufficient." App. 38 (quoting *Salt River,* 109 F.3d at 595). Thus, the court moved to the second step of the test and considered under the totality of the circumstances, whether the challenged laws interact with historic and social conditions such that minorities have less opportunity to participate in the political process. App. 38 (citing *Gingles*, 478 U.S. at 47).

That deeply factual, contextual, and localized analysis conducted by the court below belies Petitioners' hyperbolic argument that the court's decision will undermine all sorts of election laws. This is because the totality-of-circumstances determination "is peculiarly dependent upon the facts of each case" and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. *Gingles*, 478 U.S. at 79 (internal quotation marks and citation omitted). Thus, Petitioners' dire prophecy of a one-way ratchet is unlikely to transpire based on the Ninth Circuit's analysis, compelled by Section 2 and *Gingles*.

The Fifth Circuit rejected the same dire predictions on the same basis, because the Section 2 vote denial test will only invalidate laws operating in a specific way in a specific context: "[u]se of the two-factor test and the *Gingles* factors limits Section 2 challenges to those that properly link the effects of past and current discrimination with the racially disparate effects of the challenged law." *Veasey v. Abbott*, 830 F.3d 216, 246 (5th Cir. 2016). Accordingly, the Fifth Circuit concluded: "we have good reasons to believe that the State's gloomy forecast" that "all manner of neutral election laws may be struck down is unsound." *Id.* This is because Section 2 neither prohibits nor requires any particular election practice in any particular place at any particular time; instead liability hinges on the totality of the circumstances. This is precisely the balance Section 2 struck between the "broad remedial purpose of 'rid[ding] the country of racial discrimination in voting,'" App. 33 (citing *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)), and the "fact-intensive" "local appraisal," *Gingles*, 478 U.S. at 46, 79, designed to determine whether a challenged law is operating in an electoral climate of inequality and discrimination.

Because Section 2 requires examining "all the circumstances in the jurisdiction in question," *Chisom*, 501 U.S. at 394 n. 21, automatic invalidation of other states' ballot collection or OOP laws, let alone other types of election laws, is impossible. As the Ninth Circuit observed with respect to HB 2023, "third-party ballot collection has long had a unique role in Arizona." App. 114. Some of those Arizona-specific

conditions include the large numbers of Hispanic and American Indian voters who have unreliable or non-existent in-home mail service, who lack transportation, who live long distances from polling places, and who have long-standing cultural traditions of ballot collection. *Id.* And following decades of allowing ballot collection, the evidence showed not one case of related fraud. *Id.* Ballot collection laws in other states that do not mirror Arizona's unique context will not be invalidated by the holding in this case. *Id.*

Similarly, Arizona's OOP Policy imposes a heavy burden on minority voters as a result of Arizona's unique practices with precinct placement and constant redistribution. Arizona consistently leads the nation in rejected OOP ballots. In 2012, for example, Arizona discarded eleven times more OOP votes than the next highest state did. App. 14. By definition, no other state has comparable circumstances. This is at least in part directly caused by local election practices unique to Arizona. In Maricopa County, where 60 percent of the state's voters live, between the 2006 and 2008 elections, an eye-popping 43 percent of polling locations moved. App. 14-15. Between 2010 and 2012, that figure was 40 percent. *Id.* These are not inconsequential facts. Arizona's OOP rate was 40 percent higher for voters whose polling place changed, and elections officials were more likely to change minority voters' polling places. App. 15. Maricopa is also unique in that many polling places are located at the edge of precincts, farther from voters' homes, leading to voter confusion. App. 15-16. Each of these local conditions are simply not the same across the country and were significant in the Ninth Circuit's

"intensely local appraisal" in this case. And the facts recited here are a mere smattering of the extensive "peculiar," "local" evidence underlying the Ninth Circuit's decision.

Fundamentally misunderstanding Section 2, Petitioners instead posit a bright-line rule that cannot be reconciled with Section 2's text or purpose or this Court's precedents. The Republicans claim that any facially "neutral procedure[]" is "by definition" "'equally open to all'" and "give[s] minorities no 'less opportunity' than others to vote."[2] Reps. Pet. 13-14 (citing § 10301(b)). According to Petitioners, "the fact that minorities might not proportionately take advantage of this equal opportunity is irrelevant." *Id.* at 14. Instead of considering the *results* of a challenged practice, Petitioners would stop at the challenged practice itself. But the "'right' question" under Section 2 "is whether '*as a result* of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes.'" *Gingles*, 478 U.S. at 44 (emphasis added) (quoting S. Rep. No. 97-417, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206). As this Court has recognized, "[a]n inflexible rule," like Petitioners', "would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (citing § 10301(b)).

