No. 19-1257, 19-1258

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.

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

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

BRIEF OF *AMICUS CURIAE* THE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Republican Governors Public Policy Committee ("RGPPC") is a Section 501(c)(4) social welfare organization incorporated in the District of Columbia. It represents all 27 Republican State Governors as well as two Republican Territorial Governors. The RGPPC's mission includes promoting social welfare and efficient and responsible government practices; advocating public policies that reduce the tax burdens on United States citizens, strengthen families, promote economic growth and prosperity, and improve education; and encouraging citizen participation in shaping laws and regulations relating to such policies.

The RGPPC possesses has a significant interest in this important case because it possesses expertise in the policy matters surrounding election administration. RGPPC's filing will assist the Court in understanding the modern history of Arizona's election procedures, along with an understanding of the importance of the precinct-based election system and prohibition on unlimited third-party ballot harvesting. The RGPPC urges the Court to reverse the Ninth Circuit's en banc opinion.

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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 its counsel made any monetary contribution toward the preparation and submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The en banc opinion of the Ninth Circuit is as troubling as it is divided. By casting Arizona's reasonable and commonplace election regulations as discriminatory, the majority opinion threatens states' ability to pass commonsense laws and properly administer elections. If allowed to stand, the opinion would cast doubt on even the most neutral election regulations.

Contrary to the en banc opinion, Arizona's modern election practices demonstrate that Arizona has almost exclusively expanded access to the franchise of voting. In fact, over the last four decades, Arizona has been a leader among the states in making it easier to register and vote, while taking appropriate non-discriminatory steps to ensure integrity in its elections. The en banc opinion disregards this modern history and fails to account for the necessity and commonsense nature of the kind of election regulations at issue.

The election regulations at issue in the present case are both important to the administration of Arizona's elections and commonplace across the states. Arizona's precinct-based voting method is among the procedures that Arizona, 25 other states, the District of Columbia, and three United States territories have historically implemented to orderly administer elections and preserve ballot secrecy. *See* JA 730 (Bybee, J., dissenting). Arizona's out-of-precinct policy, which requires election administrators to only count ballots cast by voters in their assigned precincts, is important to the State's precinct-based voting

system. Arizona's limit on third-party ballot harvesting—which prevents anyone other than 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 protecting election integrity used by a majority of other states. *See* JA 739-742 (Bybee, J., dissenting) (collecting statutes). Nevertheless, the en banc majority focused narrowly on slight disparate results and Arizona's ancient history of racial discrimination in order to determine that the practices violate Section 2 of the Voting Rights Act.

The en banc opinion conflicts with multiple decisions from this Court, as well as those from various circuit courts of appeal, by focusing the analysis both too narrowly and too broadly. The opinion focuses almost entirely on Arizona's bygone history between the 1840s and the 1980s, giving short shrift to any expansion of the franchise within the last four decades. Specifically, the en banc opinion places too much weight on decades-old evidence of discrimination, fails to properly consider current conditions, and misapplies the "totality of circumstances" for Section 2 purposes, *see* 52 U.S.C. 10301(b). The en banc opinion also improperly imputed unlawful racial animus onto the entire legislature based on the subjective interpretation of statements from just a single legislator.

Arizona's expansion of voting access over the last 40 years has created abundant opportunities for Arizonans to vote. Arizonans are no longer required to plan in-person trips to voting offices months before an election, fill out a paper voter registration application, physically travel to a polling place on

Election Day, or wait to vote. Arizona now embraces early voting, no excuse voting by mail, online paperless voter registration, motor voter registration, and more. It is currently easier to vote in Arizona than at any time in its history. Rather than acknowledge these advances, the en banc panel cherry-picked ancient history and extrapolated subjective motivations from the actions of individual legislators to determine the 'intent' of the legislature. Such cherry-picking and incorrect analysis should doom the en banc decision.

ARGUMENT

In order to find a violation of Section 2 of the Voting Rights Act ("VRA"), a court must establish, "based on the totality of circumstances," that a 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). 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). Another 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." *Id.* at 37 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982)).

