No. ____

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. MCCONNELL
STEFFEN N. JOHNSON
WILSON SONSINI GOODRICH & ROSATI, PC
1700 K Street, N.W.
Washington, D.C. 20006
(202) 973-8800

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff
BRUNN W. ROYSDEN III
Division Chief
OFFICE OF THE ARIZONA ATTORNEY GENERAL

MARK BRNOVICH
Attorney General

ORAMEL H. (O.H.) SKINNER
Solicitor General
Counsel of Record
RUSTY D. CRANDELL
Deputy Solicitor General
KATE B. SAWYER
Assistant Solicitor General
JENNIFER J. WRIGHT
KATLYN J. DIVIS
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
o.h.skinner@azag.gov

Counsel for Petitioners

QUESTIONS PRESENTED

Arizona, like every other State, has adopted rules to promote the order and integrity of its elections. At issue here are two such provisions: an "out-of-precinct policy," which does not count provisional ballots cast in person on Election Day outside of the voter's designated precinct, and a "ballot-collection law," known as H.B. 2023, which permits only certain persons (*i.e.,* family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot. A majority of States require in-precinct voting, and about twenty States limit ballot collection.

After a ten-day trial, the district court upheld these provisions against claims under Section 2 of the Voting Rights Act and the Fifteenth Amendment. A Ninth Circuit panel affirmed. At the en banc stage, however, the Ninth Circuit reversed—against the urging of the United States and over two vigorous dissents joined by four judges.

The questions presented are:

1. Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act?

2. Does Arizona's ballot-collection law violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners are Mark Brnovich, in his official capacity as Arizona Attorney General, and the State of Arizona.

Respondents are The Democratic National Committee; DSCC, aka Democratic Senatorial Campaign Committee; The Arizona Democratic Party; The Arizona Republican Party; Bill Gates; Suzanne Klapp; Debbie Lesko; Tony Rivero; and Katie Hobbs, in her official capacity as Secretary of State of Arizona.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (D. Ariz.):

Feldman, et al., v. Arizona Secretary of State's Office, *et al.,* No. 16-cv-01065 (May 8, 2018) (judgment entered)

United States Court of Appeals (9th Cir.):

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

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

DNC, et al., v. Hobbs, *et al.,* No. 18-15845 (January 27, 2020) (judgment entered)

Supreme Court of the United States:

Arizona Secretary of State's Office, et al., v. Feldman, *et al.,* No. 16A460 (November 5, 2016) (judgment entered)

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

JURISDICTION

The court of appeals' judgment was entered on January 27, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions (U.S. Const. amend. XV; 52 U.S.C. § 10301 (2018); and Ariz. Rev. Stat. Ann. (A.R.S.) §§ 16-122, 16-135, 16-452, 16-584, and 16-1005(H), (I) (West 2015 & Supp. 2019)) are reproduced in the appendix to this petition (App. 541-549).[1]

[1] All statutes quoted in the appendix are current versions. A.R.S. §§ 16-584 and 16-452 are the only statutes that have changed since this lawsuit was initiated, and the changes are not material to the questions presented here.

INTRODUCTION

The Ninth Circuit's closely divided en banc decision raises questions of exceptional importance to American elections. Over the dissent of four judges, the majority invalidated two commonplace election administration provisions used by Arizona and dozens of other States to prevent multiple voting, protect against voter intimidation, preserve the secrecy of the ballot, and safeguard election integrity.

Arizona's out-of-precinct policy, which does not count ballots cast in person on Election Day outside voters' assigned precincts, is important to the State's precinct-based election-day voting system, which the DNC and the court below called legitimate and "importan[t]." App. 80. Arizona's ballot-collection law follows the recommendation of the bipartisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker ("Carter–Baker Commission"), that "[States] prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials."

Section 2 vote-denial cases such as this one, which challenge election provisions on the basis of small statistical disparities in voting behavior between minority and non-minority voters, have proliferated since *Shelby County*. This Court has never applied Section 2's results language to a vote-denial claim, and thus has never articulated the test that governs such claims. Lacking this Court's guidance, the circuits have divided over how to identify a "discriminatory burden on members of a protected class" for purposes of Section 2. The court below focused nar-

rowly on the disparate impact of the challenged provisions, while others, including recent Fourth, Fifth, Sixth, and Seventh Circuit decisions, look at the totality of the voting system to determine whether minority voters have an "equal opportunity" to vote.

This case provides an excellent vehicle to bring clarity to the law. Unlike many prior cases, this case comes to the Court with a full record developed in a ten-day merits trial. And unlike other important cases that failed to reach this Court because the rulings below created insurmountable pressure to amend the law or a new administration abandoned its defense, Arizona and its chief legal officer remain committed to actively defending the provisions here, which remain materially unchanged. Moreover, the Ninth Circuit's en banc reversal of the district court—and its break from the approach of other circuits—turns on a disagreement about the requirements of Section 2 and the Constitution, not on the facts. Analysis of the issues is sharpened by a panel opinion and two forceful en banc dissents. The laws at issue are commonplace. And the Ninth Circuit stayed its mandate.

In sum, the legal questions at stake are immensely important to American democracy, the lower courts urgently need guidance, and this case presents a superb vehicle to establish a clear rule of law. As the United States stated below, "[t]his case presents important questions regarding the standards for liability under Section 2 of the Voting Rights Act" where "voting practices [are] alleged to result in unequal access to the ballot box for minority voters[.]" App. 551.

Certiorari should thus be granted.

STATEMENT

A. Arizona's voter-friendly electoral system

Arizona ensures that all citizens have an equal opportunity to vote by offering online voter registration and "a flexible mixture of early in-person voting, early voting by mail, and traditional, in-person voting at polling places on Election Day." App. 406.

