No. 19-1257

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

BRIEF OF *AMICUS CURIAE* HELEN PURCELL IN SUPPORT OF PETITIONERS

Jason Torchinsky
Counsel of Record
Jonathan P. Lienhard
Dennis W. Polio
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, Helen Purcell, is the former County Recorder for Maricopa County, Arizona. First elected in 1988, Ms. Purcell served seven terms as County Recorder until 2017. As County Recorder, Ms. Purcell maintained Maricopa County's public records as well as administered all elections held in the County. *See About Us*, Maricopa County Recorder's Office (last accessed May 30, 2020), https://recorder.maricopa.gov/site/about.aspx. Ms. Purcell was also the named petitioner in the landmark case *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), where this Court elucidated what is now known as the "Purcell principle," that courts should be reluctant to intrude in election administration too soon before an election, due to the risk of voter confusion and chaotic election administration. Accordingly, Ms. Purcell possesses extraordinary expertise and experience in the administration of elections, and has a significant interest in this important case. Ms. Purcell hopes that this filing will assist the Court in understanding the modern

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[1] Pursuant to Supreme Court Rule 37, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and her counsel made any monetary contribution toward the preparation and submission of this brief. On April 30, 2020, Petitioner filed a blanket consent to the filing of all amicus briefs. On May 26, 2020, counsel for Respondent Arizona Secretary of State Katie Hobbs consented to the filing of this amicus brief. On May 26, 2020, counsel for Intervenors below, the Arizona Republican Party, et al., consented to the filing of this amicus brief. On June 1, 2020, counsel for DNC Respondents consented to the filing of this brief.

history of Arizona's voting practices and procedures, along with an understanding of the importance of the precinct-based election system and prohibition on unlimited third-party ballot harvesting. Ms. Purcell urges the Court to grant certiorari.

INTRODUCTION & SUMMARY OF THE DISCUSSION

The Ninth Circuit's divided en banc opinion, invalidating Arizona's prohibition on out-of-precinct voting and unlimited third-party ballot harvesting, is both troubling and of grave importance to states' election administration efforts across the country.

The modern history of Arizona's election practices and procedures demonstrates that the State has come a long way since the 1840s, and that Arizona has recently been among the leaders in expanding access and opportunities to register to vote and cast ballots, while taking steps to maintain the integrity of its elections. Arizona's precinct-based voting system is among the steps that the State has historically used to ensure orderly administration of elections and preserve the secrecy of each voter's individual ballot. The ruling of the Ninth Circuit in this case disregards Arizona's modern history and fails to account for the necessity of precinct-based voting systems.

As explained in more depth in Appellants' briefing, Arizona's out-of-precinct policy, which prevents election administrators from counting ballots cast in person on Election Day in precincts other than voters' assigned precincts, is important to the State's precinct-based voting system. Arizona's limit on third-party ballot harvesting—which

prevents anyone but the elector, election officials, mail carriers, family or household members, or caregivers from collecting or possessing an elector's early voted ballot—is a commonsense means of election integrity. However, the Ninth Circuit focused narrowly on those policies' slight disparate impacts and Arizona's bygone history of racial discrimination, determined that the policies violate Section 2 of the Voting Rights Act.

In focusing its analysis both too narrowly and too broadly, the Ninth Circuit's opinion comes into conflict with at least two decisions from this Court, as well as those from other circuits. Specifically, the Ninth Circuit's opinion does not properly analyze the "totality of circumstances" for Section 2 purposes, *see* 52 U.S.C. 10301(b), because it fails to focus on current conditions. Instead, it focuses almost entirely on Arizona's history between 1848 and the 1980s, giving short shrift to any expansion of the franchise within the last three decades.

Arizona's expansion of the franchise of voting has opened numerous avenues available to Arizonans to vote. Long gone are the days of being required to take time months before an election to drive to a voting office, register to vote on a paper application, drive to a polling place on Election Day, and wait to vote. Arizona now embraces early voting, no excuse voting by mail, online paperless voter registration, voter registration at the time individuals receive their driver's licenses, and more. It is now easier to vote in Arizona than at any time in its history. The Ninth Circuit's focus on bygone eras, entirely disconnected from the challenged policies, should relegate its opinion to the ash heap of history.