I. THE SCOPE OF ANY VRA ANALYSIS NECESSARILY MUST BE TEMPORALLY LIMITED.

The consideration of discriminatory practices in electoral history must necessarily be limited in temporal scope and cannot be too disconnected from current conditions given the history of race in this country. Indeed, if one were to look far enough back in nearly any jurisdiction, such effort would undoubtedly yield examples of pervasive discriminatory practices. But surely not every jurisdiction will possess unconstitutionally discriminatory election laws *today*. Consistent with this principle, courts have temporally circumscribed the scope of VRA analyses.

In *Northwest Austin Municipal Utility District Number One* v. *Holder*, this Court noted that Section 5 of the VRA raised federalism concerns due to the scope of its historical analysis. 557 U.S. 193, 203-206 (2009). 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 (emphasis added). Furthermore, the Court stated that Section 5 was troubling because it differentiated between states in ways that may no longer have been justified. *Id.* at 203-204. Ultimately, however, this Court invoked the canon of constitutional avoidance and did not rule on the constitutionality of Section 5. *Id.* at 206.

In the seminal case *Shelby County* v. *Holder*, this Court invalidated the preclearance requirements of Section 4 of the VRA due to its historical relevance. 570 U.S. 529, 557 (2013). Specifically, the Court so ruled because the preclearance requirements were no longer justified by the same concerns that were relevant a half-century earlier, when the VRA was passed. *Id*. 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 (emphasis added). This is especially true in circumstances where the VRA "authorizes federal intrusion into sensitive areas of state and local policymaking." *Id.* at 545 (quoting *Lopez* v. *Monterey Cty*., 525 U.S. 266, 282 (1999)). These circumstances are clearly present in the case at hand.

The rationale of *Northwest Austin* and *Shelby County,* that current burdens imposed on states must be justified by current needs or conditions, applies across VRA and constitutional analyses. *See, e.g.*, *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); *Smith* v. *School 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); *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); *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); *Mayhew* v. *Burwell*, 772 F.3d 80, 96-97 (1st Cir. 2014) (holding that a statute requiring a state to maintain Medicaid coverage of low-income 19- and 20-year-olds for nine years did not violate the spending clause, U.S. Const. Art. I, § 8, Cl. 1, because in part it was sufficiently justified by "current conditions" under *Shelby County*) (quoting *Shelby Cty*., 570 U.S. at 553), cert. denied, 576 U.S. 1004 (2015).

Consistent with *Shelby County* and its progeny, examination of discriminatory practices in electoral history under Section 2 must be reasonably limited to examining the current conditions of a particular state, rather than punishing a state for its distant past – including actions taken before becoming a state. In other words, the examination must be of recent history, relevant to the law or regulation in question. Undertaking an unlimited examination of past wrongs reaching back to before statehood, without balanced consideration of modern electoral advances, deprives states and municipalities of the ability to move on from the errors of previous generations. Failing to limit the examination, as the en banc Ninth Circuit did in the present case, casts a shadow over nearly all election laws in nearly all states, especially if this Court

grants credence to the opinion. Casting aside reasonable, neutral, and justified election administration efforts threatens the very core of democracy. Such "inflammatory and unsupportable charges of racist motivation poison the political atmosphere." *Veasey*, 830 F.3d at 281-82 (Jones, J., dissenting).

II. THE TOTALITY OF CIRCUMSTANCES IN ARIZONA DEMONSTRATES A CONTINUED COMMITMENT TO EXPANDING ACCESS TO VOTING RATHER THAN DISCRIMINATION.

