

Nos.: 19-1257 & 19-1258

In The Supreme Court of the United States



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

— v. —

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

BRIEF FOR AMICI CURIAE MI FAMILIA VOTA, ARIZONA
CENTER FOR EMPOWERMENT, CHISPA ARIZONA and
LEAGUE OF WOMEN VOTERS OF ARIZONA IN
SUPPORT OF RESPONDENTS

JASON A. LECKERMAN
Counsel of Record
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500
leckermanj@ballardspahr.com

ROY HERRERA
DANIEL A. ARELLANO
JILLIAN L. ANDREWS
IAN O. BUCON
BALLARD SPAHR LLP
1 East Washington Street,
Suite 2300
Phoenix, Arizona 85004
(602) 798-5400
herrerar@ballardspahr.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Arizona Center for Empowerment (“ACE”), Chispa Arizona, the League of Women Voters of Arizona, and Mi Familia Vota respectfully submit this brief of amici curiae in support of Respondents.¹

ACE is a community-led organization whose work is focused on civic engagement, political education, democracy, census participation, and voter registration in all communities of color. As part of ACE’s work in these areas, it often encounters—and hopes to end—discrimination and disinformation campaigns that make it more difficult for Arizona’s Latino voters to exercise their most fundamental right.

Chispa Arizona, a program of the League of Conservation Voters Education Fund, engages in non-partisan efforts to turn environmental values into national, state, and local priorities by growing Latino voices, political power, and civic engagement for a cleaner future in Arizona. Chispa Arizona leads site-based voter registration programs, with a focus on Arizona counties with sizeable Latino communities. Since 2018, Chispa Arizona has collected more than 44,000 voter registrations across the state. Chispa Arizona firmly believes that

¹ Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than Amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici further state that all parties have consented to the filing of this brief.

ballot collection and delivery would support the participation of Latino voters.

The League of Women Voters of Arizona is an affiliate of the League of Women Voters of the United States, a nonprofit organization that has long been active in non-partisan, grassroots organizing at the national, state, and local levels. For a century, the League has dedicated its efforts to protecting and promoting the democratic process of American government through public service and robust voter education and registration. The League's volunteers help tens of thousands of citizens in Arizona register to vote, check their registration status, update voter information, and navigate the often confusing system of absentee and mail-in voting.

Mi Familia Vota is a national non-profit organization that unites Latino, immigrant, and allied communities to promote social and economic justice through increased civic participation by promoting leadership development, citizenship, issue organizing, and non-partisan voter registration and participation. Mi Familia Vota is one of the premier Latino civic engagement organizations in the country, with operations in Arizona, California, Colorado, Florida, Nevada, and Texas.

SUMMARY OF ARGUMENT

Arizona's out of precinct ("OOP") and third-party ballot collection policies impose a disparate burden on Arizona's minority voters and, when

taken together with Arizona’s historical and ongoing discrimination against minority citizens, result in vote denial and minority voters having “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).

Amici and other community organizations have for years recognized the danger of these challenged policies as fuel to an existing fire, as Arizona’s minority voters have suffered discrimination for the entirety of the state’s history. Now, in an age where Latino Arizonans’ right to vote remains under siege from both unintentional and intentional discrimination, these policies exacerbate the inescapable truth that Latino voters in Arizona are unable to wield as much political power as their white counterparts.

Congress and courts around the country have made it clear that the Voting Rights Act (“VRA”) should be used to combat the discriminatory voting burden borne by minority voters. Amendments to the VRA and recent voting rights cases demonstrate that a robust application of § 2 is the best way to preserve some measure of equality in America’s voting practices. Recognizing this, the Ninth Circuit correctly concluded that Arizona’s challenged policies, which resulted in the disenfranchisement of at least 3,709 voters in the 2016 election alone, violate § 2.

The record before the Ninth Circuit amply reveals why so many minority voters have been

disenfranchised by the challenged policies. In particular, discrimination in the areas of wealth, education, transportation, housing, and health increase the odds that Latino voters will be disproportionately burdened by the OOP and ballot collection policies. Finally, recent troubling trends of disenfranchisement and voter suppression around the country show that the VRA—along with the federal courts’ faithful application of it—is more important than ever.

