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 HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports common-sense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

SUMMARY OF THE ARGUMENT

Renowned scientist and Nobel Laureate Ernest Rutherford once said, "If your experiment needs a statistician, you need a better experiment."[2] Said differently in the legal context, "if your legal standard relies primarily on statistics, you need a new legal standard." Just as a talented musician can play any requested tune depending on what the listener desires, so can a talented statistician similarly find data to support most desired conclusions. Such is where courts currently find themselves in the quandary of confusing and

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents for the filing of briefs of *Amicus Cur*iae at the merits stage in this matter.

[2] *See* Sukhminder et al., *The Ten Essential "T's" Imparting Impetus to Research in Anaesthesiology*, Indian J. of Anaesthesia (July 1, 2020), https://tinyurl.com/y5xyngpz.

conflicting jurisprudential arguments and outcomes surrounding §2 of the Voting Rights Act ("§2").

When courts that apply the same legal standard to identical factual scenarios arrive at completely differing opinions, there is really no legal standard at all. Legal standards and tests exist to provide an objective method against which courts view facts and make decisions. Due to the lack of clarity from this Court, confusion reigns supreme. Different courts are applying the same §2 legal standards and arriving at drastically different conclusions. Statisticians are not the problem here—the problem exists in the fact that the same legal standards can be viewed in such a way as to lead to strikingly divergent conclusions.

Statistics can be informative and certainly have a place in the legal world to aid in better understanding the application of certain laws. However, depending on the context and manner in which they are selectively presented, statistics and numbers can be misleading and equally supportive of both sides of complex legal arguments. Therefore, legal outcomes that disproportionally rely on statistical data for determinations of compliance with legislation designed to enforce civil rights are ripe for conflicting and diverging views. This is why, when deciding cases under §2, circuit panels often disagree with district courts, and en banc circuit courts disagree with circuit panels—such was the case with the District Court below and the Ninth Circuit in the present matter. Because infinite statistical data points can be mined from a particular factual situation and massaged to support a wide range of claims, different judges and courts,

when disproportionally relying on said data for support, can arrive at infinitely diverging conclusions. A clearer and more objective legal standard is needed.

Under the framework and analysis established by the Ninth Circuit in the challenged en banc opinion, virtually *any* commonplace election regulation *could* be struck down under a similar §2 analysis. As such, a "safe harbor" standard, similar to the standard established in the *Anderson/Burdick* line of cases—i.e., a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory voting restrictions—is needed. Here, Arizona passed reasonable, nondiscriminatory voting regulations pertaining to precinct voting and who can return a voter's absentee ballot (the "Challenged Provisions")—nearly identical laws exist in states across the Country. Both Challenged Provisions would easily pass muster under the *Anderson/Burdick* standard. Consistency within the §2 context is needed. Otherwise, future plaintiffs will simply bring claims under §2, as opposed to challenges under the First and Fourteenth Amendments, and achieve their desired outcomes through data purporting to show disparate impacts on the basis of race.

When a state legislature cannot pass a reasonable, nondiscriminatory election regulation without those laws being challenged under §2, it is time for more clarity from this Court. A "safe harbor" would reestablish an environment wherein state legislatures can perform their Constitutional duty and govern the times, places, and manner of elections in their respective states without fear of a

§2 racial challenge. Given the Constitutional delegation of establishing the "Times, Places and Manner" of elections to state legislatures, U.S. Const. Art I, § 4, cl. 1, it is incumbent upon this Court to lay out the boundaries of §2. Otherwise, legislatures risk having their hands tied behind their backs through court opinions that endlessly expand the interpretation of §2, and that effectively amend the Constitution and allows courts to usurp the regulation of the times, places, and manner of elections.

ARGUMENT

I. The Application of Current Section 2 Jurisprudence Leads to Diverging and Confusing Views Among District and Circuit Courts.

A. The Legal Standard.

A stable legal standard leads to predicable outcomes and provides state legislatures with guidance as to when they might stray outside the lines. The legal standard at issue here is when a state violates §2 of the Voting Rights Act. A law is in violation of §2 when it is passed with discriminatory "intent," [3] or when the law "results" in a discriminatory outcome. JA 610.

[3] While the Ninth Circuit found that Arizona's law prohibiting certain types of absentee ballot collection, H.B. 2023, was passed with discriminatory intent, this brief will not focus on that flawed finding, but will instead focus on the "results" test.

