

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 OF *AMICI CURIAE*
EMPIRICAL ELECTIONS SCHOLARS
IN SUPPORT OF RESPONDENTS**

MAXWELL V. PRITT
Counsel of Record
ALEXANDER J. HOLTZMAN
BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
(415) 293-6800
mpritt@bsflp.com

TABLE OF CONTENTS

| | Page |
|--|------|
| INTEREST OF <i>AMICI CURIAE</i> | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | 5 |
| I. Voter Fraud, Including Absentee Ballot Fraud, Is Exceedingly Rare in U.S. Elections. | 6 |
| A. Social Scientific Studies | 7 |
| B. Government Data, Investigations, and Reports..... | 12 |
| C. Other Sources of Data on Election and Voter Fraud | 19 |
| II. Arizona’s Ballot Collection Ban Is Untethered To Any Actual—and Unlikely—Threat of Ballot Collector Fraud..... | 22 |
| A. There Is No Evidence of Fraud in the Long History of Third-Party Ballot Collection in Arizona..... | 22 |
| B. More Broadly, Voter Fraud in Arizona Is Exceedingly Rare..... | 23 |
| C. Arizona Had Adequate Safeguards Against Voter Fraud in Place Prior to the Enactment of H.B. 2023. | 24 |
| D. North Carolina’s Congressional District 9 Absentee Fraud Case Exemplifies the Rarity of Absentee Ballot Fraud and the Limitations of Ballot Collection Restrictions. | 28 |

TABLE OF CONTENTS—continued

| | Page |
|---|------|
| III. Challengers to the 2020 Presidential Election Results, Including in Arizona, Alleged—But Could Not Produce—Evidence of Fraud. | 29 |
| IV. Allegations of Voter Fraud Are Not Equivalent To Evidence of Fraud, Nor Do Public Opinion Concerns About Voter Fraud Constitute Evidence that Fraud Occurred..... | 31 |
| A. Allegations of Voter Fraud..... | 31 |
| B. Public Opinion of Voter Fraud..... | 33 |
| V. Restrictions and Errors in Delivering, Processing, and Counting Absentee Ballots Are a Larger Threat To Accurate Vote Counting Than Absentee Voter Fraud. | 35 |
| CONCLUSION..... | 37 |

TABLE OF AUTHORITIES

| | Page | |
|--|------------|----|
| CASES | | |
| <i>Bowyer v. Ducey</i> , | | |
| --- F. Supp. 3d ---, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020) | 31, 32, 33 | |
| <i>Marks v. Stinson</i> , | | |
| No. 93-CV-6157, 1994 WL 47710 (E.D. Pa. Feb. 18, 1994), <i>aff'd in part and vacated in part</i> , 19 F.3d 873 (3d Cir. 1994) | 27 | |
| STATUTES | | |
| 52 U.S.C. § 21083(b) | 26 | |
| Ariz. Rev. Stat. § 16-550(A) | 26 | |
| Ariz. Rev. Stat. § 16-1005 | 26 | |
| OTHER AUTHORITIES | | |
| Anna Baringer, Michael C. Herron & Daniel A. Smith, <i>Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus</i> , 19 Election L.J. 289 (2020) | | 37 |
| Antoine J. Banks & Heather M. Hicks, <i>Fear and Implicit Racism: Whites' Support for Voter ID Laws</i> , 37 Pol. Psychol. 641 (2016) | | 34 |

TABLE OF AUTHORITIES—continued

| | Page |
|---|------|
| Ariz. Sec’y of State, 2019 Ariz. Elecs. Procs. Manual, https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf | 26 |
| Ariz. Sec’y of State, <i>Voting by Mail</i> , https://azsos.gov/votbymail | 27 |
| Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, <i>Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization</i> , 68 Stan. L. Rev. 1455 (2016) | 34 |
| Chris Kahn, <i>Half of Republicans Say Biden Won Because of a ‘Rigged’ Election: Reuters/Ipsos Poll</i> , Reuters (Nov. 18, 2020), https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ | 33 |
| Chris Lehman, <i>10 Oregon Voters Plead Guilty to Voter Fraud in 2016 Presidential Election</i> , The Oregonian/OregonLive (Apr. 29, 2019), https://www.oregonlive.com/politics/2019/04/10-oregon-voters-plea-guilty-to-voter-fraud-in-2016-presidential-election.html | 19 |