ARGUMENT

I. Latino Americans’ Right to Vote Is Under Attack.

Latinos are part of our country’s most important and fastest growing electorates. The Hispanic² population of the United States grew to a record 60.6 million people in 2019, an increase of almost 1 million people from the previous year, and nearly 10 million more people than in 2010. Noe-Bustamante, et al., *U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed*, Pew Research Center (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/>. Hispanics are the

² While Amici write on behalf of the Latino voters they serve in Arizona, some data cited throughout this brief relies on the race-based categories of Hispanic and Non-Hispanic. As it is the most widely used metric in data from the U.S. Census Bureau and others, Amici rely on it to support their arguments regarding Latino voters.

second-largest racial or ethnic group—second only to non-Hispanic whites—and represent more than half of the United States’ population growth over the past decade. *Id.* In Maricopa County, the county with the fourth largest Hispanic population in the nation, 31% of the population is Hispanic. *Id.* 22% of eligible voters in Arizona are Hispanic. *Latinos in the 2016 Election: Arizona*, Pew Research Center (Jan. 19, 2016), <https://www.pewresearch.org/hispanic/fact-sheet/latinos-in-the-2016-election-arizona/>.

Concurrent with the growth of the Latino population in the United States, many states have enacted restrictive voting laws that keep a disproportionate amount of Latinos away from the polls. Following the 2010 election, state legislatures unleashed a torrent of new, restrictive voting measures. Such laws include stringent photo identification requirements, reduced early voting opportunities, and restrictions on voter registration. In sum, 25 states have implemented such restrictive measures over the last decade. *New Voting Restrictions in America*, Brennan Center for Justice (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>. This trend has accelerated in recent years. For example, leading up to the 2016 presidential election, 14 states implemented new voting restrictions. *Id.* 2017 saw legislatures in Arkansas, North Dakota, and Missouri implement restrictive voting laws. *Id.* “In 2018, Arkansas, Indiana, Montana, New Hampshire, North Carolina, and Wisconsin enacted new restrictions.” *Id.* 2019 bore

witness to new restrictive voting laws in Arizona, Florida, Indiana, Tennessee, and Texas. *Id.* Even in 2020, in the midst of a global pandemic when easy and safe alternatives to in-person voting were more important than ever, six states—Indiana, Iowa, Kentucky, Louisiana, Oklahoma, and Tennessee—enacted new voter restrictions. *Voting Laws Roundup 2020*, Brennan Center for Justice (Dec. 8, 2019),<https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020-0>.

Although such restrictive measures may be racially neutral on their face, they tend to have radically disparate impacts on racial and ethnic minorities. A 2018 poll conducted by *The Atlantic* and Public Religion Research Institute illustrates this point:

Nine percent of black respondents and 9 percent of Hispanic respondents indicated that, in the last election, they (or someone in their household) were told that they lacked the proper identification to vote. Just 3 percent of whites said the same. Ten percent of black respondents and 11 percent of Hispanic respondents reported that they were incorrectly told that they weren't listed on voter rolls, as opposed to 5 percent of white respondents. In all, across just about every issue identified as a common barrier to voting, black and Hispanic respondents were twice as likely, or more, to have experienced those barriers as white respondents.

Vann R. Newkirk, Voter Suppression is Warping Democracy, *The Atlantic* (July 17, 2018) <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/>; Vandermaas-Peeler, et al., American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization, PRRI (July 17, 2018) <https://www.prri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018/>.

A. In Enacting H.B. 2023, the Arizona Legislature Codified Anti-Latino Sentiment.

H.B. 2023, “a 2016 statute criminalizing the collection and delivery of another person’s ballot,” *Democratic Nat'l. Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc), is no exception to this phenomenon. As the Ninth Circuit noted below, the law’s “adverse impact on minority communities is substantial.” *Id.* Indeed, “[w]ithout ‘access to reliable and secure mail services’ and without reliable transportation, many minority voters ‘prefer instead to give their ballots to a volunteer.’” *Id.* (quoting *Democratic Nat'l. Comm. v. Reagan*, 329 F. Supp. 3d 824, 870 (D. Ariz. 2018)). As Dr. Berman wrote in his expert report in the district court proceeding, regarding Hispanic voters,

[T]he practice of collecting ballots, used principally in Hispanic areas, ha[s] contributed to more votes being cast in those places tha[n] would have been cast without the practice. . . . That the practice

has increased minority turnout appears to have been agreed upon or assumed by both sides of the issue[.] Democrats and Hispanic leaders have seen reason to favor it, Republicans have not.