Early voting is "the most popular method of voting" in Arizona, "accounting for approximately 80 percent of all ballots cast in the 2016 election." App. 406. Arizona allows all voters to vote an early ballot for any reason, and these ballots may be requested on an election-by-election basis or by signing up for the Permanent Early Voter List. App. 406. For the 27 days before Election Day, Arizona voters can vote an in-person early ballot at any early voting center, or may return a completed early ballot in three ways: by postage-free mail; by hand-delivery to any early voting center or other authorized election official's office; and, in some counties, by depositing them in special drop boxes. App. 406-407. Arizonans also can vote in-person on Election Day or hand-deliver a completed early ballot on Election Day to any polling place. App. 406-407.

B. Section 2 of the Voting Rights Act

Forty years ago, this Court held that Section 2(a) of the Voting Rights Act of 1965, as originally enacted, "add[ed] nothing to" the protections of the Fifteenth Amendment, and thus was not violated absent intentional discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980). Congress responded by revising Section 2(a) to adopt language prohibiting the States from adopting voting qualifications, standards, or practices that "result[]" in "denial or abridgement" of

the right to vote "on account of race or color." 52 U.S.C. § 10301(a).

To establish a violation of amended Section 2, the plaintiff must prove, "based on the totality of circumstances," that the State's "political processes" are "not equally open to participation by members" of a protected class, "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." § 10301(b). That is the "result" that amended Section 2 prohibits: "less *opportunity* than other members of the electorate," viewing the State's "political processes" as a whole. The new language was crafted as a compromise designed to eliminate the need for direct evidence of discriminatory intent, which is often difficult to obtain, but without embracing an unqualified "disparate impact" test that would invalidate many legitimate voting procedures. S. REP. NO. 97–417, at 28-29, 31-32, 99 (1982).

This Court has not articulated a test to govern vote-denial claims under amended Section 2. Not surprisingly, the circuit courts have diverged. *See* Section II.

C. The DNC's challenge to Arizona's third-party ballot collection and out-of-precinct voting rules

Several arms of the Democratic Party (together, the "DNC") filed suit in 2016 to challenge the out-of-precinct policy and the ballot-collection law. They alleged that these laws violate Section 2 "by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American Arizonans" and violate the First and Four-

teenth Amendments "by severely and unjustifiably burdening voting and associational rights." App. 390. The DNC further alleged that the ballot-collection law violates Section 2 and the Fifteenth Amendment "because it was enacted with the intent to suppress voting by Hispanic and Native American voters." App. 390.

1. Arizona's out-of-precinct policy

Arizona's longstanding out-of-precinct policy is part of the State's precinct-based voting system. App. 408-409. "Since at least 1970," as in most other States, Arizona voters in counties with precinct-based polling locations "who choose to vote in person on Election Day" must "cast their ballots in their assigned precinct," as part of a precinct-based system that is implemented "by counting only those ballots cast in the correct precinct." App. 408-409. In these counties, a voter who "arrives at a precinct but does not appear on the precinct register" is directed to the correct precinct but also may "cast a provisional ballot." App. 409, 452. If her "address is [later] determined to be within the precinct, the provisional ballot is counted." App. 409. If not, the ballot is not counted. App. 409. The out-of-precinct policy is based on several Arizona statutes, A.R.S. §§ 16-122, 16-135, 16-584, and the Arizona Election Procedures Manual, which has the force of law, *see* App. 631-635; A.R.S. § 16-452.

2. Arizona's ballot-collection law

Arizona law has long provided that "[o]nly the elector may be in possession of that elector's unvoted early ballot," A.R.S. § 16-542(D), so as "to prevent undue influence, fraud, ballot tampering, and voter intimidation," *Miller v. Picacho Elementary School*

District No. 33, 877 P.2d 277, 279 (Ariz. 1994). In 2016, the legislature passed the ballot-collection law, known as H.B. 2023, which amended A.R.S. § 16-1005 to provide that only election officials, mail carriers, family or household members, or caregivers may knowingly collect another person's voted early ballot. A.R.S. § 16-1005(H)–(I). "Family member" includes those "related to the voter by blood, marriage, adoption or legal guardianship"; "[h]ousehold member" includes anyone "who resides at the same residence"; and "[c]aregiver" includes a "person who provides medical or health care assistance to the voter in a residence, nursing care institution," or related assisted-living settings. A.R.S. § 16-1005(I)(2).

Prohibiting unlimited third-party ballot harvesting is a commonsense means of protecting the secret ballot and preventing undue influence, voter fraud, ballot tampering, and voter intimidation. In fact, the bipartisan Carter–Baker Commission recommended that States "prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform 47 (2005) ("Carter–Baker Report"). As the Carter–Baker Commission found, "[a]bsentee ballots remain the largest source of potential voter fraud," and "[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* at 46. It therefore recommended that "[t]he practice … of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated." *Id.* at 47.

D. Ninth Circuit en banc preliminary injunction and this Court's stay

In 2016, the DNC sought preliminary injunctions, which the district court denied. Appeals proceeded quickly, reaching en banc review in days, with an en banc injunction against the ballot-collection law just four days before the 2016 election. *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016). The next day, this Court stayed the injunction without dissent. *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016).

E. The district court's ten-day trial

The district court thereafter held a ten-day trial on the merits. The court heard live testimony from seven experts and 33 lay witnesses. App. 393-405. The court made extensive factual findings, rejecting the DNC's claims in a careful 83-page opinion.

In the first part of its analysis, the court held that the DNC failed to show that the provisions "impose[d] meaningfully disparate burdens on minority voters as compared to non-minority voters." App. 484. Alternatively, even assuming cognizable burdens, the court reviewed the record and concluded that the DNC nonetheless failed to meet their overall burden for proving a Section 2 claim. App. 484-495.

As to the out-of-precinct policy, the court found that "the overall number of provisional ballots in Arizona, both as a percentage of the registered voters and as a percentage of the number of ballots cast, has consistently declined"; in the 2016 general election, only 3,970 ballots were cast in the wrong precinct—0.15% of 2,661,497 total votes. App. 444-445. The court also found that roughly 99 percent of mi-

norities and 99.5 percent of non-minorities voted in the correct precinct. *See* App. 480; *see also* App. 331 n.31.