TABLE OF AUTHORITIES—continued

| | Page |
|---|--------|
| Clint Hickman, Ltr. to Maricopa County Voters (Nov. 17, 2020), https://www.maricopa.gov/DocumentCenter/View/64676/PR69-11-17-20-Letter-to-Voters | 30 |
| Comm’n on Fed. Election Reform, <i>Building Confidence in U.S. Elections</i> (2005), https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf | 24, 35 |
| Compl., <i>Bowyer v. Ducey</i> , No. CV-20-02321-PHX-DJH (D. Ariz. Dec. 2, 2020), Dkt. No. 1 | 31, 32 |
| Corbin Carson, <i>Exhaustive Database of Voter Fraud Cases Turns Up Scant Evidence That It Happens</i> , News21 (Aug. 12, 2012), https://votingrights.news21.com/article/election-fraud-explainer | 8, 9 |
| Cybersecurity & Infrastructure Sec. Agency, <i>Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Coordinating Executive Committees</i> (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election | 30 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|--------|
| Daniel A. Smith, Brian Amos, Carl Klarner, Daniel Maxwell, Thessalia Merivaki & Tyler Richards, <i>Rigged? Assessing Election Administration in Florida’s 2016 General Election, in Florida and the 2016 Election of Donald J. Trump</i> (Matthew T. Corrigan & Michael Binder eds., 2019) | 35 |
| David C. Wilson & Paul R. Brewer, <i>The Foundations of Public Opinion on Voter ID Laws: Political Predispositions, Racial Resentment, and Information Effects</i> , 77 Pub. Opinion Q. 962 (2013) | 34 |
| David Cottrell, Michael C. Herron & Daniel A. Smith, <i>Vote-by-Mail Ballot Rejection and Experience with Mail-in Voting</i> (Oct. 8, 2020) (unpublished manuscript), http://www.dartmouth.edu/~herron/VBM_e xperience.pdf | 37 |
| David Cottrell, Michael C. Herron & Sean J. Westwood, <i>An Exploration of Donald Trump’s Allegations of Massive Voter Fraud in the 2016 General Election</i> , 51 Electoral Stud. 123 (2018) | 11, 12 |

TABLE OF AUTHORITIES—continued

| | Page |
|---|------|
| Elaine Kamarck & Christine Stenglein, <i>Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks</i> , Brookings Inst. (June 2, 2020), https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks | 17 |
| Elise Viebeck, <i>Minuscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks</i> , Wash. Post (June 8, 2020), https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html | 18 |
| Expert Report of Dr. Allan J. Lichtman, <i>Feldman v. Ariz. Sec’y of State’s Office</i> , No. 16-01065-PHX-DLR, 2016 WL 4778772 (D. Ariz. June 10, 2016) | 23 |
| <i>Federal Prosecution of Election Offenses</i> (Richard C. Pilger ed., 8th ed. 2017) | 13 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|--------|
| <p><i>Gessler Voter Sting Nets 1 Conviction Despite Accusation of Widespread Fraud</i>, The Sentinel (Mar. 13, 2015), https://sentinelcolorado.com/news/gessler- voter-sting-nets-1-conviction-despite- accusation-widespread-fraud.....</p> | 17 |
| <p>H.B. 2023, 52d Leg., 2d Reg. Sess. (Ariz. 2016).....</p> | passim |
| <p>H.B. 2305, 51st Leg., 1st Reg. Sess. (Ariz. 2013).....</p> | 23 |
| <p>Heritage Found., <i>A Sampling of Recent Election Fraud Cases from Across the United States</i>, https://www.heritage.org/voterfraud.....</p> | passim |
| <p>Heritage Found., List of Fraudulent Use of Absentee Ballot Cases, https://www.heritage.org/voterfraud/search ?combine=&state=All&year=&case_type=A ll&fraud_type=24489</p> | 20, 36 |
| <p>Iowa Sec’y of State, <i>DCI Voter Fraud Investigations Report</i> (May 8, 2014), https://publications.iowa.gov/16874/1/DCI% 20Voter%20Fraud%20Report%205-8-14.pdf</p> | 16 |

TABLE OF AUTHORITIES—continued

| | Page |
|---|----------|
| Jesse Paul, <i>10 People in Colorado May Have Cast Two Ballots in 2016 Election, While 38 Might Have Also Voted in Another State, Study Says</i> , Denver Post (Sept. 15, 2017), https://www.denverpost.com/2017/09/15/colorado-2016-improper-voting-study | 18 |
| Jesse T. Richman, Gulshan A. Chattha & David C. Earnest, <i>Do Non-citizens Vote in U.S. Elections?</i> , 36 Electoral Stud. 149 (2014)..... | 10 |
| John R. Zaller, <i>The Nature and Origins of Mass Opinion</i> (1992)..... | 34 |
| John S. Ahlquist, Kenneth R. Mayer & Simon Jackman, <i>Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment</i> , 13 Election L.J. 460 (2014)..... | 8, 9, 34 |
| Justin Levitt, <i>Analysis of Alleged Fraud in Briefs Supporting Crawford Respondents</i> , Brennan Ctr. for Justice (Dec. 31, 2007), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Analysis%20of%20Crawford%20Allegations.pdf | 33 |
| Lorraine C. Minnite, <i>The Myth of Voter Fraud</i> (2010)..... | passim |