DISCUSSION

To establish a violation of Section 2 of the Voting Rights Act ("VRA"), a 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." 52 U.S.C. 10301(b). In order to answer this question, any Section 2 analysis must examine the "totality" of the state's election system, including historical conditions. *Id.*; *see also Thornburg* v. *Gingles*, 478 U.S. 30, 44-47 (1986).

However, the consideration of discriminatory practices in electoral history cannot be unlimited in temporal scope or too disconnected from current conditions. Indeed, a look far enough back will likely yield pervasive discriminatory practices in countless jurisdictions. But surely not every jurisdiction will possess unconstitutionally discriminatory election laws today. Accordingly, courts have circumscribed VRA's scope in light of modern electoral circumstances.

For example, in *Northwest Austin Municipal Utility District Number One* v. *Holder*, this Court was asked to rule on the constitutionality of Section 5 of the VRA, but ultimately did not do so, invoking the canon of constitutional avoidance. 557 U.S. 193, 206 (2009). In its opinion, this Court noted that Section 5 raised federalism concerns. Specifically, the Court stated that the VRA "imposes current burdens [on states] and must be justified by current needs," concluding that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic

coverage is sufficiently related to the problem that it targets." *Id.* at 203.

In *Shelby County* v. *Holder*, this Court invalidated the VRA's preclearance requirements because they were no longer justified by the same concerns of 50 years earlier, when the VRA was passed. 570 U.S. 529 (2013). The preclearance coverage formula of Section 4 was "based on decades-old data and eradicated practices." *Id.* at 551. The Court held that the Fifteenth Amendment "is not designed to punish for the past; its purpose is to ensure a better future," and if the VRA is to govern the states, it must do so "on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id.* at 553. This is especially true in circumstances where the VRA "authorizes federal intrusion into sensitive areas of state and local policymaking," which is exactly what is at issue in the present case. *Id.* at 545 (quoting *Lopez* v. *Monterey Cty.*, 525 U.S. 266, 282 (1999)).

The "current needs" and "current conditions" rationale of *Northwest Austin* and *Shelby County* applies to many areas of constitutional law, even those outside of the VRA entirely. *See, e.g.*, *Smith* v. *Sch. Bd. of Concordia Par.*, 906 F.3d 327, 338 (5th Cir. 2018) (Ho, J., concurring) (applying *Shelby County*'s "current conditions" rationale to challenge a racial balancing consent decree); *Mance* v. *Sessions*, 896 F.3d 699, 706 (5th Cir. 2018) (per curiam) (observing that, in a Second Amendment case, "current burdens on constitutional rights 'must be justified by current needs'") (quoting *Shelby Cty.*, 570 U.S. at 536); *Veasey* v. *Abbott*, 830 F.3d 216, 328 (5th Cir. 2016) (Elrod, J., concurring in part and dissenting in part) (applying the "current needs" reasoning of *Northwest Austin* to a Section 2 VRA claim), cert. denied, 137 S. Ct. 612 (2017); *United*

States v. *Cannon*, 750 F.3d 492, 510-11 (5th Cir. 2014) (Elrod, J., concurring) (applying the "current conditions" reasoning of *Shelby County* and *Northwest Austin* to a Thirteenth Amendment claim), cert. denied, 574 U.S. 1029 (2014).

Accordingly, it makes logical sense that courts' consideration of discriminatory practices in electoral history under Section 2 should also be reasonably limited to examining the current conditions surrounding the enactment of a particular statute, rather than punishing a state for its distant past. Undertaking an unlimited examination of past wrongs, without a balanced consideration of modern electoral advances, deprives jurisdictions of the ability to wash away the original sin of past racial discrimination—damning them forever to a purgatory of burdensome VRA lawsuits—even against modern-day election laws and regulations. This would cast a shadow over nearly all election laws, threatening to throw duly enacted and necessary election administration efforts into chaos. Such "inflammatory and unsupportable charges of racist motivation poison the political atmosphere." *Veasey*, 830 F.3d at 281-82 (Jones, J., dissenting).