The district court further found that having "to locate and travel to" one's precinct are "ordinary burdens" of voting. App. 449. Survey results showed that, unlike those in "several other states," "none of the survey respondents for Arizona reported that it was 'very difficult' to find their polling places"; and that "approximately 94 percent of the Arizona respondents thought [doing so] was very easy or somewhat easy[.]" App. 450. The DNC presented "no evidence" that "precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters," and did not "challenge the manner in which Arizona counties allocate and assign polling places[.]" App. 483.

Citing the DNC's failure to show that the out-of-precinct policy "causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts," the court held the "observed disparities" of 0.5%—which involved "a small fraction of votes cast statewide"—did not create "a meaningful inequality in the opportunities of minority voters as compared to non-minority voters." App. 483-484.

As to the ballot-collection law, the court noted that, although the law took effect before the 2016 elections, the DNC offered "no records of the numbers of people who, in past elections, have relied on" third-party ballot collectors, and "no quantitative or statistical evidence comparing the proportion [of such voters] that is minority versus nonminority." App. 468.

As the court put it: "This evidentiary hole presents a practical problem," as "[d]isparate impact analysis is a comparative exercise," and it knew "of no vote denial case in which a § 2 violation has been found without quantitative evidence measuring the alleged disparate impact[.]" App. 468-469.

The court also found that, "even under a generous interpretation of the [nonstatistical] evidence, the vast majority of voters who choose to vote early by mail do not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions." App. 419. Citing the DNC's "anecdotal estimates from individual ballot collectors," the court found that "even among socioeconomically disadvantaged voters, most do not use ballot collection services to vote." App. 478.

The court ultimately upheld the ballot-collection law, explaining that it applies equally to all voters, does "not impose burdens beyond those traditionally associated with voting," and "does not deny minority voters meaningful access to the political process simply because [it] makes [returning early ballots] slightly more difficult or inconvenient for a small, yet unquantified subset of voters[.]" App. 478. "In fact, no individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." App. 478.

Finally, the district court "f[ound] that H.B. 2023 was not enacted with a racially discriminatory purpose" or out of "a desire to suppress minority voters." App. 497, 504. Although some proponents may have acted out of "partisan motives" or "a misinformed belief that ballot collection fraud was occurring," "the majority … were sincere in their belief that ballot

collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." App. 497, 504.

F. Ninth Circuit merits proceedings

A divided Ninth Circuit panel affirmed. Judge Ikuta's majority opinion noted that precinct-based voting is a "common electoral practice" that imposes only "'the usual burdens of voting,'" App. 333, and that the DNC lacked evidence that many voters use ballot-collection services. App. 303. As to discriminatory intent, the majority stressed that the law requires "that the legislature acted with racial motives, not merely partisan motives," concluding that "the record does not contain the sort of evidence that has led other courts to infer the legislature was acting with discriminatory intent[.]" App. 312, 316-317. Chief Judge Thomas dissented. App. 337.

The Ninth Circuit granted en banc review, and the United States filed a brief (and participated in argument), explaining that the challenged provisions do not violate Section 2. App. 550-580. The en banc court reversed. In an opinion authored by Judge Fletcher, the majority held (7-4) that the challenged provisions violated Section 2's results test, and (6-5) that the ballot-collection law was enacted with discriminatory intent, in violation of both Section 2 and the Fifteenth Amendment. App. 9, 116.

In so holding, the majority concluded that Section 2 is implicated where "more than a de minimis number of minority voters" "are disparately affected" by a voting policy. App. 44, 46.

In finding that the ballot-collection law was enacted with discriminatory intent, the majority acknowledged that many proponents of the law "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." App. 102. Nevertheless, the majority imputed racial motives to the legislature as a whole, citing its perception of the lack of proof of past fraud, one senator's statements five years before the bill passed, and a partisan video used in advertising; it concluded "that well meaning legislators were used as 'cat's paws.'" App. 103. While acknowledging that "[f]orbidding third-party ballot collection protects against potential voter fraud," the majority reasoned that "such protection is not necessary, or even appropriate, when there is a long history of third-party ballot collection with no evidence, ever, of any fraud and such fraud is already illegal under existing Arizona law." App. 114.

The decision prompted two dissents, each joined by four judges. Judge O'Scannlain rejected the majority's implicit suggestion "that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory[.]" App. 134. He also noted that "[a]necdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in other ways or would be burdened by having to do so." App. 136. And he criticized the majority's reliance on one senator's motives, noting that "each legislator is an independent actor," that most "sincere[ly] belie[ved] that voter fraud needed to be addressed," and that "the underlying allegations of voter fraud did not need to be true" to defeat any "inference of pretext[.]" App. 145.

Judge Bybee stressed that the challenged rules are ordinary "time, place, and manner restrictions" designed "to maintain the integrity of the democratic system.'" App. 147-148. Arizona's out-of-precinct policy, he explained, is "a traditional rule, common to the majority of American states." App. 156. Arizona's ballot collection rule not only is "substantially similar" to provisions "in many other states," but "follows precisely the recommendation of the bipartisan Carter–Baker Commission[.]" App. 164, 167.

On February 11, the Ninth Circuit stayed its mandate pending certiorari. App. 637. On April 9, petitioner State of Arizona was granted intervention. App. 639.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's en banc decision urgently warrants review. Over the forceful dissents of four judges, the majority reversed the district court's careful judgment, based on a ten-day trial, by reading Section 2 of the Voting Rights Act in a manner that conflicts with the decisions of four other circuits, the position of the United States, and the carefully crafted compromise reflected in Section 2 itself. The Ninth Circuit's expansive disparate-impact theory threatens not only similar laws in dozens of States, but a host of other sensible election laws that would be vulnerable to the same analysis.