Section 2 of the Voting Rights Act prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a). In explaining when a law results in vote denial or abridgment, Congress stated that a violation exists when, "based on the totality of circumstances," racial minorities "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). Drawing on the language of §2, several circuits have adopted the two-part §2 "results" test used in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

The first part of the "results" test asks, "whether the challenged standard practice or procedure results in a disparate burden on members of the protected class." JA 612. Said differently, the first prong asks whether, "as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." JA 612-613 (quoting *Gingles*, 478 U.S. at 44). "The mere existence—or bare statistical showing—of a disparate impact on a racial minority, in and of itself, is not sufficient." JA 613 (citation omitted).

Second, if the first prong is met, a court, looking at the "totality of the circumstances," then asks if "there is a relationship between the challenged 'standard, practice, or procedure' on the one hand,

and 'social and historical conditions' on the other.[4] JA 613.

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[4] The second prong does nothing to ameliorate the constitutional flaws of §2's results test. In fact, the "social and historical conditions" prong does not appear to do any work *at all*. Nearly every case *Amicus* identified that found the first prong of the results test satisfied—including this case—also found that the second prong was met. *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1037 (9th Cir. 2020); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 668-69 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216, 256-64 (5th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245-47 (4th Cir. 2014); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 556-57 (6th Cir. 2014), *vacated and remanded,* No. 14-3877, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-cv-896, 2016 U.S. Dist. LEXIS 74121, at *49-53 (S.D. Ohio June 7, 2016), *aff'd in part and rev'd in part*, 837 F.3d 612 (6th Cir. 2016); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 759-62 (S.D. Ohio 2016), *rev'd sub nom. Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 957-60 (W.D. Wis. 2016), *aff'd in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *Frank v. Walker*, 17 F. Supp. 3d 837, 877-79 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

Amicus identified only a single lower court decision that found a statistical disparity but concluded that it was not connected to "social and historical conditions" in the state. *See N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 344-46, 354 (M.D.N.C. 2014), *aff'd in part, rev'd in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (finding a disparity but also finding that there was no violation of §2 of the VRA). However, the Fourth Circuit later reversed that holding, concluding that the district court "clearly erred in holding" that the second prong was not met. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

On the surface, the standards outlined in the plain language of §2 and in the *Gingles* "results" test adopted by many of the circuit courts seem simple enough to lead to predicable outcomes—but that could not be further from the truth. As evidenced by the examples below, the reality of the matter is that courts across the country, while applying those "clear" standards have done nothing but muddy the waters of §2 "results" jurisprudence in arriving at inconsistent and diverging conclusions.

B. Examples of Judicial Confusion.[5]

1. Case at Hand (Ninth Circuit).

This case involves a 2016 lawsuit where Appellees-Plaintiffs challenged two Arizona laws under §2—one that dealt with the requirement of voters to vote in their assigned precincts and another that dealt with the criminalization of certain third-party ballot collection practices. JA 582-83. Following an eventual ten-day trial on the merits where the District Court heard live testimony from seven experts and 33 lay witnesses, the District Court rejected Appellees' §2 challenges. JA 246-258.

In regard to the out-of-precinct ("OOP") ballot rejection challenge, the District Court held that "Arizona's rejection of OOP ballots ha[d] no impact on the vast majority of voters." JA 305. The District

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[5] The purpose of this discussion is to highlight the stark disagreement in outcomes in §2 cases across the County—not just between different circuits, but between different courts within the same circuit. As such, an in-depth discussion of the various legal arguments will not take place here.

Court found that the voters who were voting OOP were not doing so because of the challenged Arizona law, but because of independent factors such as: residential instability, transportation difficulties, or informational deficits on voters. JA 302-03. The District Court further held, "Precinct-based voting merely requires voters to locate and travel to their assigned precincts, which are ordinary burdens traditionally associated with voting." JA 302.

With Appellees' challenge of HB 2023, the law relating to certain third-party ballot collection practices, the District Court held that it was impossible to find that the challenged law resulted in a decreased opportunity for minority groups to participate in the political processes and to elect candidates of their choice because there are no reliable records of voters who used third-party ballot collectors to collect their ballots in any given election. JA 272. And, for those voters who did use third-party ballot collectors, "relatively few early voters g[a]ve their ballots to individuals who would be prohibited by H.B. 2023 from possessing them." JA 273. "On its face, H.B. 2023 is generally applicable and does not increase the ordinary burdens traditionally associated with voting." JA 273. "Early voters may return their own ballots, either in person or by mail, or they may entrust a family member, household member, or caregiver to do the same."[6] JA 273.