A. The En Banc Majority Based Its Section 2 Analysis On The Actions Of Bygone Eras.

Ignoring this Court's precedents in *Northwest Austin* and *Shelby County*, the majority of the en banc Ninth Circuit panel below based its historical analysis on ancient history without any temporal limit whatsoever. That court devoted large swaths of its opinion—17 pages in total—to analyzing examples of racial discrimination starting over 170 years ago with only sporadic and tenuous examples since the 1960s. The en banc majority's discussion includes Arizona's territorial period, before Arizona attained statehood, including the "manifest destiny" beliefs of "[e]arly territorial politicians," the 1871 Camp Grant Massacre, and the "Indian Wars" of the 1880s. JA 625-626. Also discussed is the racial composition of Arizona's 1910 constitutional convention and provisions of that constitution which failed to include dual-language provisions. JA 627-

628. The en banc majority continues on, discussing the literacy tests, disenfranchisement, and intimidation of Hispanics and American Indians in the early 20th Century. JA 628-635. Then, the en banc majority engages in a prolonged discussion of Arizona's history of VRA litigation from the 1960s through the 1990s. JA 635-642.

In stark contrast to the 17 pages discussing Arizona's first 150 years, the en banc majority cites only four examples of alleged discrimination in the past 20 years, most of which are tenuous at best. JA 642-643. 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. *Id*. This recent history is disconnected from the complained of disparities and is of dubious relevance to the present case. The recent events discussed by the en banc majority are also idiosyncratic examples of the issues that naturally arise when human beings administer elections. None of the recent alleged discriminatory actions were the result of any intentional discrimination on the part of election workers or government officials whatsoever and the examples do nothing to highlight any recent history of discrimination in Arizona under Section 2.

Simply stated, the opinion's discussion of Arizona's history of discriminatory practices, nearly all of which occurred prior to 30 or 40 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—namely that Arizona has continually expanded access to the franchise and

made it easier and safer to vote. The decision below, which failed to consider this contemporary history, should be reversed in light of Section 2's totality of circumstances provisions.

The en banc's protracted discussion of Arizona's history of discrimination also conflicts with the District Court's findings of Fact and Conclusions of Law, which noted that although Arizona does have a history of discrimination, that history "has not been linear." JA 341. For example, the District Court found that during the entire time Arizona was under preclearance requirements (1975-2013), the Department of Justice did not issue a single objection to any of Arizona's statewide procedures for registration or voting. *Id*. The District Court also found that Arizona acted to avoid the politics of racially discriminatory redistricting by forming the Arizona Independent Redistricting Commission ("AIRC") in 2000. *Id*. Ultimately, the District Court found that in Arizona:

> discriminatory action has been more pronounced in some periods of state history than others and each party (not just one party) has led the charge in discriminating against minorities over the years. Sometimes, however, partisan objectives are the motivating factor in decisions to take actions detrimental to the voting rights of minorities. Much of the discrimination that has been evidenced may well have in fact been the unintended consequence of a political culture that simply ignores the needs of minorities.

JA 342 (cleaned up) (internal citations and quotation marks omitted). In sum, the District Court found that Arizona's recent history is a "mixed bag", but credited Arizona's many advancements. *Id*. The en banc majority thumbed its nose at the true fact finder, the District Court, and engaged in its own fact-finding mission, finding new "facts" outside of the District Court's findings and ignoring the facts of the District Court that were simply inconvenient to the en banc majority's analysis. *See also* JA 715 (O'Scannlain, J., dissenting) ("the majority's lengthy history lesson on past election abuses in Arizona—simply ha[s] no bearing on this case. Indeed, pages 47 to 81 of the majority's opinion may properly be ignored as irrelevant.").

B. Arizona's Modern History Demonstrates A Continued Effort To Expand Voting Access While Ensuring Election Integrity.

Contrary to the en banc majority's efforts to impose current burdens on Arizona for past conditions, the last 40 years demonstrate that Arizona has continually expanded access to the franchise of voting while taking steps to protect election integrity. Any examination of Arizona's modern history must begin with a review of ,the state's recent changes in population. Over the previous 40 years, Arizona has grappled with an explosive rate of population growth. The 1980 Census showed that Arizona had a population of

approximately 2.7 million people.[2] Ten years later, in 1990, Arizona had approximately 3.6 million residents.[3] By 2000, Arizona had a population of approximately 5.1 million people.[4] By the 2010 Census, Arizona had approximately 6.4 million residents.[5] Current 2020 Census estimates put the State's population at 7.2 million people.[6]

In response to its rapid population growth, Arizona enacted numerous voting advancements to make registering to vote secure and accessible and to make the act of voting itself easier. Arizona's modern advancements in electoral mechanics have only made voting easier, not harder, and more secure. Far from the incendiary story told by the en banc majority below, the reality is that the current conditions, *see Shelby Cty.*, 570 U.S. at 553, in Arizona do not demonstrate any significant racial discrimination in election administration sufficient to justify relief under Section 2.