TABLE OF AUTHORITIES—continued

| | Page |
|---|----------|
| M.V. Hood III & William Gillespie, <i>They Just Do Not Vote Like They Used To: A Methodology to Empirically Assess Election Fraud</i> , 93 Soc. Sci. Q. 76 (2012) | 8, 9 |
| Margaret Groarke, <i>The Impact of Voter Fraud Claims on Voter Registration Reform Legislation</i> , 131 Pol. Sci. Q. 571 (2016)..... | 1, 7, 36 |
| Michael C. Herron, <i>Mail-In Absentee Ballot Anomalies in North Carolina’s 9th Congressional District</i> , 18 Election L.J. 191 (2019) | 29 |
| Michael Wines, <i>All This Talk of Voter Fraud? Across U.S., Officials Found Next to None</i> , N.Y. Times (Dec. 18, 2016), https://www.nytimes.com/2016/12/18/us/voter-fraud.html | 12 |
| Michelle L. Robertson, <i>Election Fraud – Winning At All Costs: Election Fraud in the Third Circuit</i> , 40 Vill. L. Rev. 869 (1995) | 27 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|--------|
| <p>N.C. State Bd. of Elections, Evidentiary Hearing: Preview of Evidence, <i>In re Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District</i> (Dec. 12, 2018), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Executive%20Director's%20Preview%20of%20the%20Evidence.pdf.....</p> | 28 |
| <p>N.C. State Bd. of Elections, <i>In re Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District</i> (Mar. 13, 2019).....</p> | 27 |
| <p>Nat'l Council of State Legislatures, <i>Voting Outside the Polling Place: Absentee, All- Mail and Other Voting at Home Options</i> (July 2020), https://www.ncsl.org/research/elections- and-campaigns/absentee-and-early- voting.aspx</p> | 25, 26 |
| <p>News21, <i>Who Can Vote? You May Not Be Able To</i>, https://votingrights.news21.com .21, 22, 23, 24</p> | |
| <p>NTD Television, <i>Live: Arizona Senate Holds Hearing on Election Integrity</i> (Dec. 14, 2020), https://www.facebook.com/watch/live/?v=15 88329758035906&ref=watch_permalink</p> | 30 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|--------|
| Office of Ariz. Attorney Gen., Election Integrity Unit, https://www.azag.gov/criminal/eiu | 24 |
| Pam Fessler & Elena Moore, <i>Signed, Sealed, Undelivered: Thousands of Mail-In Ballots Rejected for Tardiness</i> , NPR (July 13, 2020), https://www.npr.org/2020/07/13/889751095/signed-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness | 36 |
| Paul Gronke, et al., <i>Voter ID Laws: A View from the Public</i> , 100 Soc. Sci. Q. 215 (2019) | 34 |
| Ray Christensen & Thomas J. Schultz, <i>Identifying Election Fraud Using Orphan and Low Propensity Voters</i> , 42 Am. Pol. Res. 311 (2013) | 8, 9 |
| S.B. 1412, 50th Leg., 1st Reg. Sess. (Ariz. 2011) | 23 |
| Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, <i>One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections</i> , 114 Am. Pol. Sci. Rev. 456 (2020)..... | 10, 11 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|------------|
| Stephen Ansolabehere, Samantha Luks & Brian F. Schaffner, <i>The Perils of Cherry- Picking Low Frequency Events in Large Sample Surveys</i> , 40 Electoral Stud. 409 (2015) | 10 |
| <i>Threats to the Homeland Before the S. Comm. On Homeland Security and Governmental Affairs</i> , 116th Cong. (2020) (statement of Christopher Wray, Director of the FBI), www.hsgac.senate.gov/09/14/2020/threats- to-the-homeland | 15 |
| U.S. Election Assistance Comm’n, <i>The Election Administration and Voting Survey 2016 Comprehensive Report</i> (2017), https://www.eac.gov/sites/default/files/eac_ assets/1/6/2016_EAVS_Comprehensive_Re port.pdf | 36 |
| U.S. Gov’t Accountability Off., GAO-14-634, <i>Elections: Issues Related to State Voter Identification Laws</i> (2014) | 7, 8 |
| U.S. Gov’t Accountability Off., GAO-19-485, <i>Voter Registration: Information on Federal Enforcement Efforts and State and Local List Management</i> (2019) | 12, 13, 14 |