Only this Court can clarify this area of law. This Court has never spoken on how Section 2 applies to vote-denial claims, even though state election laws have faced a wave of this litigation since *Shelby County v. Holder*, 570 U.S. 529 (2013). Both the circuit courts and leading commentators have lamented

that the law governing Section 2 vote-denial cases is unsettled. And this Court has had to intervene in such cases with multiple stays. But procedural obstacles—not present here—have kept this Court from reaching the merits, leaving the courts confused and the major issues unresolved even as state election laws remain under threat and have been enjoined.

This case offers this Court a special opportunity. The record is exhaustively developed by a ten-day trial on the merits, a thorough 83-page district court opinion, conflicting panel-stage opinions (where the district court was affirmed), a divided en banc decision that went the other way over two strong dissents, and the participation of the United States. The issues are thus well presented. And because a stay is in effect and Arizona and its chief legal officer are actively defending the laws, this Court will finally have a chance to bring clarity to this area, which is extraordinarily vital to American democracy.

I. The Decision Below Raises Questions Of Exceptional Importance Concerning The Right To Vote And The Integrity Of Elections

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The decision below, however, reads Section 2 to upend widespread and commonsense election rules designed to protect voter autonomy

and election integrity—objectives essential to ensuring public confidence in our democracy.

A. Invalidation of the commonsense voting measures here raises important questions warranting review

It is a weighty matter for a federal court to invalidate a State's laws, and this Court has not hesitated to grant review on that basis alone. *E.g.*, *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961). Review is even more important, however, when "other States" have "similar laws." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957). In fact, "[d]ecisions invalidating … state statutes (particularly where the statutes are representative of those in other states), are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict." Stephen M. Shapiro et al., Supreme Court Practice § 6.31(b) (11th ed. 2019). That should be especially true here, where Arizona's commonplace laws help safeguard elections, the foundation of our democracy.

1. Arizona's out-of-precinct policy

"It has long been a feature of American democracy that, on election day, voters must vote in person at an assigned polling venue—an election precinct"—to have their votes counted. App. 152 (Bybee, J., dissenting). Some "twenty-six states, the District of Columbia, and three U.S. territories disqualify ballots cast in the wrong precinct." *Id.* at 155; *id.* at 175-189 (collecting laws); *id.* at 190-192 (categorizing out-of-precinct ballot laws). In the Ninth Circuit alone, three States apply that rule. *Id.* at 190-192. Thus, Arizona's out-of-precinct policy is not "unique," but rather a "longstanding," "traditional," and "widely

held time, place, or manner rule" found in "every region of the country" and "a majority of American jurisdictions." *Id.* at 152, 155-156; App. 579 (United States explaining that Arizona's policy is "an unremarkable, decades-old component" of Arizona's "electoral rules").

While purportedly leaving in place Arizona's precinct-based voting system, the en banc majority held that Section 2 requires at least partially counting ballots voted in the wrong precinct. This adds substantial complexity: it requires determining what races each such voter was eligible to vote in.[2] In so holding, the Ninth Circuit asserted that "[t]he only plausible justification for Arizona's OOP ["out-of-precinct"] policy would be the delay and expense entailed in counting OOP ballots." App. 81. The court asserted that there is no finding "that Arizona has ever sought to minimize the number of OOP ballots." App. 80. But that claim is self-refuting—the out-of-precinct policy *itself* is Arizona's means of minimizing such ballots.

Given the acknowledged "importance" of "Arizona's precinct-based system," App. 80, it follows that Arizona's out-of-precinct policy has a solid justification. By "[c]ap[ping] the numbers of voters attempting to vote in the same place," for example, such rules avoid overcrowding and facilitate access to the polls. *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). They also make voting

[2] For example, a Scottsdale resident voting in a Glendale precinct receives a ballot with local and state legislative races for which the Scottsdale resident is ineligible to vote, alongside county and state-level races for which the Scottsdale resident would otherwise be eligible.

convenient by "allow[ing] each precinct ballot to list only those votes a citizen may cast, making ballots less confusing." *Id.* And by creating incentives to vote in the correct place, they "encourage voting" in "local elections," which "most directly affect [citizens'] daily lives." App. 159, 160 (Bybee, J.). They also, importantly, "make[] it easier for election officials to monitor votes and prevent election fraud." *Blackwell*, 387 F.3d at 569.

The reasonableness of the out-of-precinct policy is even clearer when it is viewed, as Section 2 requires, in light of the "totality" of Arizona's voting system. 52 U.S.C. § 10301(b). The district court concluded that, considered in that light, the policy did not create "a meaningful inequality in the opportunities of minority voters as compared to non-minority voters." App. 483-484. This tracks the record. Arizona provides 27 days to cast a ballot, either by mail or in person, with early voting accounting for up to 80 percent of ballots cast. On Election Day, 99 percent of minorities and 99.5 percent of non-minorities vote in the correct precinct. App. 480; *see also* App. 331 n.31. In a system with so many ways to vote, the fact that minority voters slightly outnumber non-minority voters among the small fraction of a percent who cast votes in the wrong precinct does not imply that minority voters have less "opportunity" to participate in the State's "political processes." 52 U.S.C. § 10301(b).

2. Arizona's ballot-collection law

While Arizona gives its citizens 27 days to return early ballots, it also recognizes that absentee voting carries potential for ballot fraud and voter intimidation, particularly if unrelated third parties, such as

political operatives, can collect and submit ballots. The Arizona Constitution states that "secrecy in voting shall be preserved" in elections. Ariz. Const. art. VII, § 1. The ballot-collection law serves that interest by creating "procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation." *See Miller,* 877 P.2d at 279; App. 265. Arizona has taken reasonable steps to insulate early voters: completed early ballots may be returned only by family, household members, caregivers, mail carriers, or election officials. A.R.S. § 16-1005(H)–(I). In this way, Arizona enables absentee voters to execute "a secret ballot"—"the prerequisite of a democratic election." Carter–Baker Report 67.