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[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] U.S. Census Bureau, *QuickFacts: Arizona* (last accessed December 5, 2020), https://www.census.gov/quickfacts/AZ.

1. Arizona's Motor Voter Law.

In 1982, Arizona enacted a Motor Voter law providing for voter registration when 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, predating by 11 years the National Voter Registration Act of 1993 enacted by Congress. *Id.* The measure was intended to increase Arizona's voter registration and voting rates.[7] Voting rates were reportedly low at that time due to a high proportion of recently arrived residents and senior citizens who had difficulty registering to vote. *See* Argument "For" Proposition 202, *supra* note 7, at 42. Arizona's Motor Voter provisions aimed to increase the State's registration rates with appropriate verification of eligibility and in turn increase voter participation rates. *Id.* And it worked. In the following four years, the number of Arizona's registered voters increased by over 40%.[8] In the years following 1982, the Arizona Secretary of State and the Director of the Transportation Department met annually to discuss additional ways to securely improve voter registration through Arizona's Motor Voter provisions.[9]

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[7] 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.

[8] *See* Ariz. Sec'y of State, *Historical Election Results & Information* (last accessed December 5, 2020), https://azsos.gov/elections/voter-registration-historical-election-data/historical-election-results-information.

[9] Matt A. Barreto et al., Online Voter Registration (OLVR) Systems in Arizona and Washington 82 (2010),

2. Online Voter Registration in Arizona.

As a result of continued work by Arizona's leaders, the state made access to voting even easier in 2002 when it became the first state in the country to provide for secure online voter registration. *See* Barreto et al., *supra* note 9 at 37. Arizona's efforts predated all other states in online voter registration by *five years*. *See id.* at 100. Arizonans now have the ability and the option to securely register to vote online, in person, or by mail. Online voter registration not only conserves resources that election administrators can now use to better educate voters, but the online voter registration system can also be easily used by non-English speakers because Spanish translation is readily available. *Id.* at 67. Arizona's online voter registration quickly became the most popular way to register to vote. *Id.* at 73.

3. Voting By Mail in Arizona.

Over the last 40 years, Arizona has also continuously made voting itself easier in the state by making it easier to securely vote by mail. In 1984, Arizona began providing a mechanism whereby voters could request absentee ballots for both a primary and general election with a single request. *See* H.R. 2040, 36th Leg., 2d 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 because voters need

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https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/ 2010/onlinevoterregpdf.pdf.

only submit one absentee ballot request for two elections rather than the previous method requiring separate absentee ballot requests for each election. *Id.* However, 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.

In 1997 Arizona again increased access to voting by mail, changing its absentee voting procedures to encompass early voting. H.R. 2040, 36th Leg., 2d Reg. Sess., 1984 Ariz. Sess. Laws 985 (Ariz. 1984). Arizona removed any requirement that voters have an excuse to vote by mail and transformed absentee voting into early voting. S. 1003, 43rd Leg., 2d Spec. Sess., 1997 Ariz. Sess. Laws 3063, 3071-3072 (Ariz. 1997) (relevant changes codified at Ariz. Rev. Stat. §§ 16-541 and 542). Voters no longer need to have a justification to vote early or by mail, and can now do so for any reason or no reason at all. These changes also expanded the time period during which to file vote-by-mail requests, which, after verification, allow voters to file requests for mail-in ballots up until 11 days prior to an election. *Id.* Early voting is now "the most popular method of voting" in Arizona, "accounting for approximately 80 percent of all ballots cast in the 2016 election." JA 259.

