No. 19-1258

IN THE

Supreme Court of the United States

ARIZONA REPUBLICAN PARTY, ET AL.

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

Respondents,

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This Court has never articulated a standard for vote-denial claims under § 2's results test. Filling the void, partisans have launched a barrage of lawsuits contending that routine, race-neutral "time, place, and manner" voting rules are unlawful if linked to marginally lower minority participation. This regime would compel whatever voting rules would maximize voting by minorities, which (due to racially polarized voting) would invite a flood of partisan litigation.

While most courts have resisted this effort to conscript them into partisan battles, the Ninth Circuit jumped headlong into the fray. The en banc majority invalidated two routine rules because they precluded voting in ways statistically favored by minorities. The decision obviously warrants review. It overturned voting laws in a critical swing state, on grounds that directly jeopardize countless other laws nationwide and inject judges into election minutiae. And it did so by construing § 2 differently than at least four other Circuits, contrary to its text, in a way that raises serious constitutional problems.

"Nothing to see here," Respondents insist—just the same two-part test all Circuits apply. That cannot withstand scrutiny. The Seventh Circuit made clear just last month that it does not endorse this "two-part test." That circuit, plus the Fourth, Sixth, and (now) Eleventh, also reject the notion that statistical disparities in voting show a "disparate burden" implicating the statute. Only if the political process is "not equally open," and thus affords minorities "less opportunity ... to participate," 52 U.S.C. § 10301(b), can courts step in. Ordinary "time, place, and manner" rules cause no such disparity in *opportunities*, even if minorities *take less advantage*

of those opportunities to vote. Holding otherwise, the court below deepened a conflict and misread § 2.

Because the decision below so plainly warrants review, Respondents invent "vehicle problems." They attack Republican Petitioners' standing, even though the DNC's own standing as plaintiff-appellant was based on the Arizona laws' injury to Democratic electoral prospects. By the same token, Republicans have standing to appeal a decision *invalidating* those laws and thereby impairing *Republican* prospects. Both this Court and lower courts have repeatedly endorsed standing by parties, voters, and candidates. Respondents' challenge to *Arizona*'s standing is thus irrelevant (beyond being meritless).

Respondents also argue that the Ninth Circuit's discriminatory-intent holding on H.B. 2023 makes this a bad vehicle. It does not. Section 2 was the only ground for invalidating Arizona's out-of-precinct policy, so there is no impediment to reaching the statutory question. Moreover, the intent holding independently warrants review, as it erroneously conflates *partisan* motives with *racial* ones, and bizarrely holds that one person's intent can be imputed under agency law to the entire legislature. Those errors, used to judicially veto a common-sense anti-fraud measure, threaten great mischief.

I. THE "VEHICLE PROBLEMS" ARE IMAGINED.

Seeking to evade review, Respondents call this case a "poor vehicle" because the Republican Petitioners supposedly lack standing, while Arizona ostensibly may appeal only the invalidation of H.B. 2023, which rested on an independent ground. (Hobbs.BIO.30-35.) This argument fails at every step.

A. The Republicans' standing is obvious and has never been disputed. It exactly mimics Respondents' own standing to bring this suit and appeal their loss. Respondents are Democratic Party entities; they had standing to challenge the out-of-precinct policy and H.B. 2023 because those rules precluded tools "used primarily by the Democratic Party" and thus injured "Plaintiffs' goal of electing Democratic candidates." Pet.App.321a-22a. So too, the decision below injures the goal of Petitioners—the Arizona Republican Party and four of its candidates and voters—of electing *Republicans*. (D.Ct. Dkts. 39 at 5, 56 at 3.) Since the premise of the decision below was that the challenged rules reduced minority participation in a state with "racially polarized" voting (Pet.App.69a, 81a-82a), it is impossible to deny the reciprocal harm to Republican electoral prospects caused by their invalidation. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-24 (1989) (intervenors had standing to appeal decision that harmed them).

Respondents object that the decision below did not "orde[r] [the Republicans] to do or refrain from doing anything." (Hobbs.BIO.31 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).) That is not the test. Standing requires only a concrete and particularized injury, *Hollingsworth*, 570 U.S. at 704, which a party can suffer without being ordered to act or not act. *E.g.*, *Meese v. Keene*, 481 U.S. 465, 473 (1987) (reputational injury to candidate); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (aesthetic injury); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (competitive injury); *Clinton v. City of N.Y.*, 524 U.S. 417, 432 (1998) (economic injury).