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[6] It is important to note that there is no fundamental right to vote via absentee or mail-in ballot. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09 (1969). Here, Arizona made it *easier* for certain individuals to vote via an early mail-in ballot. "[L]aw[s] that make[] it *easier* for others to vote do[] not abridge

Appellees then appealed the matter to the Ninth Circuit where, looking at the same factual record developed in the District Court, a divided panel affirmed the ruling of the District Court. JA 407, 437. The Ninth Circuit then granted en banc review where, again, looking at the same factual record developed in the district court, the majority (7-4) held that the Challenged Provisions violated §2's "results" test, and in a 6-5 decision, that the ballot-collection law was enacted with a discriminatory intent. JA 584, 691. The Ninth Circuit en banc majority held that §2 is implicated where "more than a de minimis number of minority voters" "are disparately affected" by a voting policy. JA 619, 621.

Looking at the same factual record and allegedly applying the same legal standard, the District Court and the Ninth Circuit panel arrived at a starkly different conclusion than the divided en banc Ninth Circuit.

2. Fifth Circuit.

Both the State Appellants and the Secretary of State Appellee argue that the Fifth Circuit opinion of *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), supports their respective positions, thus illustrating just how unclear and confusing this opinion actually is. *See* Pet. for Writ of Cert. 30-31; Sec. of State's Opp. to Pet. for Writ. of Cert. 19-20.

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any person's right to vote." *See Tex. League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 U.S. App. LEXIS 32211 at *14 (5th Cir. Oct. 12, 2020) (emphasis in original) (citation omitted).

Veasey involved a Texas law that required voters "to present one of several forms of photo identification in order to vote." 830 F.3d at 225. After a trial on the merits, the district court "held that [the challenged ID law] was enacted with a racially discriminatory purpose, has a racially discriminatory effect, is a poll tax, and unconstitutionally burdens the right to vote." *Id.* The State of Texas appealed the district court's ruling to the Fifth Circuit, and a panel affirmed in part, vacated in part, and remanded the case for further findings. *Id.* The Fifth Circuit then granted the State's request to rehear the matter en banc. A divided en banc court: (1) reversed and remanded the district court's finding of discriminatory purpose; (2) affirmed the finding that the challenged provision violated the §2 "effects" (also referred to as "results" test) and remanded to the district court to craft an appropriate remedy; (3) vacated the district court's holding that the ID requirement is a poll tax under the Fourteenth and Twenty-Fourth Amendments and rendered judgment for the State on those issues; (4) vacated the district court's rulings that the ID requirement unconstitutionally burdened the right to vote under the First and Fourteenth Amendments under the doctrine of Constitutional avoidance; and (5) directed the district court to not craft any remedies that would disrupt the upcoming November 2016 general election. *Id.* at 272.

Mixed into the procedural history above were more elections, preclearance issues, temporary injunctions, stays, remands, a motion to this Court, legislative amendments to the challenged law while litigation was pending, and a slew of further

procedural matters that dragged this matter on for several years. *Id.* at 227-29.

The Fifth Circuit essentially adopted the same two-part "results" test discussed *supra* that has been adopted in various circuits. In adopting the two-part test, the Fifth Circuit stated, "Use of the two-factor test and the *Gingles* factors limits Section 2 challenges to those that properly link the effect of past and current discrimination with the racially disparate effects of the challenged law." *Id.* at 246. In responding to concerns that the application of the two-part test could be limitless, the Fifth Circuit stated that using the two-part test, together with the *Gingles* factors, "serve[s] as a sufficient and familiar way to limit courts' interference with 'neutral' election laws to those that truly have a discriminatory impact under Section 2 of the Voting Rights Act. Just because a test is fact driven and multifactored does not make it dangerously limitless in application." *Id.* at 246-47. The Fifth Circuit then, quoting the district court below, outlined their logic in finding a discriminatory "effect" or "result":

> (1) SB 14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African-Americans and Hispanics; and (3) African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic

> effects caused by decades of racial discrimination.

Id. at 264.