Id.

Perhaps unsurprisingly, H.B. 2023 was debated and enacted in the midst of racially charged allegations of voter fraud surrounding ballot collection in Arizona. In 2014, Maricopa County Republican Chair A.J. LaFaro created and published a video showing “surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots.” *Reagan*, 329 F. Supp. 3d at 876. The video included racially tinged commentary, in which LaFaro stated that he “did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug; and that LaFaro did not follow him out to the parking lot to take down his tag number because he feared for his life.” *Id.* The LaFaro video became popular on Facebook and was shown at Republican meetings leading up to the debate on H.B. 2023. *Id.* Furthermore, H.B. 2023’s predecessor, S.B. 1412, was introduced by Republican State Senator Don Shooter, who “was in part motivated by a desire to eliminate what had become an effective Democratic GOTV strategy . . . [after winning his 2010 election] with 53 percent of the total vote, receiving 83 percent of the non-minority vote but only 20 percent of the Hispanic vote.” *Id.* at 879-80; *see also Hobbs*, 948 F.3d at 1007.

B. Arizona's Legislators Have an Established Record of Anti-Latino Rhetoric.

The LaFaro video and Representative Shooter's motivation for S.B. 1412 are not isolated events in Arizona's history, but represent merely a few recent data points on a long timeline stretching back to Arizona's territorial period. *See generally Hobbs*, 948 F.3d at 1017-25. In addition to the myriad examples of discrimination against Latino voters in Arizona listed in the Ninth Circuit's opinion below, state legislators have continued to imbue official discourse with racial invective in recent history. Strikingly, in 2018, then-Arizona State Representative David Stringer called immigration an "existential threat," warning that "[i]f we don't do something about immigration very, very soon, the demographics of our country will be irrevocably changed and we will be a very different country. It will not be the country you were born into." Antonia Noori Farzan, *Arizona Legislator: 'There Aren't Enough White Kids to Go Around' in State Schools*, Phoenix New Times (June 13, 2018) <https://www.phoenixnewtimes.com/news/arizona-legislator-immigration-demographic-change-represent-an-existential-threat-to-the-us-10517227>. Claiming that "there aren't enough white kids to go around," Stringer cautioned that it would "change the demographic voting base of this state." *Id.* In 2019, Arizona State Senator Sylvia Allen, while speaking at a Republican Party event, lamented the "Browning of America," stating that the United States is "going to look like South

American countries very quickly.” Steven Hsieh, *Sen. Sylvia Allen Warns the U.S. Will Soon ‘Look Like South American Countries,’* Phoenix New Times (July 26, 2019) <https://www.phoenixnewtimes.com/news/arizona-state-senator-fears-decline-of-white-birth-rate-11333367>. She warned that immigrants would fail to assimilate. *Id.*

Indeed, state legislators’ evident contempt for Latinos extends to broader cultural concerns as well. As just one example, the legislature enacted A.R.S. § 15-112 in 2010 to “target a single educational program in use in a single school district in Arizona:” Tucson Unified School District’s Mexican-American Studies program. *González v. Douglas*, 269 F. Supp. 3d 948, 966 (D. Ariz. 2017). Reviewing that law, the District of Arizona concluded in 2017 that the law had “no legitimate pedagogical objective” and instead was “motivated by a desire to advance a political agenda by capitalizing on race-based fears.” *Id.* at 974. Notably, at the time of the court’s decision, Tucson schools were operating under a desegregation decree put into effect as the result of a desegregation class action brought by Latino and Black students in Tucson in 1974. *Id.* at 950.

II. The History of the Voting Rights Act Has Been to Include and Protect Latino Voters.

In order to prevent the type of racial animus discussed above, as well as other, less obvious efforts to disenfranchise minority voters, Congress passed

the VRA in 1965 “for the broad remedial purpose of ‘ridding the country of racial discrimination in voting.’” *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). Before passage of the VRA, “Arizonans of Hispanic, American Indian, African-American and Asian heritage were the victims of discrimination in virtually every area of their social and political lives. See James Thomas Tucker et al., *Voting Rights in Arizona: 1982–2006*, 17 S. Cal. Rev. L. & Soc. Just. 283 (2008).