In voting cases, this Court has afforded standing to parties, candidates, and voters—Petitioners include all three—who suffer injury to electoral prospects. *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 189 n.7 (2008) ("Democrats have standing to challenge" voter-ID law); *Davis v. FEC*, 554 U.S. 724, 733-35 (2008) (standing for candidate challenging rule favoring his opponent); *Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (standing for voters claiming that apportionment "disfavor[ed]" them through vote "dilution"). And this is commonplace in the lower courts. Here, the court below carefully detailed how its holdings would boost Democratic turnout. Pet.App.321a. The Republicans plainly may appeal.

B. As the State explains, its standing is not limited to H.B. 2023. Because the Republicans have standing to appeal *both* holdings below, however, there is no need for this Court to "entangle itself in thorny questions over who speaks for Arizona." (DNC.BIO.3.) Only one party needs standing. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). And that party can be an intervenor. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

C. Respondents suggest that the Ninth Circuit's second ground for invalidating H.B. 2023 makes this case a poor vehicle for considering § 2. But that argument hinges on their false premise that no party has standing to challenge invalidation of the out-of-precinct rule—which rested exclusively on § 2. Since the Republicans (*and* the State) have standing to appeal the out-of-precinct holding, nothing precludes resolving the scope of § 2. And the rejection of H.B. 2023 on intent grounds is worthy of certiorari in its own right. *Infra* Part III.

II. THE STANDARD FOR § 2 VOTE-DENIAL CLAIMS DEMANDS THIS COURT'S ATTENTION.

A. On the core question presented—the standard for § 2 vote-denial "results" claims—Respondents deny the circuit split. They are wrong, but the issue's importance would warrant review anyway.

The Ninth Circuit invalidated two common laws. Many states decline to count out-of-precinct ballots; many forbid ballot harvesting. (Pet.22.) Even more significant is its *reasoning*. For socioeconomic reasons, voting rules often result in racially disparate participation rates. *Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014). To treat those disparities as implicating § 2 would "sweep[] away almost all registration and voting rules." *Id.* at 754. Yet the Ninth Circuit embraced that rule. If "disproportionate" use of a procedure by "minority voters" is enough to create a "disparate burden" under § 2 (Pet.App.82a), then the Act mandates any procedures that would increase minority voting. Every detail of election administration would become fair game for federal litigation. And every challenge would, conveniently, advantage the same party.

The DNC reassures that this "one-way ratchet is unlikely to transpire." (DNC.BIO.21.) Certainly not for lack of trying. (Pet.25 & n.2.) Over the last four months alone, Democrats and aligned groups have filed at least nine new § 2 complaints challenging rules on registration, voting by mail, early voting, ballot harvesting, etc.[1]

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[1] *Conn. State Conf. of NAACP Branches v. Merrill*, No. 20-cv-909 (D. Conn.); *Clark v. Edwards*, No. 3:20-cv-308 (M.D. La.);

Respondents' only limiting principle is "step 2 of the test"; a disparate burden does not "automatically" mean liability. (DNC.BIO.10.) But the first step—identification of a disparate burden—is a "near-perfect" predictor of result. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1592 (2019). We are unaware of any case dismissing a vote-denial challenge under step 2 after finding a step-1 burden.

That is not surprising, since the "second step" is a "totality of the circumstances" inquiry involving nine factors that are "neither comprehensive nor exclusive"; no particular factor or number of factors need be satisfied. Pet.App.37a-39a. Devised for vote-*dilution* cases, these factors are a grab-bag of inapt grievances, ripe for outcome-oriented picking. Below, the Ninth Circuit invoked, among other things:

- Arizona's mistreating Indians in territorial times (Pet.App.49a);
- a literacy test repealed fifty years ago (Pet.App.53a);
- racial disparities in "employment, home ownership, and health" (Pet.App.70a);

(continued…)

People First of Ala. v. Merrill, No. 2:20-cv-619 (N.D. Ala.); *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C.); *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C.); *Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla.). *League of Women Voters v. Va. State Bd. of Elections*, No. 6:20-cv-24 (W.D. Va.); *Edwards v. Vos*, No. 3:20-cv-340 (W.D. Wis.); *Tex. Democratic Party v. Abbott*, No. 5:20-cv-438 (W.D. Tex.).