Arizona is not alone. Many States and territories have enacted "neutral time, place, or manner provision[s] to help ensure the integrity of the absentee voting process" by limiting who may return completed ballots. App. 163, 164-167 (Bybee, J.); *id.* at 193-255 (collecting laws). While these laws vary—some "permit a broader range of people to collect" ballots, but limit "how many" they can collect; others prohibit collecting ballots "for compensation"; and still others apply different penalties—"Arizona's ballot collection rule is fully consonant with the broad range of rules" and "substantially similar" to many that criminalize third-party ballot-collection. *Id.* at 164-167. Indeed, in allowing household members and caregivers to handle absentee ballots, Arizona is more generous than many jurisdictions. *Id.*

If any doubt remained that Arizona's ballot-collection law is sensible, one need only consider that it "follows precisely" the bipartisan Carter–Baker Commission's recommendation. *Id.* at 167. The Commission urged States to "reduce the risks of

fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots," and formally recommended that:

> [States] should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice … of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.

Carter–Baker Report 46-47; App. 168 (Bybee, J.).

Moreover, outside of Arizona, there is ample "evidence [of] voter fraud in the collecting of absentee ballots." App. 169 (Bybee, J.) (collecting cases). Just last year, North Carolina's State Board of Elections unanimously vacated the 2018 general election for a congressional seat because a "coordinated, unlawful, and well-funded absentee ballot scheme … perpetrated fraud and corruption upon the election[.]" App. 584. And the leading opinion in *Crawford v. Marion County Elections Board* identified "fraudulent voting" that was "perpetrated using absentee ballots." 553 U.S. 181, 195-196 (2008) (plurality op.); *see also Veasey v. Abbott*, 830 F.3d 216, 256 (5th Cir. 2016) (en banc) ("The district court credited expert testimony showing mail-in ballot fraud is a significant threat—unlike in-person voter fraud."). For the Ninth Circuit to prohibit reliance on evidence from other States effectively prevents Arizona from proactively taking steps to prevent fraud before it occurs; after all, fraud is difficult to detect, and an absence of evidence is not evidence of absence.

3. The imputation of racial bias

The need for review is compounded by the majority's erroneous reversal of the district court's factual finding on whether the Arizona legislature acted with racial animus—a loaded charge with potentially long-term legal, social, and practical consequences. Even apart from this particular case, this erroneous finding could be weaponized in future litigation to undermine Arizona's autonomy to govern itself (*e.g.*, through "bail-in" under Section 3(c) of the Voting Rights Act, or in future vote-denial cases)—further exacerbating uncertainty in Arizona law.[3]

In a stunning exemplar of overgeneralization, the majority made sweeping statements that, "[f]or over a century, Arizona has repeatedly targeted its American Indian, Hispanic, and African American citizens, limiting or eliminating their ability to vote and to participate in the political process." App. 7. Such "inflammatory and unsupportable charges of racist motivation poison[s] the political atmosphere." *Veasey*, 830 F.3d at 281-282 (Jones, J., dissenting). Indeed, Congress amended Section 2 to avoid "unnecessarily divisive … charges of racism on the part of individual officials or entire communities." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986). This Court should prevent that unwarranted result here.

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[3] *Compare* Rick Hasen & Travis Crum, *Crum: The Fifteenth Amendment and DNC v. Hobbs*, Election L. Blog (Jan. 31, 2020), https://electionlawblog.org/?p=109188 (ruling "unnecessary to the judgment, though it does qualify Arizona for bail-in"), *with Shelby Cty.*, 570 U.S. at 543-544 (discussing sovereignty considerations pertinent to subjecting states to preclearance and other Voting Rights Act strictures).

B. The majority's statutory and constitutional analysis threatens innumerable laws nationwide and conflicts with Section 2 itself

Beyond the fact that the ruling below casts doubt on widely used in-precinct voting and ballot-collection rules, the decision's *reasoning* threatens many more laws, and is manifestly wrong.

1. The majority's Section 2 results test analysis

a. The majority's logic threatens a host of election laws by holding that a "more than de minimis" statistical disparity is enough to implicate Section 2, regardless of whether minorities have less electoral *opportunity*. "[*A*]*ny* procedural step filters out some potential voters," and "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank v. Walker*, 768 F.3d 744, 749, 754 (7th Cir. 2014). As Judge O'Scannlain observed, however, not every "facially neutral policy which may result in some statistical disparity is necessarily discriminatory[.]" App. 134.

For example, many States require voters to register before elections, present valid IDs, vote in-person, or mail absentee ballots by a given date—any of which might well, given socioeconomic disparities, result in more than a de minimis racial disparity in practice. *See* App. 151 (Bybee, J.). If that were enough to prove a discriminatory burden under Section 2, the law would "dismantle every state's voting apparatus," including "almost all registration and voting rules." *Frank*, 768 F.3d at 754. Section 2, however, "does not sweep away all election rules that result in

a disparity in the convenience of voting." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016).

What is more, the Ninth Circuit's rule flouts the statute's text and casts aside Congress's 1982 compromise. *See* Pub. L. No. 97–205, 96 Stat. 131 (1982). Congress expanded Section 2 to invalidate election practices with discriminatory results, but only if, as a result of the challenged practice and under "the totality of the circumstances," minority voters "have less opportunity" to "participate" and "to elect representatives." 52 U.S.C. § 10301(b). In expanding Section 2's coverage, Congress adopted a rule in between (1) the old, "inordinately difficult" "intent test" and (2) an unbounded results test that might invalidate "thousands" of election rules based on "the slightest evidence of underrepresentation of minorities." S. REP. NO. 97–417, at 31, 36. The courts "must make every effort to be faithful to the balance Congress struck." *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring). But the en banc majority struck its own balance—one that Congress rejected—and only this Court can restore the proper balance.

b. The majority set up a host of States to fail under Section 2 by placing no apparent limit on the use of historical evidence from bygone eras. The majority devoted seventeen pages to the 1840s through the 1990s. App. 50-67. This included extended discussion of actions before Arizona became a State, including "[e]arly territorial politicians" embracing manifest destiny, "a flood of Anglo-American and European immigrants" overwhelming prominent Hispanics, and Arizona's 1910 constitutional delegates failing to include dual-language provisions. App. 50-52.