In brief, the VRA protects each American’s right to vote. And up until the Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), Arizona’s minority voters enjoyed some measure of protection, just as Congress intended.

Pre-*Shelby County*, Congress used Section 5 of the VRA, governing “covered jurisdictions,” to monitor potential voter rights infringement in Arizona. In 1965, when the VRA was passed, an English literacy test—first imposed by the territorial legislature, then prohibited by Congress, and then reimposed by the state legislature after statehood—was still in effect in Arizona, subject to the broad discretion of each county’s registrar. *Hobbs*, 948 F.3d at 1018–19. At first, only Apache, Coconino, and Navajo Counties qualified as “covered jurisdictions” under the VRA, as all three were “majority American Indian, and there was a history of high use of the literacy test and correspondingly low voter turnout.” *Id.* at 1022 (noting that the three counties subsequently and successfully

challenged the VRA’s application to their use of the literacy test).

It soon became clear that, as originally enacted, the VRA did not adequately address the discrimination that racial and linguistic minorities such as Latinos faced. The VRA was amended in 1970 to incorporate voter participation data from the presidential election of 1968 and to “effectively impose[] a nationwide ban on literacy tests.” *Id.* at 1023. As amended, the scope of the VRA expanded to cover 8 of 14 counties in Arizona. *Id.* Arizona swiftly challenged the literacy test ban, but the Supreme Court rejected Arizona’s challenge. *See Oregon v. Mitchell*, 400 U.S. 112, 132 (1970). Justice Black noted that “[i]n Arizona . . . only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average.” *Id.* The Arizona legislature waited two years after the Court’s decision to repeal its literacy test. *Hobbs*, 948 F.3d at 1023.

In 1975, Congress amended the VRA once again to incorporate voter participation data from the 1972 presidential election and expand “the definition of ‘test or device’ to address discrimination against language minority groups.” *Id.* “Every jurisdiction in Arizona failed the new test.” *Id.*

Importantly, and as addressed at greater length in *infra* Section IV, Congress again amended the VRA in 1982 so that plaintiffs could establish a violation of § 2 of the Act by “demonstrating that a

challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race.” *Chisom*, 501 U.S. at 394.

III. Courts Have Found Attacks on Latino Voters, and § 2 Has Protected These Voters.

In keeping with congressional intent, courts have applied § 2 of the VRA to protect Latino voters from unlawfully restrictive voting measures, just as the Ninth Circuit did here.

For example, in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), the Fifth Circuit found that Texas implemented a new voter identification requirement in violation of § 2. Prior to that measure’s enactment, Texas permitted voters to “cast a ballot in person by presenting a registration certificate—a document mailed to voters upon registration.” *Id.* at 225. After the enactment of SB 14 in 2011, however, voters were required to present specific forms of personal identification before voting at the polls. *Id.* If a voter were unable to produce a valid form of identification for purposes of SB 14, he or she could “cast a provisional ballot after executing an affidavit” attesting to his or her eligibility to vote, but would be required to produce a valid SB 14 identification within 6 days at the county registrar. *Id.* at 226. A broad group of voters and advocacy groups challenged the measure in federal court in 2013. After a 9-day bench trial, the district court found that the measure “create[d] an unconstitutional burden on the right to vote [under the First and Fourteenth Amendments], has an

impermissible discriminatory effect against Hispanics and African-Americans [under § 2], and was imposed with an unconstitutional discriminatory purpose.” *Id.* at 227-28.

Reviewing the district court’s decision *en banc*, the Fifth Circuit upheld its finding that SB 14 had a discriminatory effect on minorities’ voting rights in violation of § 2. *Id.* at 250–56 (noting evidence in record that Latinos were 2.42 times more likely to lack identification sufficient to cast a ballot under SB 14); *id.* at 258 (noting evidence in record that “the gap between Anglo and Latino Republican support is between 30 and 40 percentage points”). The Fifth Circuit remanded to the district court to consider an appropriate remedy. *Id.* at 265.

Veasey helped set the groundwork for appropriate enforcement of § 2, which when correctly employed, is a powerful tool to protect minority voters, and one which the Ninth Circuit wisely used in the *en banc* decision below.

IV. The Ninth Circuit Properly Analyzed Arizona’s Voting Policies and Correctly Concluded They Violate the Voting Rights Act.