I. The Totality Of Circumstances In Arizona Does Not Demonstrate A Violation of Section 2.

Essentially turning a blind eye to this Court's rationale in *Northwest Austin* and *Shelby County*, the en banc majority of the Ninth Circuit below devoted a significant portion of its analysis to exploring historical examples of discrimination from bygone eras without limit. This discussion spans a massive 17 pages, covering 1848 through the 1990s. It includes Arizona's territorial period, before

Arizona attained statehood, including the "manifest destiny" beliefs of "early territorial politicians," the 1871 Camp Grant Massacre, and the "Indian Wars" of the 1880s. Pet. App. 50-51. Also discussed is the racial composition of Arizona's 1910 constitutional convention along with provisions in that constitution which failed to include dual-language provisions. Pet. App. 52-53. The en banc majority continues on, discussing the literacy tests, disenfranchisement, and intimidation of Hispanics and American Indians in the early 20th Century. Pet. App. 53-60. Followed by a prolonged discussion of Arizona's history of VRA litigation from the 1960s through the 1990s. Pet App. 60-67.

In contrast to the 17 pages of discussion on Arizona's first 150 years, the en banc majority cites only four negative examples of alleged discrimination in the past 20 years. Pet. App. 67-68, 88. These include a one-time change in the number of Maricopa County polling places for the 2016 Presidential Preference Election and isolated mistranslation in some Spanish-language voting materials by Maricopa County in 2012 and 2016. Pet. App. 67-68. These examples are not only disconnected from the complained of disparities and of dubious relevance to the present case, but are also idiosyncratic examples of the issues that naturally arise when human beings administer elections. None of these alleged discriminatory actions were the result of any intentional discrimination on the part of election workers or government officials whatsoever.

Regardless, the en banc majority's discussion of Arizona's history of discriminatory practices, nearly all of which occurred prior to 30 years ago, is protracted, unnecessary, and irrelevant under *Northwest Austin* and *Shelby County*. Arizona's

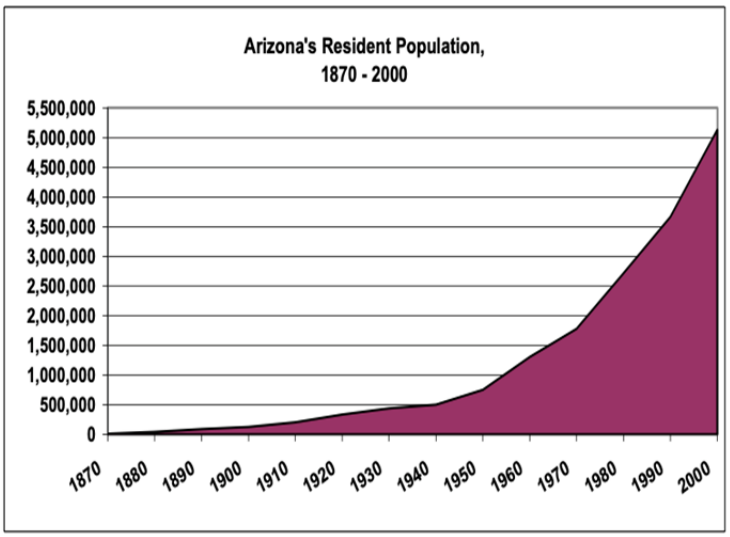
modern history of election administration tells a much different story. The decision below, which failed to consider this contemporary history, should be reversed in light of Section 2's totality of circumstances provisions.

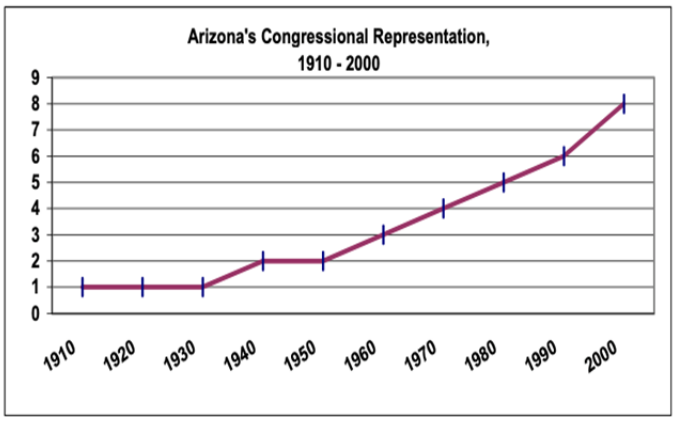
A. Arizona's Modern History Demonstrates A Commitment to Expanding Access to Voting While Protecting Election Integrity.