- that minorities "hold [only] 25 percent" of elected offices (Pet.App.75a);
- the "underfund[ing]" of Arizona's "public schools" and lack of robust "health insurance coverage for children" (Pet.App.76a); and
- disparities in *registration* (Pet.App.67a), even though the policies at issue affect only registered voters.

The irrelevance and manipulability of this "second step" confirms the need for this Court to clarify the first step. It would make no sense, and be at war with § 2's language, if liability turned on one judge's assessment of this inapposite checklist.

B. The circuits are also divided. Respondents call the conflict "illusory," claiming all courts apply the "well-established two-part inquiry." (Hobbs.BIO.17; DNC.BIO.29.) Not so.

The Seventh Circuit just reiterated that it views this "two-part test" with "skepticism, not approval." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). And its analysis makes clear this is no "semantic" debate. (DNC.BIO.26 n.3.) In accord with the statutory text, *Luft* held that the "baseline" for a § 2 results claim is "opportunity to participate"; the Act thus imposes an "equal-treatment requirement, not an equal-outcome command." *Id.* Plaintiffs argued that Wisconsin's voting rules, while not reducing "their (legal) opportunity to participate," did "reduce the likelihood that they will use the opportunities." *Id.* at 672-73. Judge Easterbrook was blunt: "this does not establish a violation," as § 2 is not "an anti-retrogression rule" and does not "forbi[d] any change ... that makes voting harder for any identifiable group." *Id.*

That approach conflicts with the decision below, which did not look for (let alone find) any disparity in *opportunity* to vote in Arizona; it identified "disparate burdens" solely because (i) the out-of-precinct policy "result[ed] in ... a substantially higher percentage of minority votes than white votes [being] discarded"; and (ii) ballot-harvesting was used to collect a "disproportionate number of early ballots from minority voters." Pet.App.46a, 82a. Liability thus hinged on the reduced "likelihood" that minorities would "use the opportunities they possess," not a gap in "opportunity to participate." *Luft*, 963 F.3d at 672-73.

The decision below also conflicts, in the same way, with the Fourth and Sixth Circuits. Respondents say those Circuits ask—like the Ninth—whether the rule causes a "disparate burden" or "disparate impact." (Hobbs.BIO.17-18.) But the similar language masks "important nuances" about the meaning of "disparity" and "impact." Pet.App.373a.

In the Ninth Circuit, a *statistical disparity* that is causally connected to a voting practice establishes a "disparate burden." *See* Pet.App.46a (plaintiffs "need only show that the result of entirely discarding [out-of-precinct] ballots has an adverse disparate impact"). But the Sixth Circuit requires "an adverse disparate impact on protected class members' opportunity to participate in the political process." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016). That is why, despite evidence that African-American voters "have shown a preference for voting early ... at a rate higher than other voters," the court found that reducing early voting imposed no "cognizable" burden. *Id.* at 627, 639. The same is true of the

Fourth Circuit: It asks whether a voting rule imposes a "disparate burden that has the effect of denying [minorities] an *equal opportunity* to vote." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 599 (4th Cir. 2016) (emphasis added). Accordingly, even if a "lower percentage of minorities have qualifying photo IDs," leading to a "disparity in the convenience of voting," that "does not violate § 2," as everyone has "an equal opportunity to participate." *Id.* at 600-01. Since every voter "ha[d] the full *ability* to vote," it did not matter if fewer minorities *did* vote. (Hobbs.BIO.22 (quoting *Lee*, 843 F.3d at 600) (emphasis added).)

The Eleventh Circuit deepened the split last week by upholding Alabama's voter-ID law. *Greater Birmingham Ministries v. Alabama*, --- F.3d ---, 2020 WL 4185801 (11th Cir. July 21, 2020). Even though fewer minorities than whites had "compliant IDs," this did not establish a disparate burden, as it did not show that minorities had less *opportunity* to obtain ID and vote. *Id.* at *22. The majority followed the Fourth Circuit, "refus[ing] to make the 'unjustified leap from the *disparate inconveniences* that voters face when voting to the *denial or abridgement of the right to vote*.'" *Id.* (quoting *Lee*, 843 F.3d at 600-01). And the court tacitly acknowledged a circuit conflict by aligning itself with the "*dissent* from the Fifth Circuit's holding in *Veasey*." *Id.* (emphasis added).

In short, the Ninth Circuit treats disparate rates of *utilization* as a "disparate burden" cognizable under § 2, whereas the Fourth, Sixth, Seventh, and now Eleventh Circuits look to disparate *opportunities*. And that major difference controls whether neutral "time, place, and manner" regulations that impose only the ordinary burdens of voting run afoul of § 2.