As local organizations who work to increase the engagement, enfranchisement, and turnout of Latino voters, Amici are well-versed in the obstacles facing minority voters in Arizona. A robust application of § 2 is the best way to honor the intent of the Voting Rights Act and ensure that Latinos in Arizona are not denied their right to vote—a right

which must be equal to that of the state’s white voters. The Ninth Circuit properly recognized that the two Arizona policies at issue are two of the most pernicious burdens facing the state’s Latino voters in recent history. And despite Petitioners’ cynical insistence that this construction creates nothing more than “a get-out-the-vote program for one political party,” (Brief for Private Petitioners at 31), the Ninth Circuit properly undertook an “intensely localized” appraisal of Arizona’s election procedures and the history of discrimination levied against minorities in the state.

Arizona’s Latino voters have always had “less opportunity” to meaningfully “participate in the political process,” 52 U.S.C. § 10301(b), than have their white counterparts. But the addition of Arizona’s OOP and ballot collection policies on top of this history of discrimination rendered Latino political opportunity even more compromised. Only the faithful application of § 2 used by the Ninth Circuit—and its sister circuits—can account for the factors that have compounded the lack of opportunity that Latinos have to exercise their right to vote.

A. Arizona’s Challenged Policies Impose a Disparate Burden on Minority Voters.

At the first step of the results test, the Ninth Circuit correctly found that Arizona’s OOP and ballot collection policies impose a disparate burden on Arizona’s minority voters.

The Ninth Circuit examined an array of statistical data and “extensive and uncontradicted evidence in the district court,” which indicated that minority voters are predisposed to the negative effects of the OOP and ballot collection policies. *Hobbs*, 948 F.3d at 1014. This data was particularly persuasive in the context of OOP voting, as “Hispanic, Native American, and African American voters cast OOP ballots at statistically higher rates than their non-minority counterparts.” *Reagan*, 329 F. Supp. 3d at 835. In fact, in 2012, Maricopa County’s rate of OOP voting was “131 percent higher for Hispanics . . . than whites.” *Id.*

These imbalanced numbers of Latino OOP votes versus white OOP votes are striking, and their damaging effect is clear when one considers that Arizona leads the nation in the number of rejected OOP ballots. *Hobbs*, 948 F.3d at 1001 (noting that “[t]he percentage of rejected OOP votes in Arizona is eleven times that in Washington, the State with the second-highest percentage”). Thus, Arizona’s Latino voters, who vote OOP more than any demographic in the state, are likely at greater risk of having their entire ballot thrown out than any other voting group in the entire country.

Moreover, even a small number of minority voters denied their full right to vote is significant in the context of Amici’s work. Disenfranchisement of a few thousand voters across the state has grave implications for Latino voters, who are already underrepresented at the polls. *See Reported Voting and Registration by Sex, Race, and Hispanic Origin*

for November 2018, tbl. 4b, U.S. Census Bureau,
<https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html>

(reporting that only 36.2 percent of Arizona's Hispanic voters cast ballots in the 2018 general election, compared to 63.9 percent of white, non-Hispanic voters). Indeed, news of nearly 4,000 rejected votes casts a shadow over the voter trust and participation that Amici organizations work to foster amongst Latino voters. Amici regularly encounter new voters who are enthusiastic about the process but doubtful that their ballots will actually be counted in the races where they matter most.

On top of its negative effects on voter morale and turnout, the disenfranchisement of 3,709 Arizona voters can change the course of an election. For example, Arizona's 2020 general election saw several extremely close races that could have been altered by a few thousand votes:

- In Arizona Legislative District 28, where the incumbent state senator represents around 171,000 residents, Democrat candidate Christine Marsh unseated Kate Brophy McGee by only 497 votes.
- In the statewide four-way race for three open seats on the Arizona Corporation Commission, candidate Anna Tovar outpaced the second highest vote-getter by only 231 votes.

- In the race for Maricopa County Recorder, Republican candidate Stephen Richer unseated the Democratic incumbent Adrian Fontes by 4,599 votes out of nearly 1.9 million cast.