Contrary to the en banc majority's mischaracterizations, modern history since the 1980s demonstrates that Arizona has continually expanded access to the franchise of voting. Arizona has been grappling, and continues to grapple, with a high rate of population growth. The 1980 Census showed that Arizona had a population of approximately 2.7 million people. U.S. Dep't of Commerce, Bureau of the Census, PC80-1-B1, 1980 Census of Population U.S. Summary 1-124 tbl.61 (1983), https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8011u_bw.pdf. By 1990, Arizona had approximately 3.6 million residents. U.S. Dep't of Commerce, Bureau of Census, 1990 CP-1-4, 1990 Census of Population Arizona 1 tbl.1 (1992), https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-4.pdf.

By 2000, Arizona had a population of approximately 5.1 million people. U.S. Dep't of Commerce, Bureau of Census, PHC-1-4, 2000 Census of Population Arizona 2 tbl.1 (2002), https://www.census.gov/ prod/cen2000/phc-1-4.pdf. By the 2010 Census, Arizona had approximately 6.4 million residents. U.S. Dep't of Commerce, Bureau of Census, CPH-1-4, 2010 Census of Population Arizona 2 tbl.1 (2012), https://www2.census.gov/

library/publications/2012/dec/cph-1-4.pdf. Current 2020 Census estimates put the State's population at 7.2 million people. *QuickFacts: Arizona*, U.S. Census Bureau (last accessed May 30, 2020), https://www.census.gov/quickfacts/AZ. The Census Bureau has charted this modern rapid growth through 2000:





U.S. Census Bureau, Resident Population and Apportionment of the U.S. House of Representatives,

https://www.census.gov/dmd/www/resapport/states/arizona.pdf.

In light of this modern rapid population growth, Arizona enacted numerous voting advancements to make registering to vote easier, to expand absentee and early voting, to create a permanent early voting list, and other enhancements. Arizona's modern advancements in electoral mechanics have only made voting in the State easier, not harder. The reality is that, far from the inflammatory rhetoric of the en banc majority, the current conditions in Arizona do not show significant racial discrimination in election administration sufficient to justify relief under Section 2.

More recent and much more relevant to the claims in this case than "early territorial politicians," Pet. App. 50-51, in 1982 Arizona enacted a Motor Voter law allowing voter registration at the time and place where residents apply for a driver's license. *See* Ariz. Rev. Stat. §§ 16-111 and 16-112. Arizona's Motor Voter provisions were approved by initiative petition during the 1982 general election, 11 years prior to the National Voter Registration Act of 1993 enacted by Congress, and substantive portions remain codified to this day. *Id.* The rationale behind this initiative was to increase Arizona's then low voting rate. Argument "For" Proposition 202, Arizona Initiative and Referendum Publicity Pamphlet General Election 1982 at 42, available at https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10849. Major reasons cited for that low voting rate were the high proportion of residents who had recently arrived to the State and senior citizens who had difficulty registering to vote. *Id.*

Arizona's Motor Voter provisions aimed to increase the State's registration rates and accordingly increase the voter participation rates in subsequent elections. *Id*. And it worked. In the following four years, the number of Arizona's registered voters increased by over 40%. *See Historical Election Results & Information*, Arizona Secretary of State (last accessed May 30, 2020), https://azsos.gov/elections/voter-registration-historical-election-data/historical-election-results-information. Subsequently, the Secretary of State and the Director of the Transportation Department met annually to discuss potential ways to improve voter registration through Arizona's Motor Voter provisions. Matt A. Barreto et al., Online Voter Registration (OLVR) Systems in Arizona and Washington 82 (2010), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/onlinevoterregpdf.pdf. In approximately 1999, the discussion in these meetings turned to the idea of conducting Motor Voter applications online. *Id.*

In 2002, Arizona, a state founded by pioneers of the old west, became a different kind of pioneer, this time in online voter registration. *Id.* at 37.[2] Arizona now gives individuals the option to register to vote online, in person, or by mail. Online voter registration not only saves money that election administrators can then utilize to educate voters and

[2] It was not until five years later that the next state to undertake online voter registration, Washington, enacted legislation permitting online voter registration beginning in 2008. *See* Matt A. Barreto et al., Online Voter Registration (OLVR) Systems in Arizona and Washington 100 (2010).

reduce voter confusion, but it can also be used by non-English speakers as Spanish translation is readily available. *Id.* at 67. Soon after Arizona's adoption of online voter registration, it became the most popular way to register to vote by a wide margin. *Id.* at 73.