Contrary to Respondents' misdirection, the issue is *not* whether a disparity needs to be causally linked to the challenged practice. (Hobbs.BIO.17-20.) Plainly it must; a disparity in the air proves nothing. The disputed question is: a disparity *in what*? The Ninth Circuit says *outcomes*; the others say *opportunity*. This Court should resolve that fundamental conflict.

C. The Ninth Circuit approach is wrong, as it ignores the statutory directive that a voter is denied the right to vote "on account of race" only if the process is "not equally open," in that minorities "have less opportunity ... to participate." 52 U.S.C. § 10301. Lower minority voting rates do not mean the political process is not "equally open." The critical question is whether the voting system provides the same legal "opportunity," not whether socioeconomic factors beyond election officials' control make it less convenient for minorities to participate in the equal-access regime. If the usual burdens of voting make voting less convenient for some racial groups, § 2 does not require the state to equalize. Disparate *participation* does not equal disparate *opportunity*.[2]

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[2] Respondents cite Justice Scalia's hypothetical of limiting registration to "three hours one day a week." *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting). If that draconian rule had the effect of "ma[king] it more difficult for blacks to register than whites," it could be said to deny blacks the right to vote based on race. *Id.* (Pet.27-28.) But this simply recognizes that when a state imposes *more* than the "usual burdens of voting," it effectively denies the right to vote for those who cannot overcome such extraordinary burdens. *Crawford*, 553 U.S. at 198. Likewise, poll taxes and literacy tests (DNC BIO.24 n.2) literally *deny* the right to vote, rather than merely specify the *where*, *when*, and *how*.

Yet that equation is all that supported the holdings below. On out-of-precinct voting, the majority found simply that minorities are "over-represented among OOP voters." Pet.App.41a-42a. To disguise this reliance on outcome statistics, Respondents suggest that polling places for minorities were located further away and moved more frequently. (Hobbs.BIO.28; DNC.BIO.23.) But that does not appear *anywhere* in the Ninth Circuit's analysis. Pet.App.41a-46a. And Respondents cite no district court fact-finding to that effect. In fact, the district court noted that plaintiffs "do not challenge ... the manner in which Arizona and its counties allocate or relocate polling places." Pet.App.358a. As to H.B. 2023, Respondents do not try to hide the Ninth Circuit's sole premise: "many minority voters relied on third-party ballot collection, while white voters did not." (Hobbs.BIO.28.) That does not establish disparate *opportunity*.

Respondents also defend the court's "second step" analysis as compelled by *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Gingles*, concerning vote-*dilution*, is "of little use in vote denial cases." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 709 (2006). The Eleventh Circuit recognized as much last week, explaining that the *Gingles* Senate Report factors "cannot" sensibly "apply" in "vote denial" cases. *Greater Birmingham*, 2020 WL 4185801, at *24. As noted, this "second step" led below to consideration of irrelevant, readily manipulable factors—only underscoring the need for review.

III. THIS COURT SHOULD ALSO REVIEW THE NINTH CIRCUIT'S DISCRIMINATORY-INTENT THEORY.

The invalidation of H.B. 2023 on discriminatory-intent grounds also warrants review. The majority overturned a "common sense" measure, enacted for "non-race-based" reasons, using an unprecedented application of the "cat's paw" doctrine to attribute racial motives. (Pet.App.91a, 98a-99a.) Undisturbed, this reasoning will haunt the law.

Respondents say the court got it right because the bill would not have passed without one ill-motivated senator and a "racially tinged" video. (DNC.BIO.18.) But even if the senator was racially motivated (the district court accused him of "partisan motives," Pet.App.404a, which are distinct from *racial* ones), and even if a video of a "man of apparent Hispanic heritage ... dropping off ballots" is somehow suspicious (the court never said why), it does not follow that the bill is intentionally discriminatory. The senator and video supposedly "spurred a larger debate" about fraud. Pet.App.406a. Maybe that creates but-for causation, but the *proximate* cause of H.B. 2023's passage was the "sincere," well-founded "belief that ballot collection increased the risk of early voting fraud." Pet.App.405a. Striking a law on this skimpy basis is wrong, dangerous, and conflicts with other courts. *Greater Birmingham*, 2020 WL 4185801, at *17 (declining to impute discriminatory intent based on "only one vote of the 105 votes").

JULY 2020

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