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[2] Both a poll tax and literacy test are facially neutral election requirements. Under Petitioners' test, Section 2 would not reach these obviously discriminatory devices if they were not otherwise outlawed.

Take for instance Justice Scalia's paradigmatic illustration of a "neutral procedure" that violates Section 2: "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity 'to participate in the political process' than whites, and § 2 would therefore be violated." *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). Petitioners disagree. In their view, because all citizens, black and white, have the same window in which to register, there could be no Section 2 violation because any racial disparity would be nothing more than "disproportionate utilization," Rep. Pet. 14, by black citizens. The law's disparate impact on registration rates and resulting unequal opportunity to participate in the political process would be irrelevant. It would also be irrelevant to consider the totality of the circumstances, such as whether black voters in the jurisdiction experienced socioeconomic conditions resulting from a history of discrimination that hindered their ability to take advantage of this purportedly equal opportunity, e.g., minimum wage jobs with inflexible schedules, lack of a personal vehicle, or any other contextual factors. But Section 2 demands such a localized, fact-intensive inquiry, like the Ninth Circuit conducted here. What Petitioners really seek is the judicial repeal of the 1982 Amendments, and a requirement that voting rights plaintiffs show discriminatory intent to invalidate a voting restriction.

## B. There is no circuit split on the Section 2 vote denial test.

Contrary to both Petitioners' assertions, there is no circuit split for this Court to resolve or clarify. The Ninth Circuit's test in this case mirrors the Section 2 vote denial tests applied by the Fourth, Fifth, Sixth, and Seventh Circuits.[3]

The Brnovich Petitioners' and Republicans' divergent characterizations of the purported split underscore the hollowness of their claims. The Brnovich Petitioners assert that the Ninth Circuit's decision is at odds with all other Circuits. Brnovich Pet. 32. In contrast, the Republicans assert that the Ninth Circuit's decision aligns it with the Fifth Circuit, and clashes with the Fourth, Sixth, and

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[3] The Seventh Circuit's decision this week in *Luft v. Evers* confirms that it continues to apply the standard it articulated in *Frank*. No. 16-3003, 2020 WL 3496860, at *4 (7th Cir. June 29, 2020). While the *Luft* panel asserts its test diverges from the Fourth and Sixth Circuits' test, *id.*, it does not clearly explain how, and any purported difference appears to be semantic. The *Luft* court, like the other circuits, states that "Section 2(b) provides the standard for interpreting § 2(a)'s 'denial or abridgement' result." *Id.* Its only elaboration is to quote Section 2(b): "Section 2(a) is violated only when, under the totality of the circumstances, the election system is 'not equally open to participation' by members of a protected class so that group's members have 'less opportunity than other members of the electorate to participate.'" *Id.* (quoting Section 2(b)). Of course, the test used by all the other circuits, as noted below, also quotes from Section 2(b). If the Seventh Circuit meant to announce a vote denial test that differs *substantively* from other circuits, *Luft* provides a cryptic message, and this case is not the proper vehicle to address any potential error that may lay there.

Seventh Circuits. Reps. Pet. 15. Neither characterization is correct and reveals that the purported split is a product of Petitioners' spin, not the actual decisions themselves.

The Brnovich Petitioners falsely assert that the Ninth Circuit created a circuit split with all of its sister Circuits because it held that a statistical disparity alone—as long as it is more than de minimis—was sufficient to demonstrate a discriminatory burden under Section 2. Brnovich Pet. 27-32. But this is not and has never been the test adopted by the Ninth Circuit. *Salt River*, 109 F.3d at 595) (standing alone "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the Section 2 'results' inquiry."). In *Gonzalez v. Arizona*, the Ninth Circuit en banc reaffirmed this principle and rejected a Section 2 challenge to Arizona's voter ID requirement, stating that "a Section 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged qualification causes that disparity, will be rejected." 677 F.3d 383, 405 (9th Cir. 2012) (quoting *Salt River*, 109 F.3d at 595).