Despite the Fifth Circuit's conclusory statement that the "results" test's application was not limitless, one could remove "SB 14" from the explanation above and insert virtually any voting requirement that requires affirmative effort (such as obtaining a witness for a mail-in ballot or getting to a polling location) and link it to poverty, then to a minority group, and then to a history of racism of a particular state because, unfortunately, the sad truth is that each of the fifty states have a past history of racism. Notwithstanding the poverty rate being at an all-time low for African-Americans and Hispanics, the poverty rate for Whites is still well below that of African-Americans and Hispanics.[7] Therefore, the Fifth Circuit's logic, when applied to a different voting requirement—the requirement many states have to vote in-person—would also lead to a finding of a §2 "results" violation: (1) you need some type of reliable transportation to get to a polling location; (2) those in poverty have a harder time obtaining reliable transportation; (3) African-Americans and Hispanics have higher poverty rates than Whites; and (4) African-Americans and Hispanics have higher poverty rates because of the racist history of a particular state.

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[7] *See* John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019*, U.S. Census Bureau (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

While the Fifth Circuit stated the right principles in that the two-part test was not limitless, their application and lack of limiting principles say otherwise. No state should be able to pass discriminatory laws, but state legislatures need room to enact sensible regulations of elections without every election regulation being at risk of being stuck down under §2. While the district court and the Fifth Circuit agreed in their §2 "results" findings in *Veasey*, other circuits, discussed *infra*, applying the exact same two-part test, arrived at very different conclusions.

3. Seventh Circuit.

In 2011, Wisconsin passed a law very similar to the law at issue in the Fifth Circuit *Veasey* case—namely that a voter is required to present a photo ID at the polls. *Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014). Additionally, the law was strikingly similar to the one upheld by this Court in *Crawford v. Marion County Election Board*. *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)). Notwithstanding the controlling precedent in *Crawford*, a district court held that Wisconsin's voter ID law violated §2 and enjoined its implementation. *Id.* The Seventh Circuit then stayed the injunction and later reversed the district court. *Id.*

In reasoning nearly identical to that of the Fifth Circuit in *Veasey*, the Wisconsin district court justified its findings this way: "[T]he reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to

live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing." *Id.* at 753 (quoting *Frank v. Walker*, 17 F. Supp. 3d 837, 877 (E.D. Wis. 2014)). Again, based on that logic, what election regulation could pass §2 muster?

The Seventh Circuit cautioned against reading §2 in such an overly expansive way: "[I]t would be implausible to read §2 as sweeping away almost all registration and voting rules. It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." *Id.* at 754. Because all Wisconsin voters had an equal opportunity to get an ID, but some simply chose not to, the Seventh Circuit held that the challenged law did not violate §2. *Id.* at 749, 753.

While the Seventh Circuit did not adopt the two-part "results" test at issue in the case at hand, it did alternatively hold that, had they adopted it, the first prong would not have been satisfied because everyone had an equal opportunity to obtain an ID and vote. *Id.* at 754-55. The Seventh Circuit further noted that it was skeptical of the second "history and conditions" prong because it fails to distinguish between discrimination by the government and discrimination by unrelated third parties—such as private businesses, etc. *Id.* at 755.

Again, with *Frank*, just as with the case at hand, you have a circuit court overturning a district court on a §2 "results" ruling. In *Frank*, the Seventh Circuit exercised judicial restraint and correctly

allowed a facially neutral, everyday election regulation to stand.

4. Sixth Circuit.

Although the Sixth Circuit appears to have adopted the two-part "results" test, it follows a more restrained approach similar to that of the Seventh Circuit in *Frank*. *See Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). In *Ohio Democratic Party*, the Sixth Circuit reversed a district court opinion that struck down Ohio laws reducing the days allowed for early voting and eliminating same-day voter registration. *Id.* at 637.

The Sixth Circuit upheld the challenged laws despite a showing in the district court that African-Americans voted early and used same-day registration "at a rate higher than other voters." *Id.* at 627-28. The Sixth Circuit held that "disproportionate racial impact alone" was not enough to establish a discriminatory burden, result, effect. *Id.* at 637 (citation omitted). The plaintiffs were required to show that the challenged laws caused the "racial inequality in the opportunity to vote," but they failed to do so. *Id.* at 637-39.