In the ensuing years, changes were also made to absentee voting in the State, making it easier for more people to vote by mail. For example, in 1984, House Bill 2040 allowed voters to request absentee ballots for both a primary and general election with a single request. *See* H.R. 2040, 36th Leg., Second Reg. Sess., 1984 Ariz. Sess. Laws 984 (Ariz. 1984) (codified at Ariz. Rev. Stat. §§ 16-542, 544, 547-8, 584). This change made it much easier to vote absentee by submitting one absentee ballot request for two elections rather than the previous system which required separate absentee ballot requests for the primary and general election respectively. *Id.* House Bill 2040 was passed by the state legislature and approved by the Governor. However, House Bill 2040 did not completely provide for unfettered voting by mail. Voters were still required to submit an absentee ballot request 90 days before the Saturday preceding an election and voters were still required to provide an excuse to vote absentee. *Id.* at 1984 Ariz. Sess. Laws 984-85. Arizona required that, in order to vote by absentee ballot, a voter was required to certify that they had a justification or excuse to do so, such as the voter's expectation of absence from the State, physical disability, age being older than 65 years, residing more than 15 "road miles" from a polling place, legal blindness, religious objection, or confinement at a hospital or other facility. *Id.* at 1984 Ariz. Sess. Laws 985.

Then, in 1997, Arizona again made it even easier to vote by mail, changing its absentee voting procedures to encompass early voting. Arizona amended its laws to change the title of absentee voting to early voting and removed any requirement that voters have an excuse to vote by mail. S. 1003, 43rd Leg., Second Spec. Sess., 1997 Ariz. Sess. Laws 3063, 3071-3072 (Ariz. 1997) (relevant changes codified at Ariz. Rev. Stat. §§ 16-541 and 542). This meant that voters need not have a justification to vote early or by mail, and could do so for any or no reason. These changes also expanded the time period to file vote-by-mail requests, allowing voters to file requests for mail-in ballots up until 11 days prior to an election. *Id.* In 2007, Arizona again greatly expanded the franchise by creating a permanent early voting list. H.R. 2106, 48th Leg., First Reg. Sess., 2007 Ariz. Sess. Laws 641, 644 (Ariz. 2007) (relevant changes codified at Ariz. Rev. Stat. § 16-544). This eliminated the requirement that voters request vote-by-mail ballots year after year. A voter need only ask to be placed on the permanent early voting list once, and that voter automatically receives an early voting ballot prior to each election. *Id.* Additionally, any voter may vote early in person at any early voting location up until 5:00 p.m. on the Friday preceding the election. Ariz. Rev. Stat. § 16-542(E). Arizona's early voting provisions make it substantially easier for Arizonans to vote and greatly increases the likelihood that they will vote.

The preceding examples demonstrate that when viewing Arizona's electoral background through the lens of modern history and its recent rapid expansion of population, rather than that of centuries past, it is obvious that the State has

provided nearly every secure opportunity within reason to permit its citizens to vote.

B. Arizona Counties Are Increasingly Utilizing Vote Centers.

Arizona is also currently increasing access to the franchise through the proliferation of Vote Centers. In 2011, the State amended its elections code to allow counties to use Vote Centers if they so choose. H.R. 2303, 50th Leg., First Reg. Sess., 2011 Ariz. Sess. Laws 331 (Ariz. 2011) (amending Ariz. Rev. Stat. § 16-411). Counties still retain the ability to conduct elections under the traditional precinct model if they deem the Vote Center model inappropriate for their particular county. *Id.* Unlike the traditional precinct-based system, the Vote Center model requires each Vote Center to be equipped to print a specific ballot, depending on each voter's particular district. This way, all races for which a voter is eligible to vote are included on their ballot regardless of which Vote Center they attend. Ariz. Rev. Stat. §16-411(B)(4); *see also Democratic Nat'l Comm.* v. *Reagan*, 329 F. Supp. 3d 824, 840 (D. Ariz. 2018), rev'd on other grounds *sub nom.*, *Democratic Nat'l Comm.* v. *Hobbs*, 948 F.3d 989 (9th Cir. 2020). Thus, under Arizona's Vote Center system, voters may cast their ballots at any Vote Center in the county in which they reside and receive the appropriate ballot. Ariz. Rev. Stat. § 16-411(B)(4).