In this case, the Ninth Circuit again rejected the proposition that a "bare statistical showing" of a disparate impact was sufficient to establish a Section 2 violation. App. 38. Instead, it "engag[ed] in a two-step process" that all other circuits to evaluate a vote denial claim have also followed. App. 37. (citing *Veasey*, 830 F.3d at 244-24; *LWV*, 769 F.3d at 240; *Ohio State Conference of NAACP v. Husted*, 768 F.3d

524, 554 (6th Cir. 2014); *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014)). The disparate effects of Arizona's OOP Policy and HB2023 on minority voters is relevant to part one of the two-part test. *See* App. 42-47, 84-87. But the court did not stop there, i.e., find a statistical disparity and declare liability as Petitioners erroneously contend. Rather, the Ninth Circuit asked at step two "whether, under the 'totality of the circumstances' there is a relationship between the challenged 'standard, practice, or procedure,' on the one hand, and 'social and historical conditions' on the other," which "cause[s] an inequality in the opportunities enjoyed by [minority] and white voters to . . . participate in the political process." App. 38 (quoting *Gingles*, 478 U.S. at 47; 52 U.S.C. 10301(b)). Thus, the entire premise of the Brnovich Petitioners' argument—the basis for their claim that the Ninth Circuit created a circuit split—is wrong.

The Ninth Circuit's two-step framework is the same test applied by every other circuit to consider vote denial claims at least since *Shelby County*. *See*, *e.g.*, *Husted*, 768 F.3d at 554; *Veasey*, 830 F.3d at 244; *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-638 (6th Cir. 2016); *Frank,* 768 F.3d at 754; *LWV,* 769 F.3d at 237-38, 240. As these cases confirm, no circuit has adopted a test that finds liability based on a statistical disparity alone, and all of them apply the same two-part test.

In contrast to the split claimed by the Brnovich Petitioners, the Republicans claim that the Ninth and Fifth Circuits have improperly equated racially

disparate participation rates with discriminatory results. Reps. Pet. 15. This too is false. The Republicans attempt to draw a line based on whether a circuit requires that the challenged practice deprives minority voters of an equal opportunity to participate. Reps. Pet. 15-20. But even if the Republicans' formulation were the correct standard, there is no split on this point among the circuits. The Fifth Circuit in *Veasey* cited extensive record evidence of burdens on minority voters' opportunity to participate as a direct and specific result of Texas's ID requirement. *Veasey*, 830 F.3d at 254-56. The Ninth Circuit did the same below, finding that, for example, minority voters, as a result of on-going effects of Arizona's history of discrimination, were disproportionately likely to encounter the key causes of OOP voting, including polling location changes, polling location placement, and residential instability. App. 14-21. These findings, combined with the Senate Factors, demonstrated that minority voters had less opportunity to avoid being disenfranchised by the OOP policy than white voters. The Republicans, desperate to identify a circuit split, simply ignore the Fifth and Ninth Circuits' context-specific, fact-bound reasoning, and incorrectly assert that the courts' rulings were driven by a statistical disparity alone. *See, e.g.*, Reps. Pet. 19. But the Republicans' disagreement with the Ninth Circuit's application of the well-established two-part test to the particular facts of this case does not warrant this Court's review.

And, as demonstrated by the varied outcomes for plaintiffs in these cases, far from imposing a "minority maximization standard," the two-part test imposes

precisely the type of careful, localized analysis that this Court has required since *Gingles* and that has been a part of the Section 2 analysis even before then. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 769-70 (1973) (discussing "intensely local appraisal" under Section 2); S. Rep. 97-417, 30, 1982 U.S.C.C.A.N. 177, 208 (discussing "searching practical evaluation"). Accordingly, there is no circuit split and no reason for certiorari review.

It is only because of the false premise that the Ninth Circuit employed a "minority maximization" test that Petitioners can hyperbolically assert that the "Ninth Circuit's [Section 2] holding would invalidate over three dozen election laws across the country," Reps. Pet. 22; *see also* Brnovich Pet. 21-23, and would "exceed Congress's power to enforce the Fifteenth Amendment," Reps. Pet. 32, by threatening neutral "time, place, and manner regulations." Reps. Pet. 27. But these arguments not only misrepresent the Ninth Circuit's holding, as discussed above, they gravely misunderstand the purpose and reach of Section 2 as well as the actual outcomes of cases decided under the two-part vote denial test.