Only a few pages, by contrast, concern the last twenty years. App. 67-68, 88. And even then, the majority pointed to only four items of recent history as evidencing pertinent official discrimination: (1) a one-time, since-abandoned change in the number of Maricopa County polling places for the 2016 Presidential Preference Election; (2) isolated, erroneous translations in voting materials by Maricopa County in 2012 and 2016; (3) withdrawal of a pre-clearance request in connection with a "relatively innocuous ballot-collection provision" in 2011; and (4) repeal of another voting rule based on public opposition. *See* App. 67-68, 88. In discussing the present-day effects of discrimination, moreover, the majority made no effort to connect the identified racial disparities to official discrimination—Section 2 was deemed satisfied based solely on disparities in poverty, employment, home ownership, mail delivery, and health. App. 72-75, 89-90.

c. The majority's hyper-skeptical treatment of the State's rationale for the challenged provisions likewise threatens commonsense voting measures in other States. For example, the majority acknowledged the district court's finding that the ballot-collection law "minimiz[es] the opportunities for ballot tampering, loss, and destruction," helping to "maintain[] 'public confidence in election integrity.'" App. 91. Nevertheless, the majority brushed off that finding, reasoning that, before the law, "third-party ballot collection was permitted for many years," yet no one "ever found a case of voter fraud connected to" it *in Arizona*. App. 92. The majority treated other States' experience and the Carter–Baker Commission's expert recommendations as having "little bearing on the case before us." App. 93, 94.

States will be hamstrung in their ability to ensure public confidence in their elections if they can be held to have acted pretextually in following recommendations of respected bipartisan commissions concerning how to *prevent* fraud, as well as the experience of other jurisdictions. "Legislatures … should be permitted to respond to potential deficiencies in the electoral process with foresight." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). In *Crawford*, for example, "[t]he record contain[ed] no evidence of any [voter impersonation] fraud actually occurring in Indiana at any time in its history," yet that did not doom Indiana's voter ID law, as "fraud in other parts of the country ha[d] been documented." 553 U.S. at 194-195 (plurality).

2. The majority's discriminatory intent analysis

The majority's discriminatory intent analysis—its 6-5 holding that, due to a single legislator, the legislature as a whole acted with a discriminatory purpose in adopting the ballot-collection law—is equally threatening. Most notably, the majority wrongly applied the "cat's paw" theory to legislative action, failed to heed *Crawford*'s blessing of prophylactic efforts to prevent voter fraud, and trampled the correct standard of review.

a. As Judge O'Scannlain explained, the majority's unprecedented reliance on a "cat's paw" theory—an "employment discrimination doctrine"—in a Voting Rights Act case "is misplaced because, unlike employers whose decision may be tainted by the discriminatory motives of a supervisor, each legislator is an independent actor[.]" App. 144. Until now, it has long been settled that "[w]hat motivates one leg-

islator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). And even where "racial identification is highly correlated with political affiliation" and legislators are "conscious" of disparate racial impacts, plaintiffs must specifically show that *racial* motives motivated the legislature. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)); *Hunt v. Cromartie*, 526 U.S. 541, 551-552 (1999). Here, however, the court confused "*racial* motives and *partisan* motives." App. 142 (O'Scannlain, J.).

b. According to the majority, the lack of direct evidence of ballot-collection fraud in Arizona showed racial animus. *See* App. 101. But as *Crawford* teaches, the absence of "any such fraud actually occurring in [Arizona] at any time in its history" is irrelevant when such fraud "ha[s] been documented" in "other parts of the country." 553 U.S. at 194-195 (plurality). That guidance is especially on point here, where North Carolina's State Board of Elections unanimously invalidated the 2018 general election for a congressional seat on account of analogous absentee-ballot-harvesting fraud. App. 581-630. And, as the Fifth Circuit has explained, the "potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting." *Veasey*, 830 F.3d at 239; *see also id.* at 256 ("The district court credited expert testimony showing mail-in ballot fraud is a significant threat—unlike in-person voter fraud."). Indeed, it is nothing short of extraordinary that the bare, 6-5 majority here would declare "[f]orbidding third-party ballot collection" to be "not necessary, or

even appropriate" absent documented proof of past fraud *in Arizona*. App. 114.

c. The majority's outright disregard for the proper standard of review—which it "completely ignore[d]," applying "its own de novo review"—further supports granting review. App. 141 (O'Scannlain, J.). Whether a policy "reflect[s] an intent to discriminate on account of race" is "a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard"—precisely the kind of determination on which a district judge, having personally heard the witnesses, receives immense deference. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288 (1982); *see also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *id.* at 575 ("determinations regarding the credibility of witnesses" warrant "even greater deference").

II. Lacking This Court's Guidance, The Circuits Are Deeply Divided Over How To Determine If Laws Impose A "Discriminatory Burden" Under Section 2

Despite a surge in vote-denial claims since *Shelby County*, "the Court has yet to consider a Section 2 vote-denial claim after *Gingles*," and "the standard for such adjudication is unsettled." *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 626 (6th Cir. 2016).[4] Multiple circuits have noted that *Gingles* is "unhelpful in voter qualification cases." *Frank*, 768 F.3d at 754 (agreeing with Fourth and

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[4] *See also* Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 Fla. St. U. L. Rev. 1, 3, 4 (2018) ("not a single United States Supreme Court decision[] ha[s] interpreted the results standard in the vote denial context" despite an "increase in Section 2 vote denial litigation"); *Veasey*, 830 F.3d at 247 n.37 (Section 2 cases "have increased since *Shelby County*.").