In 2007 Arizona created a permanent early voting list, making it even easier to vote by mail. H.R. 2106, 48th Leg., 1st Reg. Sess., 2007 Ariz. Sess. Laws 641, 644 (Ariz. 2007) (relevant changes codified at Ariz. Rev. Stat. § 16-544). Arizona's permanent early voting list eliminated the need for voters to 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, greatly increasing the likelihood that they will vote.

C. Arizona's Actions To Increase Access To The Franchise Of Voting Have Worked.

Arizona's efforts to make voting easier have worked. Even though Arizona has experienced an unprecedented explosion in population growth over the last four decades, its voter engagement has increased at an even greater rate. This is a credit to Arizona's efforts, because such a quick explosion in population growth and residential mobility would ordinarily result in lower voter registration and turnout.[10] Such a reduction in voter engagement rates could be due to a number of circumstances such as difficulty or delay in registering to vote after becoming a new resident.

However, through its steadfast efforts to increase secure access to the franchise of voting, Arizona has overcome this trend. In 1980, while the state had a population of approximately 2.7 million

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[10] *See* Squire, P., Wolfinger, R., & Glass, D. (1987). Residential Mobility and Voter Turnout. *American Political Science Review, 81*(1), 45-65. doi:10.2307/1960778; *see also* Jaume Magre et al., *Moving to Suburbia? Effects of Residential Mobility on Community Engagement*, 53 Urb. Stud. 17 (2016).

people,[11] it had only 1.1 million registered voters,[12] with 898,193 turning out to vote during that year's presidential election.[13] That translates to a 41% overall voter registration rate, not accounting for voting age, citizenship, or other eligibility criteria and an 80% voter turnout rate during a presidential election. Ten years later, Arizona had over 3.6 million residents,[14] over 1.8 million registered voters,[15] and over 1 million turning out to vote during the 1992 presidential election.[16] Arizona's overall voter registration rate was by this point over 50%, accounting for an increase of about 9% in ten years and presidential election year turnout of nearly 77%. By 2000, Arizona had a population of over 5.1 million people,[17] voter registration over 2.1 million,[18] and over 1.5 million turning out to vote

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[11] 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.

[12] Ariz. Sec'y of State, *1980 Voter Registration*, https://apps.azsos.gov/election/VoterReg/History/Year/1980.pdf.

[13] Ariz. Sec'y of State, *1980 General Election Canvass*, https://azsos.gov/sites/default/files/canvass1980ge.pdf.

[14] 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.

[15] Ariz. Sec'y of State, *1990 Voter Registration* https://apps.azsos.gov/election/VoterReg/History/Year/1990.pdf

[16] Ariz. Sec'y of State, *1992 General Election Canvass*, https://azsos.gov/sites/default/files/canvass1992ge.pdf.

[17] 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.

[18] Ariz. Sec'y of State, *State of Arizona Registration Report: 2000 General Election*, https://apps.azsos.gov/election/voterreg/2000-11-01.pdf.

during that year's presidential election.[19] Arizona's overall voter registration rate by 2000 was over 42%, slightly lagging behind the staggering increase in population during the 1990's, and a voter turnout of over 71%. Ten years later, Arizona had approximately 6.4 million residents,[20] with 3.1 million registered voters,[21] and 2.3 million voters turning out during the 2012 presidential election.[22] Arizona's overall voter registration rate by 2010 was approximately 49%, and increasing voter turnout during the 2012 presidential election to over 74%. This year, estimates place the State's population at 7.2 million people,[23] with nearly 4.3 million registered voters, and over 3.4 million voters turning out in last month's presidential election.[24] Arizona's total voter registration rate is now at nearly 59%--the most in history—with voter turnout during the 2020 election at nearly 80%. What these figures demonstrate is that Arizona's efforts to increase access to the franchise, and to make voting secure

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[19] Ariz. Sec'y of State, *State of Arizona Official Canvass: 2000 General Election*, https://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf.

[20] 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.

[21] Ariz. Sec'y of State, *State of Arizona Registration Report: 2012 General Election*, https://apps.azsos.gov/election/voterreg/2012-10-30.pdf.

[22] Ariz. Sec'y of State, *State of Arizona Official Canvass: 2012 General Election*, https://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf.