The VRA—including Section 2—was enacted for the purpose of "eradicat[ing] color discrimination affecting the right to vote." Voting Rights: Hearing Before Subcomm. No. 5 of the House Judiciary Comm. on H.R. 6400, 89 Cong. 13 (1965) (Statement of the Hon. Nicholas Katzenbach, Atty. Gen. of the U.S.). Congress reaffirmed this in 1982 when it codified the Section 2 results test in the wake of *City of Mobile v. Bolden*, 446 U.S. 55 (1980), providing that "Section 2

would ban any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color." S. Rep. 97-417, 17, 1982 U.S.C.C.A.N. 177, 194 (quotation marks omitted). Not limited to vote dilution cases, the Senate Report stated that Section 2 is "the major statutory prohibition of all voting rights discrimination." *Id.* at 30, 207. This Court has recognized and affirmed the VRA's broad purpose numerous times, explaining that "[t]he [VRA] was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969); *see also Shelby County*, 570 U.S. at 536-37.

Thus, Section 2 was intended to be used to evaluate any voting regulation placing a discriminatory burden on minority voters that "results in a denial or abridgement of the right" to vote, such that they "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. This extends to so-called "time, place, and manner" regulations that have a discriminatory impact. The VRA's definition of voting makes clear that there is no safe harbor to discriminate by labeling restrictions that way: voting includes "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." *Id.* § 10101.

But rather than invalidating all election laws in the mythical one-way ratchet that Petitioners claim results from the vote denial test, the unique combinations of the challenged laws and the totality of the circumstances in which they each operate dictate liability. *Compare, e.g.*, *Lee*, 843 F.3d at 601 (finding that Virginia's voter ID law does not violate Section 2 because all voters have an equal opportunity to receive a free ID), *with LWV*, 769 F.3d at 239 (finding that North Carolina's elimination of same day registration and OOP voting violate Section 2 because voters' access to registration is unequal).[4]

Finally, the Republicans take issue with the Ninth Circuit's application of the Senate Factors, wrongly asserting that the Ninth Circuit's application of them was inappropriate because this is a vote denial, not vote-dilution case. *Id.* at 32. As explained, Section 2's results test was intended to apply to all manner of election challenges and the Senate Factors have long provided valuable guidance for a searching, practical, localized analysis, no matter what type of claim is at issue. *See supra* at 32.

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[4] When Congress codified the Section 2 results test, opponents made the same argument Petitioners make here. As Senator Mathias explained in the Senate Report, "the proposed results test was developed by the Supreme Court and followed in nearly two dozen cases by the lower federal courts. . . . It is not an easy test." S. Rep. 97-417, 31, 1982 U.S.C.C.A.N. 177, 209. In fact, of 23 reported cases applying the results test prior to *City of Mobile v. Bolden*, defendants won in 13 cases and prevailed in part in 2 others. *Id.* at 211.

## II. THE NINTH CIRCUIT'S DISCRIMINATORY PURPOSE HOLDING DOES NOT WARRANT REVIEW

Petitioners erroneously contend that the Ninth Circuit's discriminatory intent holding departed from this Court's precedents. Here again, Petitioners mischaracterize the Ninth Circuit's legal and factual analysis to manufacture a certiorari-worthy issue.

The Ninth Circuit faithfully applied the *Arlington Heights* analysis to the factual findings made by the district court, and rendered a narrow decision grounded in the unique facts of this case. While Petitioners may disagree with the Ninth Circuit's reasoning, their petition represents nothing more than an inappropriate request for this Court to review the Ninth Circuit's perceived errors in this case, and this case only. *See Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, C.J., dissenting) (citing address by former Chief Justice Vinson) ("To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved[.]").

For example, Petitioners erroneously assert that the Ninth Circuit adopted a categorical rule that if a legislature justifies a voting restriction based on fraud prevention, that justification is pretextual whenever there is no evidence of voter fraud in the legislative record. Reps. Pet. 34; Brnovich Pet. 25. But the Ninth Circuit adopted no such categorical rule. The Ninth

Circuit's fact-bound holding was nearly the opposite of Petitioners' caricature.

As instructed by *Arlington Heights*, the Ninth Circuit reviewed, among other things, the historical background, sequence of events, and legislative history of HB2023, and its impact on particular racial groups. App. 96-105. In its discussion, it evaluated proponents' stated justifications for HB2023 for any direct and circumstantial evidence that discriminatory purpose was "a motivating factor." App. 101-03; *Arlington Heights*, 429 U.S. at 265-66. Comparing public justifications offered by members of a decision-making body with the record before the body is an ordinary method of evaluating circumstantial evidence of officials' motivation for taking official action. *See Arlington Heights*, 429 U.S. at 267-68 (finding highly relevant "statements by members of the decision-making body, minutes of its meetings, or reports"; finding relevant testimony by decisionmakers "concerning the purpose of the official action").