Sixth Circuits); *see also Veasey*, 830 F.3d at 243-244 ("there is little authority on the proper test"); *Simmons v. Galvin*, 575 F.3d 24, 42 n.24 (1st Cir. 2009) ("the Supreme Court's seminal opinion in *Gingles* … is of little use" and "a satisfactory test" has "yet to emerge"). In short, lacking any "clear standard," the circuits have found it "challenging" to "apply[] Section 2's 'results test' to vote-denial claims." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636 (6th Cir. 2016).

Many circuits currently use a two-step framework that frankly is difficult to square with the compromise that Congress struck in Section 2's text and has little connection to *Gingles*. As the United States put it to the en banc court: "If applied too literally, this test could be troublingly over-inclusive and could invalidate many commonplace rules of modern election administration"; "not all racially disparate impacts, including those rooted in socio-economic disparities, will actually result in 'less opportunity' to vote." App. 563.

Regardless of their overall framework, the circuits are intractably divided over the core question highlighted by the United States: how to determine whether a provision produces an unlawful "discriminatory burden" as opposed to a mere disparate inconvenience. Only this Court can resolve that split.

A. Four circuits have held that a disparate impact is insufficient to show an unlawful discriminatory burden absent proof of less opportunity to vote

Led by the Seventh Circuit, four circuits have held that Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities"

or produces a "statistical disparity." *Frank*, 768 F.3d at 753, 752. Rather, consistent with Section 2(b)'s text, these circuits ask whether, considering "the entire voting and registration system," the practice at issue makes the election "*not equally open*" to minorities, or leaves them with "*less opportunity*" to vote. *Id.* at 753 (emphasis in original); *accord Lee*, 843 F.3d at 600-601; *Ohio Democratic Party*, 834 F.3d at 637; *Veasey*, 830 F.3d at 253-254.

The leading case is *Frank v. Walker*, in which the Seventh Circuit reversed the invalidation of Wisconsin's voter-ID law in the face of findings that "white registered voters are more likely to possess qualifying photo IDs, or the documents necessary to get them." 768 F.3d at 752. "To the extent outcomes help to decide whether the state has provided an equal opportunity," the court held, "it is essential to look at everything (the 'totality of the circumstances,' § 2(b) says)"—not just at the challenged laws "in isolation." *Id.* at 753-754. Yet "the district judge did not find that [minorities] have less 'opportunity' than whites to get photo IDs"—only that they are "less likely to *use* that opportunity"—so the "disparate outcome" did not amount to the requisite denial or abridgment of the right to vote. *Id.* at 753. As the court recognized, reading Section 2 to impose an "equal-outcome command" would "sweep[] away almost all registration and voting rules," as "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Id.* at 754.

Recent Fourth Circuit precedent follows the Seventh Circuit. In *Lee*, the district court, facing a challenge to Virginia's voter-ID law, found "'a slim statistical margin'" of difference between the rates at

which black and white voters had valid IDs, and the plaintiffs argued that this "disparate burden … ha[d] the effect of denying African Americans and Latinos an equal opportunity to vote." 843 F.3d at 599-600. But the court rejected the notion that a provision triggers Section 2 "as long as there is disparity in the rates at which different groups possess acceptable identification," noting that such a rule would "sweep away all election rules that result in a disparity in the convenience of voting." *Id.* at 600-601.

Consistent with Section 2's text, *Lee* stressed that "disparate inconveniences" are insufficient, as "§ 2 asks … whether the Virginia process has diminished the opportunity of the protected class to participate in the electoral process," and thus results in "the denial or abridgement of the right to vote." *Id.* at 601 (emphasis omitted). And since nothing in the record "support[ed] a conclusion that minorities are not afforded an equal opportunity to obtain a free voter ID"—*e.g.*, "none of the voter witnesses identified any 'legal obstacle inhibiting their opportunity to vote'"—the plaintiffs "simply failed" to show that they "ha[d] less of an opportunity than others to" vote. *Id.* at 598, 600.

Recent Sixth Circuit precedent is in accord with this approach. In *Ohio Democratic Party*, for example, the court reversed a ruling striking down Ohio laws reducing the days allowed for early voting and eliminating same-day registration, explaining that a law imposes no "discriminatory burden" under Section 2 unless "members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 834 F.3d at 637. To be sure, the plaintiffs there showed that Af-

rican-Americans voted early and same-day registered "at a rate higher than other voters." *Id.* at 627-628. But such a showing was not "sufficient" under Section 2's text:

> Section 2's textual requirement that a voting standard or practice, to be actionable, must result in an adverse disparate impact on protected class members' opportunity to participate in the political process … cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2.

Id. at 637. In the Sixth Circuit, therefore, "disproportionate racial impact alone" is insufficient to prove a "cognizable" discriminatory burden; plaintiffs must also show that the law "caus[es] racial inequality in the *opportunity to vote*." *Id.* at 637-639 (emphasis added).

Similarly, in *Veasey*, a challenge to a Texas voter-ID law, the Fifth Circuit held that Section 2 outlaws only "burdens on minority voters that would disproportionately abridge their ability to participate in the political process." 830 F.3d at 253. The court there affirmed the law's invalidity precisely because the district court's holding "rest[ed] on far more than a statistical disparity." *Id.* at 253-254. Viewing the system as a whole, the court explained, the district court made "concrete" findings "regarding the excessive burdens faced by Plaintiffs." *Id.* at 254. In particular, the court found that they faced "many specific burdens in attempting to obtain [the required ID] or vote," and that Texas's mail-in voting system in-

volved "complex procedure[s]" and was "not an acceptable substitute for in-person voting." *Id.* at 255.[5]

B. In the Ninth Circuit, anything more than a de minimis disparity establishes a discriminatory burden

Under Ninth Circuit law, the discriminatory-burden requirement is satisfied whenever "more than a de minimis number of minority voters" are disparately affected by a particular feature of election law, without regard to the core statutory criterion of "opportunity." App. 44, 46, 86-87. The court did not require proof that, viewing the entire system, minority voters have less opportunity to vote in their assigned precincts or without the assistance of party operatives and other strangers. To make matters worse, the court gave short shrift to the voting system as a whole, rebuking the district court for analyzing the number of out-of-precinct ballots as a percentage of all ballots cast (0.47 percent in 2012 and 0.15 percent in 2016). App. 43-44. That ignores Section 2's mandate that, "based on the *totality of circumstances*, it [be] shown that the political *processes* leading to nomination or election in the State or political subdivision are not equally open." 52 U.S.C. § 10301(b) (emphasis added).