More and more Arizona counties are utilizing the Vote Center model. In the 2018 November General Election, ten of Arizona's fifteen counties utilized Vote Centers, including Cochise, Coconino,

Gila, Graham, Greenlee, Maricopa, Navajo, Santa Cruz, Yavapai, and Yuma counties. *See 2018 General Election*, Citizens Clean Elections Commission (last accessed May 30, 2020), https://www.azcleanelections.gov/arizona-elections/november-2018-election. These counties account for over 74% of the State's total population based on the 2010 Census data. U.S. Dep't of Commerce, Bureau of Census, CPH-1-4, 2010 Census of Population Arizona 18 tbl.2 (2012), https://www2.census.gov/library/publications/2012/dec/cph-1-4.pdf. Counties utilizing Vote Centers are no longer limited to those that are rural and sparsely populated, like Greenlee County, but now include those that are the most populous in Arizona—like Maricopa County. *Cf. Reagan*, 329 F. Supp. 3d at 840.

In empowering its counties to adopt the Vote Center model, Arizona has yet again greatly expanded the franchise. This was also given short shrift by the en banc majority below when looking at the totality of the circumstances. While counties' adoption of the Vote Center model certainly represents an expansion of the franchise, adoption of such a model may not be appropriate for every jurisdiction. *See Reagan*, 329 F. Supp. 3d at 861-62. For example, unlike with precinct-based polling places, in counties utilizing Vote Centers it can be difficult to predict the number of voters at each Vote Center. *Id.* at 862. This could result in an increase in voter wait times, potentially with corresponding decreases in turnout. *Id.* Accordingly, it is appropriate for Arizona to leave the policy decision on whether to move to the Vote Center model to the discretion of the individual counties.

II. Arizona's Prevention Of Out-Of-Precinct Voting And Unlimited Third-Party Ballot Harvesting Is Strongly Justified.

Prohibiting both unlimited out-of-precinct voting and unlimited third-party ballot harvesting is strongly justified by Arizona's interests in administering secure and efficient elections. *Cf.* Pet. App. 81 ("The only plausible justification for Arizona's [out-of-precinct] policy would be the delay and expense entailed in counting [out-of-precinct] ballots."); Pet. App. 91-95. These justifications more than make up for any minor inconvenience afforded to voters by the policy.

A factor in determining whether a challenged policy violates Section 2 is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). There is no doubt that Arizona has an interest in the orderly administration of its elections, including the need to prevent fraud, to quickly and efficiently report election results, and to promote faith and certainty in election results. *See Nader* v. *Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2008). These are all compelling interests. *See Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 225 (2008) (Souter, J., dissenting) ("There is no denying the abstract importance, the compelling nature, of combating voter fraud."); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election process as

means for electing public officials."); *Miracle* v. *Hobbs*, No. 19-17513, 2020 U.S. App. LEXIS 14031, at *4 (9th Cir. May 1, 2020) ("[T]he public also wants guarantees of a fair and fraud-free election, and a state 'indisputably has a compelling interest in preserving the integrity of its election process.'") (citing *Eu* v. *S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231, (1989)).

Primarily, prohibiting out-of-precinct voting makes voting more convenient. It allows election administrators to budget the numbers of voters who can vote in the same location. *See Sandusky Cty. Democratic Party* v. *Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004); Pet. 16. Too many voters utilizing a single polling place could lead to long wait times, overwhelmed election administrators, and disenfranchised voters. This is the same reason that the Vote Center model is not an appropriate choice for every jurisdiction. *See* p. 15, *supra*. Secondly, it allows each polling place to list only those elections the voters in that precinct may vote in. *Id.* This makes ballots less confusing and encourages voting in local elections. *See* Pet. App. 159-60 (Bybee, J., dissenting).

Arizona is also justified in preventing out-of-precinct voting to ensure secure and legitimate elections, preventing the potential for fraud or impropriety. First, as discussed above, preventing out-of-precinct voting caps the number of voters for which election administrators are responsible. This makes it easier for election administrators to "monitor votes and prevent election fraud." *Blackwell*, 387 F.3d at 569. Second, preventing out-of-precinct voting also helps increase the secrecy and privacy of the ballot. In submitting a ballot directly

to an election official in a voter's precinct, rather than to one who could be stationed hundreds of miles away from her county, the possibility that others might view, record, or tamper with her ballot is significantly reduced. *See Miller* v. *Picacho Elementary Sch. Dist. No. 33*, 877 P.2d 277, 279 (Ariz. 1994).