The utter absence of *any* evidence of ballot collection-related fraud in the history of Arizona is certainly probative circumstantial evidence regarding legislators' motivations for a law purportedly enacted to prevent ballot collection fraud. But the Ninth Circuit's analysis did not end there, as Petitioners incorrectly suggest. Rather, as the en banc court pointed out, the district court identified the two particular sources of racially discriminatory "evidence" that convinced legislators that ballot collection was a problem. App. 30-32, 100-02. The first

was the widely disseminated, frequently-cited LaFaro video created by proponents of ballot collection restrictions that falsely accused a Hispanic get-out-the-vote volunteer of being a "thug" engaged in "stuff[ing] the ballot box," and which the *district court* described as "racially charged" and which the *district court* and Ninth Circuit agreed constituted a racial appeal to obtain restrictions on ballot collection. App. 30-32, 76, 90, 101; App. 491-92. The second was the "unfounded" "far-fetched" and "demonstrably false" allegations about ballot collection fraud offered by the bill's lead sponsor, Senator Shooter, who the *district court* found was motivated to pass the bill in part due to "the high degree of racial polarization in his district" and a "desire to eliminate" the increasingly effective ballot collection efforts among Hispanic voters in his district, who had overwhelmingly supported his opponents in increasingly close reelection bids. App. 26-27, 30, 88-90, 100-02; App. 497-99.

Put in its proper context, the Ninth Circuit's reliance on the fact that there was no evidence of ballot collection fraud before the legislature is inextricable from its broader reliance on the district court's related finding: that the only evidence that *did* inform legislators' views were "unfounded," "demonstrably false," and "racially charged" allegations about Hispanic voters' use of ballot collection. And this was only one component of the Ninth Circuit's holding regarding evidence of discriminatory intent, which also included the historical background and procedural deviations leading up to the passage of HB2023, as well as HB2023's disparate impact on minority voters. App.

99-105. This highly case-specific reasoning is far from the purported categorical rule that Petitioners concoct. Because the Ninth Circuit explicitly relied on the specific—and hopefully anomalous—legislative history of HB2023, its reasoning would not extend to other factual circumstances—for example, a case in which the legislature has no direct evidence of fraud to justify a voting restriction, but relies upon evidence of fraud risks that is accurate and not "racially charged."

Petitioners similarly mischaracterize the Ninth Circuit's discussion of the "cat's paw" doctrine, incorrectly implying that the court used the doctrine to impute discriminatory intent to the entire legislature solely because one legislator was motivated by discriminatory intent. Reps. Pet. 36; Brnovich Pet. 24-25. This again misstates the Ninth Circuit's fact-bound reasoning, which expressly relied upon the district court's factual finding that Senator Shooter's demonstrably false allegations, as well as the "racially charged" video, were "successful in convincing" *other* legislators that ballot collection was a problem that needed to be solved. App. 499. Indeed, legislators referenced the video during legislative debates, and another key proponent of HB2023, then-Senator Michelle Reagan, even incorporated the video into a television ad in support of her campaign for Secretary of State. App. 492, 498. Under these specific factual circumstances, the Ninth Circuit's analogy to the "cat's paw" doctrine was apt: the district court found that other legislators' reasoning for passing the bill was, as a factual matter, heavily influenced by demonstrably false and racially motivated allegations

advanced by certain proponents of the bill. This tainted the process. While some legislators may have been motivated in part by a sincere belief that ballot collection was a problem, that motivation resulted from their uncritical reliance upon "far-fetched" and "demonstrably false" allegations and explicit racial appeals, demonstrating that discriminatory purpose was a motivating factor in the passage of the bill. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-30 (2018) (failure of members of adjudicatory body to object to discriminatory statements by other members cast doubt on fairness of hearing).

Petitioners' argument that the Ninth Circuit improperly conflated partisan and racial motivation again mischaracterizes the district court's findings and the Ninth Circuit's reasoning. The Republicans quote part of a sentence in the district court's opinion, which states that Senator "Shooter was in part motivated by a desire to eliminate what had become an effective Democratic [GOTV] strategy[.]" App. 374. But the first clause of the cited sentence, and the sentence that follows—which the Republicans omit—demonstrates the opposite: Shooter targeted ballot collection *because* Hispanic voters, who opposed his candidacy, relied upon it: "*Due to the high degree of racial polarization in his district*, Shooter was in part motivated by a desire to eliminate what had become an effective Democratic GOTV strategy. Indeed, Shooter's 2010 election was close: he won with 53 percent of the total vote, receiving 83 percent of the non-minority vote but only 20 percent of the Hispanic vote." App. 498 (citations omitted) (emphasis added).