Again, using the same two-part "results" test, and applying the same facts to the standard, a district court and a circuit court arrived at different conclusions. Further, the Sixth Circuit properly exercised restraint in holding that statistics alone did not show a discriminatory §2 "result."

5. Fourth Circuit.

Two recent cases out of the Fourth Circuit confirm that the Sixth Circuit is more in line with the limited approaches of the Seventh and Sixth Circuits.

The first case, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), involves a Virginia voter-ID law that the plaintiffs argued was a violation of §2. Notwithstanding a finding that black voters lacked proper ID at a higher rate than white voters, the Fourth Circuit rejected finding a §2 violation because doing so would "sweep away all elections rules that result in a disparity in the convenience of voting." *Id.* at 600-01. The Fourth Circuit held that §2 was not about "disparate inconveniences" but rather about equal "opportunity of the protected class to participate in the electoral process." *Id.* at 601.

The second case, *N.C. State Conference of the NAACP v. Raymond*, No. 20-1092, 2020 U.S. App. LEXIS 37663 (4th Cir. Dec. 2, 2020), a matter decided just days ago, involves a North Carolina voter-ID law. Here, the Fourth Circuit reversed a district court's finding of a §2 violation. *Id.* at *3. The Fourth Circuit held that the district court's over-reliance on North Carolina's racial history was improper. *Id.* Because "a legislature's past acts do not condemn the acts of a later legislature" and because a court "must presume [the legislature] acts in good faith," the Fourth Circuit reversed the district court. *Id.* (citation omitted).

These two cases are further examples of judicial restraint and, as evidenced in *Lee*, the confusion that currently exists between the district and circuit courts regarding the proper application of the §2 "results" test.

* * *

Laid out in this way it is clear that the prevailing legal standards invite different judges to make different rulings based on the same sets of facts—and that often these judgments seem to be policy decisions of the sort better left to the state legislatures. More clarity is needed from this Court to end the string of confusing and conflicting opinions and to provide a uniform standard by which state legislatures can pass the reasonable, nondiscriminatory laws necessary for the regulation of elections without immediate fear of a §2 challenge.

II. Under The Ninth Circuit's Section 2 Analysis, Virtually *Any* Election Law or Regulation Could be Struck Down as a Violation of Section 2.

As discussed in Section I.B.2, *supra*, a court using the two-part legal standard adopted by the Ninth, Fifth, and other circuit courts, can arrive at an infinite number of outcomes because an infinite number of statistics can be mined from different factual scenarios before the courts.

Given the unfortunate, yet very real, racial history of our country, any court can find a history of racism coupled with the higher levels of poverty

among minority groups. *See* Section I.B.2, *supra*. With that information, courts could label any ordinary election regulation as targeting minority groups through the poverty that was brought on by a prior history of discriminatory practices in a particular state.

Bare statistical disparities cannot be enough to find a violation of the §2 "results" test. For example, if white voters are 2% more likely to register to vote than black voters, the voter registration system cannot simply be held to violate §2. *See Frank*, 768 F.3d at 754. Further, if white voter turnout was 2% greater than black voter turnout on Election Day, the in-person voting requirement could not simply be held to violate §2. *Id.*

However, following the §2 framework outlined in the Ninth and Fifth circuits, ordinary voting regulations, such as the requirement to register to vote or simple polling location hours, could easily be invalidated due to racial statistical disparities. Following this logic, "[m]otor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses." *Id.* "[I]t would be implausible to read §2 as sweeping away almost all registration and voting rules," yet that is exactly how the Ninth and Fifth Circuits have read the §2 "results" test. *Id.*

When simple cherry-picked statistics are used to measure whether a law has a disproportionate racial effect, state legislatures will start to place a

disproportionate emphasis on racial outcomes and studies when passing and considering legislation, thus putting the legislature in danger of violating the First and Fourteenth Amendments' Equal Protection Clause. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017) (race cannot be a predominate factor in motivating a legislature's decision).