While the number of voters disenfranchised by Arizona's OOP policy is more easily quantified than the number impacted by H.B. 2023, the district court correctly noted that "no court has explicitly required quantitative evidence to prove a vote denial claim," and thus did not reject the claim on those grounds. *Reagan*, 329 F. Supp. 3d at 868. Nonetheless, the district court rejected "consistent and uncontradicted testimony about third-party ballot collection they had done, supervised, or witnessed," which was later properly credited by the Ninth Circuit. *Hobbs*, 948 F.3d at 1033. Amici, organizations with experience in Latino voting behavior, are well aware that minority voters were more likely to utilize ballot collection to return their early ballots in the face of inadequate mail service, lack of transportation, and lack of voter information and education. Amici believe firmly that allowing ballot collection would facilitate their efforts to register and turn out Latino voters in Arizona.

At bottom, the Ninth Circuit correctly assessed the number of minority voters affected by the OOP and ballot collection policies, and the Court should uphold the well-reasoned finding at step one of the § 2 test that such policies impose a disparate burden on minority voters.

B. The Disparate Burden on Minority Voters Is Linked to Social and Historical Conditions in Arizona.

The Ninth Circuit was correct in its finding that the disparate burden imposed by Arizona's OOP and ballot collection policies is more likely to be borne by minority voters because the historic discrimination against Arizona's minorities has increased their reliance on OOP voting and third-party ballot collection. The result is “an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives; or to participate in the political process.” *Hobbs*, 948 F.3d at 1016 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); 52 U.S.C. § 10301(b)).

In reaching this conclusion, the Ninth Circuit correctly characterized the Senate factors and analyzed them in the context of Arizona’s history. *See id.* at 1017–32. This section will focus on Senate factor five and the effects on Arizona Latinos of discrimination in “socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation.” *Reagan*, 329 F. Supp. 3d at 876. This factor most directly explains the predisposition of Latino voters to vote OOP or by ballot collection, and thus best accounts for the disproportionate number of Latinos disenfranchised by the challenged policies.

Arizona’s Latino citizens have undisputedly unequal access to education, health, and wealth

compared to the state's white citizens.³ Indeed, the district court recognized that "the effects of discrimination in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona." *Id.*

Census data compiled by the University of Arizona shows that nationally, nearly 20 percent of Hispanic-Americans live below the poverty line, compared to 11 percent of white Americans. *Poverty Rate (2019)*, Making Action Possible for Southern Arizona, <https://mapazdashboard.arizona.edu/health-social-well-being/>. In Arizona, those rates are 21.6 percent and 13.2 percent, respectively. *Id.*

The inequality continues across educational achievement, where Arizona's Latinos have been less likely than their white counterparts to graduate high school. *Accountability & Research Data, Cohort 2019 Four Year Graduation Rate Data*, Ariz. Dept. of Educ., <https://www.azed.gov/accountability-research/data> (reporting that 75 percent of Hispanic or Latino students graduated high school, compared to 85 percent of white students). And, as the lower

³ Of course, other minority groups in Arizona are also subject to discriminatory gaps in health, wealth, and education. The Court should therefore also consider the gravity of the historical discrimination encountered by American Indians and African-Americans in Arizona. Arizonans of both groups live below the poverty line at rates significantly higher than white citizens and have faced unique and egregious historical discrimination that, like Latinos, renders them more likely to be disenfranchised by Arizona's OOP and ballot collection policies.

courts both noted, “[w]hite Arizonans . . . are nearly three times more likely to have a bachelor’s degree than Hispanics and Native Americans.” *Hobbs*, 948 F.3d at 1028.

The effects of discrimination are longstanding and pervasive in Arizona. Cumulatively, they give rise to an increased likelihood that Latino voters will vote by OOP or by third-party ballot collection, due in large part to three specific challenges foisted upon Latinos as a result of extensive inequality in the state. Namely, Arizona’s Latino voters are more likely to 1) lack access to knowledge about their polling or ballot drop-off location; 2) lack physical access to these locations; and 3) receive faulty information about elections and mistrust voting information.

1. Latino voters are more likely than white voters to lack access to knowledge of their polling place

Increased rates of poverty make it more likely that Latino voters will rely on OOP voting or third-party ballot collection because poverty decreases access to updated information about polling places and makes it more likely that a voter’s polling place will change.