Nor did the Ninth Circuit allude to any evidence that minority voters face any greater obstacle to voting by one of the several means available under Ari-

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[5] To be sure, the dissent questioned the Fifth Circuit's application of this standard. *Id.* at 306-307 (Jones, J., dissenting). Yet the majority flatly rejected the dissent's characterization of "the district court's findings as resting solely on a statistical disparity … rather than any concrete proof that voters were denied the right to vote." *Id.* at 253.

zona law: in-precinct voting, mail-in voting, early voting at voting centers, etc. The court relied entirely on evidence of the slight statistical disparity between minorities who attempt to cast ballots out of precinct and non-minorities who do so. App. 44, 46. Under the Seventh Circuit's reading, by contrast, that would not require a State to create yet another voting method—in-person, out-of-precinct Election Day voting. *See Frank*, 768 F.3d at 753.

The Ninth Circuit's approach squarely conflicts with the circuits discussed above, which deem it "essential to look at everything"—not just at the challenged laws "in isolation," *Frank*, 768 F.3d at 753-754—and reject the notion that "a disparate impact, in and of itself, is sufficient" to satisfy Section 2, *Ohio Democratic Party*, 834 F.3d at 637. Indeed, some of those cases involved significantly greater statistical disparities than exist here. *E.g.*, *Frank*, 768 F.3d at 752 ("97.6% of whites, 95.5% of blacks, and 94.1% of Latinos currently possess either qualifying photo IDs or the documents that would permit Wisconsin to issue them").

C. The Ninth Circuit's view is in accord with older Fourth and Sixth Circuit precedent

The Ninth Circuit relied on *League of Women Voters v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), which sustained a Section 2 challenge to North Carolina's decision to stop counting out-of-precinct ballots. App. 46. Citing figures like those here, App. 45, the court held that "3,348 out-of-precinct provisional ballots" by minority voters qualified as a "substantial number" of disparately affected voters without broader analysis of the voting system. *League of*

Women Voters, 769 F.3d at 244. As the court put it, "what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities." *Id.*

This approach is also echoed by *Michigan State A. Philip Randolph Institute v. Johnson*, 833 F.3d 656 (6th Cir. 2016). The court there affirmed a preliminary injunction based on the district court's finding that "plaintiffs had demonstrated that [Michigan's removal of straight-party voting] imposed a disproportionate effect on African–American voters because … African–Americans are more likely to use straight-party voting than white voters.'" *Id.* at 668.

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In sum, the circuits have found it "challenging" to "apply[] Section 2's 'results test' to vote-denial claims." *Ohio Democratic Party*, 834 F.3d at 636. The Ninth Circuit's holding that anything beyond a de minimis statistical disparity qualifies as a discriminatory burden breaks sharply from recent Seventh, Sixth, Fifth, and Fourth Circuit precedent holding—consistent with Section 2's text—that "disproportionate racial impact alone" is insufficient; the challenged practice must also abridge "the *opportunity* to vote." *Id.* at 637-638. The law in this important area is thus unsettled, and only this Court can provide a "clear standard." *Id.* at 636.

III. This Case Is An Ideal Vehicle To Address The Meaning Of Section 2 And The Requirements Of The Fifteenth Amendment

This case is a superb vehicle to address the law in this vital area. First, the challenged provisions are commonplace, the claims here represent a growing number of election cases, and the majority below squarely addressed the central Section 2 and discriminatory intent questions by applying a legal approach that could as easily apply to any other State's laws. Thus, this Court's decision will have broad impact.

Second, the challenged provisions have not been materially amended, which is notable given the enormous pressure to amend laws that are invalidated in Section 2 litigation, especially given the uncertainty of obtaining a ruling before legislatures feel they must act. Indeed, this appears to have stopped numerous Section 2 vote denial cases from reaching this Court.[6]

Third, unlike earlier cases where a change in officeholders led States to abandon the defense of their laws, both the State and petitioner Brnovich, the Arizona Attorney General, are committed to proceeding. *Cf. North Carolina v. N.C. NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J.).

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[6] *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18-1910, Dkt. 30, 36-2 (6th Cir. Jan. 14, 2019) (voter initiative effectively nullified challenged law, rendering appeal moot); *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018) ("During the remand, the Texas legislature passed a law designed to cure all the flaws" and "succeeded").

Fourth, unlike earlier Section 2 cases that arose at the preliminary injunction stage or required a remand to address factual or remedial issues, this case arises from a final judgment based on a fully developed record, including detailed findings made after a 10-day trial. App. 389-506; *cf. Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J.) (issues "better suited for certiorari" after "final judgment").

In sum, this case goes to the heart of Section 2 and the constitutional issues that warrant resolution, and none of the obstacles that have kept past cases from reaching this Court is present here.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

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Respectfully submitted,

MICHAEL W. MCCONNELL
STEFFEN N. JOHNSON
WILSON SONSINI
GOODRICH & ROSATI, PC
1700 K Street, N.W.
Washington, D.C. 20006
(202) 973-8800

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff
BRUNN W. ROYSDEN III
Division Chief
OFFICE OF THE ARIZONA ATTORNEY GENERAL

MARK BRNOVICH
Attorney General

ORAMEL H. (O.H.) SKINNER
Solicitor General
Counsel of Record
RUSTY D. CRANDELL
Deputy Solicitor General
KATE B. SAWYER
Assistant Solicitor General
JENNIFER J. WRIGHT
KATLYN J. DIVIS
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
o.h.skinner@azag.gov

Counsel for Petitioners