A. Statistics Can Be Misleading.

Simple reliance on statistics can be dangerous because statistics can be misleading. For example, in the case at hand, the Ninth Circuit emphasized the higher percentage of minorities who cast OOP ballots. JA 592-95. In describing the 2012 OOP numbers for Pima County, the Ninth Circuit used phrases such as, "the rate of OOP ballots was 123 percent higher for Hispanic voters, 47 percent higher for American Indian voters, and 37 percent higher for African American voters." JA 594. The problem with simply providing percentages is that one does not know what is actually going on behind the curtain. It is the experience of *Amicus* that when parties to a case, courts, or simply the general public use blanket percentages to support their arguments, the numbers behind those percentages often tell a different story. In the percentages discussed above, the Ninth Circuit was specifically discussing Pima County, Arizona's second most populous county. JA 594. The actual OOP numbers in Pima County tell an entirely different story than the misleading percentages used by the Ninth Circuit to justify their §2 "results" finding. First, the OOP numbers in Pima County have significantly decreased since 2012. JA

299. In the 2016 general election, only 1,150 OOP ballots were cast out of 427,102, representing only 0.27% of all votes. JA 299. The 2016 numbers are down from the 2012 numbers, which saw 2,212 OOP ballots out of 385,725 total votes, representing 0.57% of all votes. JA 299.

Why did the Ninth Circuit use older numbers that told a different story than more recent OOP numbers? Because it helped its narrative. Such is the danger with legal standards that disproportionally rely on potentially misleading statistics. Dissecting the Ninth Circuit's statistical statements above, it appears that one is dealing with a difference of mere dozens of voters between different racial groups. Judge Easterbrook of the Seventh Circuit warned against dividing percentages to prove a point in the §2 context. *See Frank*, 768 F.3d at 752 n.3. Judge Easterbrook wisely stated:

> If 99.9% of whites had photo IDs, and 99.7% of blacks did, the same approach would yield the statement "blacks are three times as likely as whites to lack qualifying ID" (0.3 / 0.1 = 3), but such a statement would mask the fact that the populations were effectively identical. That's why we do not divide percentages.

Id. This is similar to the consumer assuming that they are saving a sizeable amount of money by the "50% off" sale tag on a piece of furniture, only to find that the item was originally priced at $10, making their discount just $5. It is important to fully

understand the numbers behind the asserted statistics before arriving at any conclusions.

The truth of the matter is that in Arizona as a whole, OOP ballots have decreased from 14,885 OOP ballots out of 2,320,851 total (0.64%) in 2008 to 3,970 total OOP ballots out of 2,661,497 total ballots (0.15%) in 2016. JA 297-98. Using the language of the Ninth Circuit, Arizona has had a 73% decline from 2008 to 2016. JA 298. This large decrease in numbers is likely due to the expansion of the Vote Center model (as opposed to the precinct model) in eleven out of Arizona's fifteen counties. *See* 2020 November Election, Citizens Clean Elections Commission (last accessed Dec. 6, 2020), https://www.azcleanelections.gov/arizona-elections/November-3-election. Each Vote Center is 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 county-wide. Ariz. Rev. Stat. § 16-411(B)(4).

An additional concern with an over-reliance on statistical data to prove a §2 violation is that it can often lead to a counterintuitive outcome. For example, as discussed *supra*, the number of OOP voters in Arizona keeps falling. However, under the Ninth Circuit's approach, the rarer a situation becomes, the more potential there is for an asserted statistical disparity to be used to upend the provision. Such is the case with the challenged precinct-voting model currently being used in only four Arizona counties. Even while a practice is naturally phasing out and becoming less relevant, it

is more susceptible to a §2 challenge because if there are only 100 OOP voters in a single county, and there is a change of just a few, it statistically appears to be a larger problem than it is in reality.

Another example of a counterintuitive outcome is in dealing with year-to-year fluctuations in voting numbers and what type of voting is being used by different racial groups. This could mean that a law has no disparity in years two or four, but then does have one in year six, thus leading to an invalidation of the law under §2, only to return to no disparity in year eight. The invalidation in year six appears to be driven by a random statistical anomaly that has nothing to do with the legislature's intent or motives, and not a real racial problem such as §2 was intended to solve. A law should not be valid under §2 one year, but then invalid the next. However, with the statistical cherry-picking used by the Ninth Circuit to support its §2 holding, this feared counterintuitive outcome is exactly what lies in store if the Ninth Circuit's opinion is allowed to stand.

