

Nos. 19-1257; 19-1258

In The
Supreme Court of the United States

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MARK BRNOVICH,
ATTORNEY GENERAL OF ARIZONA, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

◆

**On Writs Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

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**BRIEF OF AMICI CURIAE FAIR FIGHT ACTION,
INC. AND THE ARIZONA VOTER EMPOWERMENT
TASK FORCE IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici Curiae Fair Fight Action, Inc. (FFA) and the Arizona Voter Empowerment Task Force (AVET) are organizations committed to free and fair elections.² Both engage in education and outreach about modern voter suppression tactics, monitor public institutions and private organizations engaged in systemic voter suppression, and help voters facing actual or threatened legal action for exercising their fundamental right to vote. Sadly, H.B. 2023 and its defense and recent use by Petitioner Mark Brnovich, Arizona Attorney General, prove the need for FFA's and AVET's existence and advocacy.

AVET has been concerned that H.B. 2023's criminalization of the non-fraudulent collection of voted early ballots could turn average Arizonans in already-marginalized communities into alleged felons for their efforts to simply help their neighbors and community to vote. After all, Latino and indigenous communities in Arizona historically relied on third-party ballot collection because they disproportionately bear a host of burdens that make it harder to return early ballots either by mail or in person. *See Democratic Nat'l*

¹ All parties have filed blanket consents authorizing the filing of this brief. No counsel for a party authored any part of this brief. No person other than the amici or their members or counsel made a monetary contribution to this brief's preparation or submission.

² FFA is a Georgia nonprofit advocacy organization organized under Section 501(c)(4) of the Internal Revenue Code. AVET is a coalition of community advocates and attorneys throughout Arizona.

Comm. v. Hobbs (“DNC”), 948 F.3d 989, 1005-06 (9th Cir. 2020) (en banc).

AVET’s fears were realized in the weeks just before the 2020 General Election when the Attorney General, under the pretense of investigating “ballot fraud,” launched an aggressive investigation in the small and overwhelmingly Latino community of San Luis, Arizona. That investigation led to what are now the first criminal prosecutions brought under H.B. 2023. The conduct alleged in the indictments involved the mere possession of “approximately four early ballots” cast in the August 2020 Primary Election. The defendants are two Latinas who reside in San Luis, which the Ninth Circuit recognized as a community where minorities rely on ballot collection. *Id.* at 1006. The Attorney General’s aggressive investigation of those cases in the weeks before the November General Election in this tiny community of fewer than 30,000 people is almost as troubling as the timing of his public announcement of the indictments. What matters most, however, is that there was no evidence of voter fraud associated with ballot collection in Arizona before H.B. 2023, *id.* at 1005, and there is still none today. Indeed, in the first criminal prosecutions brought under H.B. 2023, the Attorney General does not allege any fraudulent acts relating to ballots, voting, or anything else.

At bottom, the Ninth Circuit correctly held that H.B. 2023 violates Section 2 of the Voting Rights Act (Section 2). Amici have an interest in ensuring that this Court affirms, and thus guarantees, that neither the defendants in the two pending cases nor any other

Arizonan face conviction under a needless criminal statute enacted based on “false statements and race-based innuendo.” *Id.* at 1037.

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SUMMARY OF ARGUMENT

“[T]hird-party ballot collection has long had a unique role in Arizona,” and is important to many Latino and Native American voters who have long faced hurdles – socioeconomic and otherwise – to voting. *Id.* at 1045. H.B. 2023 ended that practice and imposed another hurdle between those minority groups and the ballot box. And it offends the VRA because it was sold on false pretenses as a fraud-fighting tool, but it originated in a state legislator’s desire to eliminate “increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted.” *Id.* at 1007.

H.B. 2023 was always a wolf in sheep’s clothing intended to depress voter participation in minority communities. This intent made it all-but-inevitable that the first people prosecuted under its provisions would come from one such community. They are two Latinas from 98% Latino San Luis, Arizona, a city with “a major highway separat[ing] almost 13,000 residents from their nearest post office,” “no mass transit, a median income of \$22,000, and many households with no cars.” *Id.* at 1006 (citations omitted). Elections officials ultimately received and counted the ballots the defendants are accused of possessing in

violation of H.B. 2023, and there is *no* allegation of fraud. Yet these women now face felony charges and the life-altering stigma and consequences that would accompany a conviction.

These facts support the Ninth Circuit’s application of the Senate Factors to H.B. 2023, and in particular, the ninth factor: “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.” S. Rep. No. 97-417, at 28-29 (1982). “Tenuous” hardly begins to describe the faux anti-fraud justifications behind H.B. 2023, justifications which should preclude any prosecutions under H.B. 2023 from occurring.

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ARGUMENT

I. H.B. 2023 Works as Designed to Suppress Voting in Minority Communities.

The ongoing criminal prosecutions under H.B. 2023 are troubling in every aspect and proof positive that the Ninth Circuit correctly applied the Senate Factors.

A. In late October 2020, as Arizonans were casting their ballots for the General Election, AVET received reports that uniformed deputies from the Yuma County Sheriff’s Office (YCSO) were knocking on doors in the San Luis area during early morning hours to ask about residents’ voting history as part of

an investigation into “ballot collection.” This tactic concerned and alarmed many people, and word spread quickly through this close-knit community. YCSO told one resident that deputies were working with “an attorney in Phoenix” and had a list of about 50 names to question. Even worse, these door knocks from law enforcement seeking information from voters occurred when early voting in Arizona was already underway. Courts throughout the country have held that law enforcement actions can constitute voter intimidation, *see, e.g., United States v. MacLeod*, 385 F.2d 734, 740-41 (5th Cir. 1967), and YCSO’s conduct alarmed residents enough that they reached out to AVET.