[23] *QuickFacts: Arizona*, U.S. Census Bureau (last accessed May 30, 2020), https://www.census.gov/quickfacts/AZ.

[24] Ariz. Sec'y of State, *State of Arizona Official Canvass: 2020 General Election*, https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf.

and easier, have worked. Recent voter participation in Arizona has kept up with, and even outpaced, the incredible population growth the state has seen over the last 40 years.

Unfortunately, not one of the preceding examples were mentioned by the en banc majority below when analyzing the totality of the circumstances. Yet these examples demonstrate that when viewing Arizona's electoral background through the lens of modern rather than ancient history, it is obvious that the state has provided nearly every opportunity within reason to expand access to the franchise. And those provisions have worked. Therefore, when the proper totality of the circumstances analysis is conducted, it becomes clear that Arizona is not impermissibly discriminating in access to voting—indeed, the process is as open as it has ever been.

III. ARIZONA'S PRECINCT-BASED VOTING SYSTEM AND PROHIBITION ON UNLIMITED THIRD-PARTY BALLOT HARVESTING ARE STRONGLY JUSTIFIED.

Prohibiting unlimited out-of-precinct voting and unlimited third-party ballot harvesting is strongly justified by Arizona's interests in administering efficient and secure elections. *Cf.* JA 656 ("The only plausible justification for Arizona's [out-of-precinct] policy would be the delay and expense entailed in counting [out-of-precinct] ballots."); *Cf.* JA 666-670. These justifications more than make up for any minor inconvenience voters experience by way of the policy.

Arizona has an undeniable interest in the orderly administration of its elections, including the need to prevent fraud and irregularities, 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). The 2020 General Election has only reinforced that these interests are at the very least compelling, if not imperative. *See also 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 processes as means for electing public officials."); *Miracle* v. *Hobbs*, No. 19-17513, 808 Fed. Appx. 470, 473 (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)).

A. Arizona's Interests In Its Out-Of-Precinct Policy.

Arizona's prohibition on out-of-precinct voting makes voting more convenient. It permits election administrators to account for 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. 16-17. Too many voters utilizing a single polling place could lead to long wait

times, overwhelmed election administrators, and disenfranchised voters. Secondly, it makes each polling place responsible for listing only those elections relevant to the voters in that precinct. *Blackwell*, 387 F.3d at 569. This makes ballots less confusing, streamlines information for local elections officials, and encourages voting in local elections. *See* JA 727-728 (Bybee, J., dissenting).

Arizona is also justified in preventing out-of-precinct voting in order to ensure more secure and legitimate elections, and to prevent the potential for fraud, impropriety, or the appearance thereof. First, as discussed above, preventing out-of-precinct voting essentially caps the number of voters for which each precinct-level election official is responsible for assisting and managing. This makes it easier for election administrators to "monitor votes and prevent election fraud." *Blackwell*, 387 F.3d at 569. Second, prohibiting 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 forced to accept out-of-precinct votes, they, and the out-of-precinct voters, will not only encounter difficulties with voting wait times, but also problems with 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 out-of-precinct elections the voter is eligible to vote in before recording the

voter's vote for those eligible offices. *See* JA 656-657. This identification would threaten the secrecy of the out-of-precinct voter's ballot. Further, that ballot would have to be transmitted from the distant 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 or transported to the correct precincts, while maintaining privacy and security? There are currently no approved mechanisms, processes, statutes or regulations in place for doing so while preserving chain-of-custody. To develop such a mechanism would be incredibly time intensive, costly, and far from foolproof.

Alternatively, given the challenges associated with transporting or transmitting ballots to the proper precinct under the en banc majority's opinion, out-of-precinct voters may only be able to vote for statewide races in that foreign precinct, or for races relevant to both the home and distant precincts. That regime creates disenfranchisement as well, because it would prevent people from voting in local elections. It could also result in election results marred by human error, as election administrators would be responsible for determining whether that voter is eligible or registered to vote in another precinct, 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 only increase the public's mistrust and skepticism of the electoral system, a growing problem highlighted during the 2020 election cycle.