*See Cooper v. Harris*, 137 S. Ct. 1455, 1473 n. 7 (2017) (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995)) ("[T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."). And in advancing their argument that partisanship alone motivated the passage of the law, Petitioners simply gloss over—as they must—the district court's finding that an explicit racial appeal featured prominently in the legislative debate over HB2023, was disseminated at local partisan functions and incorporated into partisan campaign ads. App. 491, 498. Petitioners' caricature of HB2023—that it was simply a law whose passage was motivated exclusively by partisan motivations that happened to have a racially disparate impact—is not borne out in the facts of this case.

Petitioners' suggestion that the Ninth Circuit's reasoning runs afoul of this Court's decision in *Crawford v. Marion Cnty. Election Bd.* is similarly unsupported. Reps. Pet. 35; Brnovich Pet. 25. Again, the Ninth Circuit imposed no per se rule, as Petitioners contend, that evidence of voter fraud is necessary to enact prophylactic anti-fraud measures. Moreover, *Crawford*—which concerned an *Anderson-Burdick* claim and did not involve a discriminatory purpose claim at all—is not controlling here, nor does the Ninth Circuit's holding purport to govern claims brought under the *Anderson-Burdick* framework. And even if *Crawford* were somehow relevant, the Ninth Circuit's decision is consistent with *Crawford*'s caution against "applying any 'litmus test' that would neatly separate valid from invalid restrictions," 553

U.S. 181, 190 (2008). Petitioners' suggestion that Arizona could not, as a matter of law, have enacted a voting restriction motivated in part by a discriminatory purpose because it has an interest in prophylactic anti-fraud measures, or because the law resembles recommendations set out in a 15-year-old commission report, constitutes precisely the kind of litmus test that *Crawford* criticizes.

Petitioners' argument that the Ninth Circuit disregarded the proper standard of review is also baseless. Brnovich Pet. 26. The en banc court unambiguously applied clear error review to the district court's holding regarding whether discriminatory intent was a motivating factor in the adoption of HB2023. App. 104. Its holding was narrow: it did not reverse the district court's findings regarding witnesses' credibility, and it accepted almost every one of district court's factual findings and inferences. Rather, the Ninth Circuit determined that the district court's own findings were incompatible with its conclusion that race was not a motivating factor in HB2023's adoption. App. 104-04. To be sure, Petitioners and the dissenting members of the panel disagree. But Petitioners' contention—that the specific factual findings *in this case* do not compel the conclusion that race was a motivating factor *in this case*—is nothing more than a request for this Court to grant certiorari solely to correct a perceived error limited to the facts of the present case. The Court should decline the invitation.

## III. THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW

Petitioners' representations that this case is a rare, proper vehicle for certiorari fail to acknowledge the elephant in the room: the Secretary of State of Arizona, the individual legally charged with implementing Arizona's election laws and procedures, opposes this appeal. Contrary to Petitioners' representations, Arizona is not speaking with one voice.

Arizona law indicates that "'the Attorney General is not the proper person to decide the course of action which should be pursued by another public officer." *Yes on Prop 200 v. Napolitano,* 160 P.3d 1216, 1225 (Ariz. Ct. App. 2007) (quoting *Santa Rita Mining Co. v. Dep't of Prop. Valuation*, 111 Ariz. 368, 370 (1975)).[5] As a result, the Attorney General cannot appeal a case against the wishes of the executive officer it represents. *Santa Rita Mining Co.*, 111 Ariz. at 371. This is because it is the executive officer who stands in the shoes of the State and embodies the State's interest. *See id.*

Secretary Hobbs is the chief elections officer of Arizona and, in this context has the power to determine whether the Ninth Circuit's decision on Arizona's election laws—particularly its OOP Policy—should be appealed. She has stated unequivocally that she will not pursue the appeal of

[5] This Court looks to state law when determining who can represent the State in federal court. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

Ninth Circuit's decision on Arizona's OOP Policy. Any grant of certiorari, therefore, will necessarily result in this Court wading deep into the middle of a state power struggle rooted in Arizona state law.

* * *

## CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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