The University of Arizona has noted that around 82 percent of Latinos in the state have broadband internet access, compared to 90.5 percent of white Arizonans. *Internet Access (2019)*, Making Action Possible for Southern Arizona, <https://mapazdashboard.arizona.edu/infrastructure>

/internet-access. When the location of a voter’s polling place is not obvious, the most reliable way to learn its location is via the state’s online resources. This problem is further exaggerated in Arizona, where many polling places may be located at the edge of a precinct, less likely to be obvious to voters who live far from it. *See Brief of Respondent Democratic National Committee at 9 (“In 2012, approximately 25 percent of OOP voters lived closer to the polling place where they cast their OOP ballot than to their assigned polling place”); 23 (noting that Maricopa County polling places are often “located at the edge of precincts, farther from voters’ homes, leading to voter confusion”).*⁴

Adding to the challenge of locating a polling place is that the polling places change frequently. *See Hobbs*, 948 F.3d at 1001 (“between 2006 and 2008, at least 43 percent of [Maricopa County] polling locations changed”). They change even more frequently for minority voters who experience high residential mobility as a result of poverty and housing discrimination, and because election officials change polling places more frequently in poor areas than in affluent areas. *Id.* at 1002

⁴ While Maricopa County recently changed to a vote-center model whereby voters could cast their vote at any vote center in the county regardless of precinct, Maricopa County may rejoin other precinct-based counties again in the future. If Maricopa County were to revert to the precinct system, the OOP policy will resume the disenfranchisement of OOP voters in Maricopa County by rejecting their entire ballot in violation of VRA § 2, unless this Court affirms the Ninth Circuit’s *en banc* holding to protect OOP voters.

(“Hispanics experienced stability in their polling places . . . about 30 percent lower than the rate for whites”).

If, due to a lack of access and an abundance of confusion, a minority voter cannot locate the voter’s assigned polling place, he or she is more likely to vote at the wrong location or to forgo voting in person. Assuming a minority voter *can* locate his or her assigned polling place, the next challenge is getting there to cast a vote.

2. Latino voters are more likely than white voters to lack access to their polling place or ballot drop-off locations

The district court and the Ninth Circuit both remarked upon the fact that Latino voters are “more likely to work multiple jobs, less likely own a car, and more likely to lack reliable access to transportation.” *Hobbs*, 948 F.3d at 1028. Importantly, the Ninth Circuit noted that these factors make it more difficult not only to “travel to a polling place” but also “between an incorrect polling place and a correct polling place,” meaning a voter who is informed he must vote a provisional ballot may not have the ability to remedy that by traveling to the correct location. *Id.*

Additionally, minority voters are less likely to have time off work to vote when polls are open, increasing the chances that they will vote at the nearest precinct or hand their ballot off to a collector, just to be sure they can fit voting into their

schedule. *American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization*, PRRI <https://www.prri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018/> (reporting that 16 percent of Hispanic and Black voters said that they or a member of their household failed to vote due to an inability to take time from work, as compared to 8 percent of White voters).

These problems are exacerbated by the fact that Arizona's persistent lack of polling places and its oddly placed polling places create a greater distance for voters to travel, often without reliable ways to get there. See Brief of Respondent Katie Hobbs at 8 ("Voters who live more than 1.4 miles from their assigned polling place are 30 percent more likely to vote OOP.").

Finally, the primary issue minority voters face that makes them more likely to utilize third-party ballot collection is a lack of reliable mail service. As the Ninth Circuit recognized, "H.B. 2023 is likely to have a pronounced effect in rural counties with significant American Indian and Hispanic populations who disproportionately lack reliable mail and transportation services." *Hobbs*, 948 F.3d at 1035.

3. Latino voters are more often subject to misinformation than non-minority voters, leading to voter distrust

In addition to the historic inequalities described above, Arizona's Latino voters are also subject to increased rates of misinformation and resulting voter distrust, due in part to the language and education discrimination described in Senate factor five. First, the district court and Ninth Circuit discussed the instances when "Maricopa County has repeatedly misrepresented or mistranslated key information in Spanish language voter materials." *Hobbs*, 948 F.3d at 1024. Those errors, combined with "lower levels of English literacy and education," render Latino voters "more likely to be unaware of certain technical voting rules." *Id.* at 1028; *See also* Tucker et al., *supra*, at 284 (discussing Arizona's "sweeping limitations on bilingual education").