B. Arizona's Interests In Its Limits On Ballot Harvesting.

Similarly, prohibiting unlimited third-party ballot harvesting in Arizona makes voting there more secure and helps ensure election integrity. *See* Pet. 17-19, 25-26; Br. of State Petitioners at 47-49. The State's existing electoral framework is sufficiently broad to allow ample opportunity for electors to easily vote, without opening the door to the insecurity created by unlimited ballot harvesting. *See supra*. Indeed, fraud in ballot harvesting has been documented in other parts of the country and by other courts. *See* JA 531-575 (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) (ordering 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 across the nation have 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).

See also DCCC v. *Ziriax*, 2020 U.S. Dist. LEXIS 170427, at *36-43, *62-67 (N.D. Okla. 2020) (discussing Oklahoma's interest in preventing fraud and upholding that state's ballot harvesting prohibition); *Crossey* v. *Boockvar*, 2020 Pa. LEXIS 4868 (Pa. 2020) (upholding Pennsylvania's prohibition on ballot harvesting); Troy Closson, *New Local Election Ordered in N.J. After Mail-In Voter Fraud Charges*, N.Y. Times (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/nyregion/nj-election-mail-voting-fraud.html (discussing invalidation of Paterson, New Jersey election due to widespread fraud and corruption stemming from ballot harvesting).

Arizona's justifications for its out-of-precinct voting and ballot harvesting policies are also balanced with the fact that, in making it easier to vote, Arizona and its counties provide a litany of more secure 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 is hardly persuasive, and raises substantial risk that such court ordered actions could undermine confidence in the electoral system.

IV. LEGISLATION SHOULD NOT BE INVALIDATED BECAUSE OF COURTS' SUBJECTIVE INTERPRETATIONS OF THE ACTIONS OF A SINGLE LEGISLATOR.

Rather than impute worthy motivation upon the Arizona Legislature for its decades of successful efforts to increase access to the franchise, the en banc majority of the Ninth Circuit imputed unlawful racial animus to the entire body based on statements from just a single legislator. JA 677. As an initial matter, that particular legislator clearly lacked significant influence over the legislature. His lack of meaningful influence is plainly evidenced by his 2018 expulsion from the Arizona House of Representatives by a 56-3 vote.[25] Nevertheless, even if the circumstances of that particular legislator were different, it is inappropriate to invalidate a statute, especially one concerning such a " sensitive area[] of state and local policymaking", *Shelby Cty.*, 570 U.S. at 545 (quoting *Lopez*, 525 U.S. at 282), in light of the subjective interpretations of statements by one legislator, or even a small group of legislators.

"[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite." *Edwards v. Aguillard*, 482 U. S. 578, 636-37 (Scalia, J., dissenting). Furthermore, courts "cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a

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[25] *See* Ariz. Legislature, *Bill History for HR2003*, https://apps.azleg.gov/BillStatus/BillOverview/70748.

particular legislator's preenactment floor or committee statement" let alone staff-prepared committee reports they might have read, postenactment statements, or media coverage. *Id*. Then comes the question of how many legislators must have supposedly harbored malevolent perspectives in order to impute improper motivation? *See id*. at 638-39. Is, as was the instance in this case, one enough?

In *United States* v. *O'Brien*, this Court refused to strike down a statutory amendment due to the alleged motivation of a subset of members of Congress. 391 U.S. 367, 382-84 (1968). The Court said: "Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id*. at 383-84. And it declined to void the amendment at issue "essentially on the ground that it is unwise legislation . . . and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id*.