If Arizona counties are required to accept out-of-precinct votes, they, and the out-of-precinct voters, will encounter a host of difficulties in regard to ballot security and privacy. For example, if an out-of-precinct ballot is accepted, the polling place will have to identify the voter and determine which elections the voter is eligible to vote in in the other precinct and then record the voter's vote. *See* Pet. App. 81-82. This identification would threaten the secrecy of the out-of-precinct voter's ballot. Further, that ballot would have to be transmitted from the foreign precinct to the voter's home precinct, which could be in a completely different county. Through what mechanism and in what timeframe must these out-of-precinct ballots be transmitted to the correct precincts? There are currently no approved mechanisms in place for counties to transmit these ballots or this sort of information across county lines in a secure and private manner which maintains chain-of-custody. To develop such a mechanism would be incredibly time intensive, costly, and surely far from failsafe.

Alternatively, out-of-precinct voters may only be able to vote for statewide races in that foreign precinct, or for races in which the district overlaps both the home and foreign precincts. *See* Pet. App. 81-82. That regime creates disenfranchisement as well, because it would prevent and dissuade people

from voting in local elections. It could also lead to a greater likelihood of fraud since it would be more difficult for election administrators to determine whether that voter is eligible or registered to vote and whether that voter has already voted elsewhere. Further, that regime would raise serious questions as to how those out-of-precinct ballots should be tabulated for election result and turnout data. It might even result in more ballots being cast in a precinct than people who live there. This occurrence would surely result in at least the appearance of impropriety.

Similarly, prohibiting unlimited third-party ballot harvesting makes voting more secure and helps ensure election integrity in Arizona. *See* Pet. 17-19, 25-26. The State's existing electoral framework is sufficiently broad to allow ample opportunity for electors to vote in many other ways, without allowing for unlimited ballot harvesting. *See* p. 8-15, *supra*. Indeed, fraud in ballot harvesting has been documented in other parts of the country and by other courts. *See* Pet. App. 586 (North Carolina State Board of Elections Order requiring a special election for the 9th Congressional District due to ballot harvesting fraud); *Pabey* v. *Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (order a special election due to ballot harvesting fraud); *see also Crawford*, 553 U.S. at 195 n.12 (plurality opinion) ("much of the fraud was actually absentee ballot fraud"). Courts in other parts of the nation have also upheld similar prohibitions in the name of election integrity. *See, e.g.*, *Ray* v. *Texas*, No. 2-06-CV-385 (TJW), 2008 U.S. Dist. LEXIS 59852 (E.D. Tex. Aug. 7, 2008) (rejecting challenge to Texas statute criminalizing signing as a witness for more than one early voting

ballot application)*; see also Qualkinbush* v. *Skubisz*, 826 N.E.2d 1181 (Ill. App. Ct. 2004) (holding that a statute restricting who is eligible to return an absentee ballot did not conflict with the Voting Rights Act); *DiPietrae* v. *City of Phila.*, 666 A.2d 1132 (Pa. Commw. Ct. 1995) (upholding a Pennsylvania statute limiting agent-delivery for absentee ballot applications and absentee ballots).

Arizona's justifications for its prohibitions on out-of-precinct voting and unlimited third-party ballot harvesting are also balanced with the fact that, in making it easier to vote and establishing Vote Centers, Arizona and its counties provide many ways for individuals to vote. Some of these methods, such as early voting by mail, do not even require the voter to be present in their home precinct at the time they cast their vote. Accordingly, the "need" for voters to be able to cast out-of-precinct ballots at any polling place, effectively forcing a quasi-Vote Center model on all counties in the State, is hardly persuasive.

CONCLUSION

For the aforementioned reasons, amicus curiae respectfully requests that this Court grant Petitioners' petition for a writ of certiorari.

Respectfully submitted,

Jason Torchinsky
Counsel of Record
Jonathan P. Lienhard
Dennis W. Polio
Holtzman Vogel
Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

Counsel for Amicus Curiae