At the end of October, several advocacy groups aligned with AVET sent letters to the Yuma County Sheriff and the Yuma County Attorney demanding an end to YCSO’s intimidating questioning and requesting public records related to YCSO’s conduct. They received no response.

B. What we now know is that the “attorney in Phoenix” was the Attorney General, who was investigating potential violations of H.B. 2023 in connection with the August 2020 Primary Election. On December 16, 2020, the state grand jury indicted Alma Yadira Juarez and Guillermina Fuentes, both accused of possessing “approximately four early ballots for the August 2020 Primary Election.” *State of Arizona v. Juarez/Fuentes*, No. S1400CR20201214 (87 SGJ 230) (Yuma Cty. Super. Ct. Dec. 16, 2020). A press release issued by the Attorney General one week later provided the further detail that “[t]he early ballots were

deposited into a ballot box on Election Day, and were processed and counted by the Yuma County Recorder during the election.” Ariz. Att’y Gen. Mark Brnovich, *Two Individuals Accused of Ballot Harvesting in Yuma County*, available at <https://www.azag.gov/press-release/two-individuals-accused-ballot-harvesting-yuma-county> (last visited Jan. 18, 2021). And the Attorney General went out of his way to announce that “each defendant faces up to two years in prison and a \$150,000 fine.” *Id.* All this occurred, of course, shortly after this Court granted the Attorney General’s petition for writ of certiorari. Predictably, the story ran in Arizona’s paper of record. See Rafael Carranza, *2 Yuma women indicted under Arizona’s Controversial ballot-harvesting law*, ARIZ. REPUBLIC (Dec. 23, 2020), available at <https://www.azcentral.com/story/news/local/arizona/2020/12/23/two-yuma-women-indicted-ballot-harvesting/4033370001/>.

C. These prosecutions are emphatically not evidence of “fraud” that might justify H.B. 2023’s existence. After a months-long investigation, the Attorney General sought and obtained indictments *only* under H.B. 2023’s criminalization of a “person who knowingly collects voted or unvoted ballots from another person,” where “collects” means merely “to gain possession or control.” ARIZ. REV. STAT. §§ 16-1005(H), 16-1005(I)(2)(b). The only charges against the women relate to the possession of “approximately four ballots” and the indictment suggests they were the same ballots, presumably given to one woman by the other. These women do not face charges under other statutes proscribing

“[b]allot-collection-related fraud” that predated H.B. 2023. As the Ninth Circuit noted,

[c]ollecting and failing to turn in someone else’s ballot was already a class 5 felony. Ariz. Rev. Stat. § 16-1005(F). Marking someone else’s ballot was already a class 5 felony. *Id.* § 16-1005(A). Selling one’s own ballot, possessing someone else’s ballot with the intent to sell it, knowingly soliciting the collection of ballots by misrepresenting one’s self as an election official, and knowingly misrepresenting the location of a ballot drop-off site were already class 5 felonies. *Id.* § 16-1005(B)–(E). These criminal prohibitions are still in effect.

DNC, 948 F.3d at 1036. Given the Attorney General’s extensive investigation, facts supporting “fraud” charges in these cases simply do not exist.

D. There was no legitimate reason to send uniformed deputies door-to-door in San Luis in the middle of early voting when the conduct alleged in the indictments occurred months before. And the aggressive nature of the investigation is disproportionate to the ultimate charges related to the possession of “approximately four early ballots.” Not 4,000, not 400, not even 40: 4. This aggressive approach also shows that H.B. 2023 is ripe for abuse and has nothing to do with ferreting out fraud. In short, H.B. 2023 – both in design and practice – is pretextual and intended to suppress voting in minority communities.

Nor was there any urgency in announcing the indictment of these defendants in December, and in the

middle of merits briefing before this Court; the statute of limitations for an offense of this nature in Arizona is seven years. ARIZ. REV. STAT. § 13-107(B)(1). The Attorney General could have waited years, to say nothing of waiting until this Court finally resolves whether H.B. 2023 violates federal law. These defendants are real people who face real criminal liability, not pawns in a game of systemic voter suppression.

Apart from whatever motivated these prosecutions, the discretion afforded to prosecutors highlights the danger H.B. 2023 poses in discouraging voting by criminalizing non-fraudulent ballot collection and delivery. Even if a criminal investigation were warranted in these pending cases, the Attorney General could have approached them differently, including by quietly charging misdemeanors. *See* ARIZ. REV. STAT. § 13-604(B). Instead, he sought felony indictments and used his bully pulpit to announce that each defendant faces up to two years in prison and a \$150,000 fine (the maximum felony penalties under Arizona law). The message reverberated through the San Luis community, as the local newspaper declared on its front page: “Exalcaldesa de SL podría ir a prisión” (Ex-mayor of SL could go to prison). Lucy Pesqueira, *Exalcaldesa de SL podría ir a prisión*, DIARIO NOTICIAS (Dec. 28, 2020). This message will not prevent fraud, and instead could do irreparable damage to voter participation in communities like San Luis.



CONCLUSION

Like the poll taxes and literacy tests of the Jim Crow era, modern voter suppression efforts are relentless and effective. H.B. 2023 is one such effort, adopted in Arizona based on demonstrably false claims of voter fraud for the specific purpose of stopping a practice used predominately in minority communities. *See DNC*, 948 F.3d at 1037 (“[I]f some Arizonans today distrust third-party ballot collection, it is because of the fraudulent campaign mounted by proponents of H.B. 2023. . . . To the degree that there has been any fraud, it has been the false and race-based claims of the proponents of H.B. 2023”). This Court should affirm the Ninth Circuit’s en banc opinion.

Respectfully submitted,

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