Further, the presumption of legislative good faith is a strong one to overcome, especially through the actions of a single legislator. In *Abbott* v. *Perez*, a three-judge panel found that the 2013 Texas Legislature had acted with discriminatory intent in passing a new redistricting plan after its 2011 plan was denied preclearance under the Voting Rights Act. 138 S. Ct. 2305, 2318 (2018). The panel first stated that the burden was on the challengers but then flipped it based on who passed the 2013 law: a Legislature with "substantially similar" membership

and the "same leadership" that passed the flawed 2011 plan. *Perez* v. *Abbott*, 274 F. Supp. 3d 624, 645–46, 648 n.37 (W.D. Tex. 2017). Because the entity that passed both plans remained the same, the court "flip[ped] the evidentiary burden on its head," requiring Texas to show that the 2013 Legislature had "purged the 'taint'" of the unlawful 2011 plan. *Abbott*, 138 S. Ct. at 2324–25. This Court reversed the panel's "fundamentally flawed" analysis. *Id.* at 2326. The panel had erred because it had "reversed the burden of proof [and] [] imposed on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart.'" *Id.* at 2325 (quoting *Perez*, 274 F. Supp. 3d at 649). Its finding of discriminatory intent had "relied overwhelmingly on what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor." *Id.* at 2326 n.18. What was relevant was "the intent of the 2013 Legislature." *Id.* at 2327. And that legislature was to be afforded "the presumption of legislative good faith" and not condemned based on prior bad acts. *Id.* at 2324. This Court made it clear that "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Id.* Any history of discrimination must be weighed "with any other direct and circumstantial evidence of th[e] Legislature's intent." *Id.* at 2327. *See also N.C. State Conference of the NAACP* v. *Raymond*, No. 20-1092, 2020 U.S. App. LEXIS 10972 (4th Cir. Apr. 7, 2020) (accord).

The weight of one singular legislator, especially one whose actions are attenuated, at best, to the resultant policies, is hardly enough to outweigh the Arizona Legislature's presumption of

good faith. Accordingly, the answer to the question of whether the discriminatory intent of one legislator—even assuming that legislator's intent can be discerned at all—is sufficient or even relevant for Section 2 purposes must be answered in the negative. The en banc majority of the Ninth Circuit erred in doing just that.

V. IF ARIZONA'S NEUTRAL AND REASONABLE ELECTION REGULATIONS ARE "DISCRIMINATORY," NEARLY ALL STATE ELECTION LAWS ARE IN DANGER.

Indeed, given Arizona's successful efforts to increase election security and access to the franchise of voting, and also in light of the complete neutrality of the laws at issue, nearly any election law in any state is threatened if the en banc majority's opinion is left to stand. Under the en banc majority opinion, even the most mundane and neutral election laws are vulnerable to challenge under Section 2 if some microscopic statistical discrepancy exists in voting, if discrimination occurred in that state at some point in its history, or if some legislator who supported the law says something that is subjectively decided to have racist undertones. Indeed, that is exactly what happened in the present case. Such threats are very real, especially considering that an examination of the history of nearly any jurisdiction will yield examples of racial discrimination at one point or another.

Furthermore, there is nothing novel about Arizona's out of precinct policy or its limits on third-party ballot harvesting. JA 729-730 (Bybee, J.,

dissenting). Besides Arizona, twenty-five states, the District of Columbia, and three United States territories disqualify ballots cast in the wrong precinct. *Id*. The states with such policies represent every region of the country and transcend party lines, with some led by Republicans, some led by Democrats, and some led by both. *Id*. A majority of states also place limits on the harvesting of ballots. *See* JA 739-742 (Bybee, J., dissenting) (collecting statutes). Simply put, the provisions invalidated by the en banc majority are widely-implemented election regulations.

Because of the large number of states that possess substantially similar election regulations to Arizona, and because nearly every state has some unfortunate history of discrimination based on race, nearly every state of the union will suddenly possess potentially illegal election regulations overnight if this Court condones the en banc majority's opinion. Operating under the constant threat of VRA litigation would devastate states and their election administration efforts. The threat of needless VRA litigation would have the primary effect of making election administration incredibly expensive and damage the public's confidence in election administrators. Secondly, such needless and constant litigation would waste valuable judicial resources and inundate dockets nationwide.

With so much at stake and with only facially neutral laws at issue, the opinion of the en banc majority of the Ninth Circuit should not and cannot stand.

CONCLUSION

For the aforementioned reasons, amicus curiae respectfully requests this Court grant Petitioners' requested relief.

Respectfully submitted,

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