III. Courts Should Not Be Involved In Statistical Comparisons of Policy Choices of State Legislatures.

The Ninth Circuit's decision in this case is replete with statistical analysis but conspicuously light on judicial interpretation of the relevant issue: namely, the state legislature's constitutional authority over election rules. "Under the Constitution, it is the state legislature—not the governor *or* federal judges—that is authorized to establish the rules that govern the election[s]" in each state. *Tex. League of*

United Latin Am. Citizens v. Hughs, No. 20-50867, 2020 U.S. App. LEXIS 32211, at *29 (5th Cir. Oct. 12, 2020) (Ho, J., concurring) (emphasis in original). States may decide upon different policies concerning provisional ballots and other issues, but that "variation … reflects our constitutional system of federalism. Different state legislatures may make different choices." *Democratic Nat'l Comm. v. Wis. State Legis.*, No. 20A66, (Oct. 26, 2020) (Kavanaugh, J., concurring), slip op. 5.

This year, there were a number of cases in which federal courts overturned lawfully adopted state election rules, and in all but one of those cases, the Supreme Court affirmed the legislature's prerogative to adopt its own rules. *See, e.g.*, *id.* at *1; *Andino v. Middleton*, No. 20A55 (Oct. 5, 2020) (granting stay where district court order enjoined South Carolina's witness requirement for absentee ballots as unconstitutional); *Merrill v. People First of Ala.*, 20A67 (Oct. 21, 2020) (granting stay where district court order enjoined Alabama's photo identification and witness requirements for absentee voting during the Virus as unconstitutional and violative of the Americans with Disabilities Act); *Clarno v. People Not Politicians Or.*, No. 20A21 (Aug. 11, 2020) (granting stay of district court order relaxing Oregon's election procedures because of the Virus); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (granting stay of district court order relaxing Idaho's rules for ballot initiatives); *but see, Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28 (Aug. 13, 2020) (denying request for stay only because all state officials were of the same party and supported the lower court's decree relaxing Rhode Island's witness

requirement). There are no facts here which compel a different outcome.

While "[o]ur founding charter never contemplated that federal courts would dictate the manner of conducting elections[,]" that is precisely what the Ninth Circuit did here. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020). The constitutional authority conferred upon state legislatures by the Elections Clause should be affirmed here as it has been in similar cases, and federal courts should avoid playing a policymaking role for which they are not properly equipped.

IV. A "Safe Harbor" Approach to Facially Neutral Election Laws and Regulations Is Needed With Section 2 Claims.

> It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives," and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections ….

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (citations omitted).

As the Seventh, Fourth, and Sixth Circuits held, the §2 "results" test cannot be read in a way to invalidate everyday voting regulations that simply require the "usual burdens of voting." *See* Sections I.B.3-5, *supra*; *see also Crawford*, 553 U.S. at 198. However, under the current framework of the §2 "results" test advanced by the Ninth Circuit, virtually any election regulation could be invalidated as having a disproportionate racially discriminatory "result."

In order to provide for the proper regulation of elections, a "safe harbor" standard, similar to the standard established in the *Anderson/Burdick* line of cases—i.e., a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory voting restrictions—is needed in the §2 "results" context. *See Burdick*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). Otherwise any ordinary voting regulation could be struck down due to a purported racial statistical disparity.

To allow the standard adopted in the Ninth and Fifth Circuits to stand without clarity from this Court would be to "afford state legislatures too little breathing room, leaving them 'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 137 S. Ct. at 802 (citation omitted). State legislatures are stuck between a rock and a hard place in attempting to legislate around the ever

expanding §2 "results" umbrella by attempting to temper their legislation by relying on racial statistics, and thus risk making race a predominate factor and leading to an Equal Protection violation. *See id.* at 794.

Absent action by this Court, states will be unable to adhere to their Constitutional duty to adopt election regulations. *See* U.S. Const. Art. I, § 4, cl. 1. The "breathing room" required can be achieved by adopting the *Anderson/Burdick* Equal Protection "safe harbor" pertaining to everyday neutral election regulations that simply require the "usual burdens of voting." *See Bethune-Hill*, 137 S. Ct. at 802; *Crawford*, 553 U.S. at 198. This is a similar standard adopted in the Seventh, Sixth, and Fourth Circuit cases discussed above. *See* Sections I.B.3-5, *supra.* Afterall, "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." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

CONCLUSION

We respectfully urge this Court to reverse the decision below and to elucidate a standard that provides a "safe harbor" in which state legislatures can perform their Constitutional duty to prescribe the times, places, and manner of holding elections in their respective states.

Respectfully submitted,

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