On top of misinformation, Latino voters are subject to election practices that breed mistrust of an unreliable system. For example, last-minute changes to polling places—more common in poor neighborhoods—suggest to voters that they are better off not voting in the next election if it means they can avoid showing up at the wrong place. "[E]xtremely long lines" at the polling place also suggest to Latino voters that the election system cannot be trusted to create an easy and accessible voting experience. *Id.* at 1025.

As for the ballot collection policy, the district court noted the “surprising number of voters in the Hispanic community [who] distrust returning their voted ballot via mail, particularly in low-income communities where mail theft is common.” *Reagan*, 329 F. Supp. 3d at 869. These voters—and in particular, older Latino voters—are more likely to rely on in-person return, possibly via a volunteer who offers to return a voter’s ballot on his or her behalf. Amici regularly observe this trend in their voter engagement work, and believe that they could more effectively encourage Latino voter turnout if they could assist voters via ballot collection.

Taken together, the considerations of Senate factor five suggest that the ongoing disparities in wealth, education, housing, transportation, and other fields give rise to many reasons why Latino voters are more likely to rely on OOP voting or third-party ballot collection. As a result, Latino voters are more frequently disenfranchised by the policies, meaning they have less “less opportunity than other members of the electorate” to exercise political will. 52 U.S.C. § 10301(b).

V. A Robust Voting Rights Act Is More Necessary than Ever to Protect Latino Voters.

The Court should affirm the Ninth Circuit’s *en banc* holding because it represents the robust voter protections that the VRA is intended to provide, and which are more necessary than ever for Arizona’s Latino voters. Recent years have seen a marked increase in voting restrictions against

which § 2 provides a potent tool to protect voters. These measures have included voter ID restrictions (*see Veasey; League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016)); shortened early voting periods (*see Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016)); and limits to same-day voter registration (*see North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017)), among others.

This wave of VRA litigation is due in part to *Shelby County v. Holder* and its invalidation of federal preclearance requirements. 133 S. Ct. 2612 (2013). Without the safety net of preclearance, state legislatures will continue to enact laws that restrict the rights of minority voters. Arizona’s enactment of H.B. 2023 is the perfect example of this post-*Shelby County* phenomenon. *See Reagan*, 329 F. Supp. 3d at 880–81.

All of these threats to minority voting rights are taking place against a larger national backdrop of the extreme events of 2020, which have stressed Arizona’s voting procedures to the breaking point. COVID-19 made Amici’s work even more vital, as they navigated new challenges around safely engaging with voters and realized that the threat of the pandemic made even more important options like OOP voting and third-party ballot collection. 2020 also brought with it a wave of groundless voting security concerns—a debate in which Arizona has unfortunately been thrust onto center stage. Despite the tireless efforts of Arizona election

officials to conduct a smooth and efficient election amid unprecedented challenges, Americans and even Arizona's own representatives have continued to lob wild allegations of voter fraud regarding the state's November 2020 general election. These baseless allegations of voter fraud, like those that animated the passage of H.B. 2023, invite conspiracy-minded legislators to pass ever-more stringent voting restrictions, always under the guise of preserving the very election integrity they themselves have called into question. These measures stand to disproportionately harm Arizona's Latino voters.

In the midst of these discouraging developments and the ongoing discrimination against minority voters, a robust application of § 2 is the best way to help prevent the erosion of minority voting rights. And while states are entitled to devise localized procedures in their administration of elections, the courts must in turn be equipped to use the tools Congress provided them to discern the discriminatory results those procedures wreak on minority populations. The Ninth Circuit properly exemplified how to make such surgical and "intensely local" appraisals of state election practices, as § 2 requires. Anything less than a strong § 2 will fail to combat both actual and perceived attempts to curtail Latino voters' access to free and fair elections, and will be powerless against the ongoing discrimination that Arizona Latinos face in exercising their political power.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's *en banc* decision.

Respectfully Submitted,

JASON A. LECKERMAN
Counsel of Record
BALLARD SPAHR LLP
1735 Market Street,
51st Floor
Philadelphia, PA 19103
(215) 655-8500
leckermanj@ballardspahr.com

ROY HERRERA
DANIEL A. ARELLANO
JILLIAN L. ANDREWS
IAN O. BUCON
BALLARD SPAHR LLP
1 East Washington St.,
Suite 2300
Phoenix, AZ 85004
602-798-5400

Counsel for Amici Curiae

January 20, 2021