INTEREST OF *AMICI CURIAE*¹

Amici curiae are empirical scholars of election administration. They teach about and conduct research on the effects of election policies on elections security, enfranchisement, and public confidence in elections. Given their expertise, amici are well positioned to bring to the Court's attention relevant, quantitative evidence on the absence of voter fraud and to highlight the pernicious effect on voter confidence and enfranchisement of substituting narratives about perceived voter fraud for evidence of actual voter fraud.

Lorraine Minnite is Associate Professor of Public Policy and Chair of the Department of Public Policy and Administration at Rutgers University-Camden. She is the author of *The Myth of Voter Fraud* (2010).²

Margaret Groarke is Professor of Political Science at Manhattan College and author of *The Impact of Voter Fraud Claims on Voter Registration Reform Legislation*, 131 Pol. Sci. Q. 571 (2016).

Michael C. Herron is the William Clinton Story Remsen 1943 Professor of Government at Dartmouth

¹ No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel contributed money to fund the brief's preparation or submission. All parties lodged letters of blanket consent to the filing of amicus briefs.

² Academic affiliations are for informational purposes only.

College. His current research focuses on administrative issues in American elections.

Kenneth R. Mayer is Professor of Political Science at the University of Wisconsin-Madison and Affiliate faculty in the La Follette School of Public Affairs, UW Madison. He has conducted extensive research on election administration, voter ID, and voter fraud.

Marc Meredith is Associate Professor of Political Science and (by courtesy) Business Economics and Public Policy at the University of Pennsylvania. His research focuses on voting behavior and election administration.

Thessalia Merivaki is Assistant Professor of American Politics at the Department of Political Science and Public Administration at Mississippi State University. She is an expert on voter list maintenance and the processing of provisional ballots.

Daniel A. Smith is Professor and Chair of Political Science at the University of Florida. His extensive research examines the effects of voting and election rules on political behavior.

SUMMARY OF THE ARGUMENT

I. Empirical scholars of elections broadly agree that voter fraud is exceedingly rare in modern U.S. elections. Amici have studied voter fraud directly and systematically reviewed the literature and evidence on voter fraud. While the American public discourse over voter fraud has grown louder—often driven by

partisan political considerations—evidence of actual fraud remains scant.

A. Social scientific research reveals very little evidence of voter fraud in contemporary U.S. elections. When the U.S. Government Accountability Office (“GAO”) prepared a report in 2014 on voter fraud in the United States, all five of the studies that the GAO found were scientifically sound identified almost no voter fraud in modern elections. Empirical research since the GAO report continues to show minimal evidence of actual voter fraud in U.S. elections.

B. Government reports and investigations of voter fraud likewise have failed to reveal meaningful evidence of voter fraud in U.S. elections. State-level investigations similarly suggest that very little actual voter fraud occurs or is even specifically alleged to have occurred.

C. Two databases of voter fraud cases and allegations, developed by the Heritage Foundation and a group of journalism students, further reinforce the conclusion that voter fraud in U.S. elections is exceedingly rare.

II. Focusing on the State of Arizona, there is no evidence of fraud associated with third-party ballot collection and, more broadly, the evidence shows that voter fraud in Arizona is exceedingly rare. There are sufficient protections on absentee voting in Arizona—including signature matching, bipartisan ballot counting, ballot tracking, tamper-evident envelopes,

and voter identification requirements—to prevent (or, in the rare instance, catch) absentee voter fraud without restrictions on ballot collection. And the revelation of fraud by a campaign in a North Carolina congressional race in 2018 suggests that ballot collection restrictions do not stop determined criminal efforts by campaigns or other third parties to corrupt an election.

III. Evidence from Arizona and nationwide from the November 2020 election suggests that it was among the most secure in American history, with little to no evidence of voter fraud.

IV. Despite a lack of evidence, allegations of voter fraud have flourished since the 2020 presidential election, including in Arizona. But allegations of voter fraud are not evidence of fraud. Allegations do, however, affect public opinion. Tracking the proliferation of specious allegations of voter fraud, surveys show that a portion of the public believes voter fraud is a problem in U.S. elections. Elites have caused growing distrust by encouraging public misunderstanding of voter fraud for partisan purposes. The distrust is not driven by actual evidence of voter fraud or a lack of safeguards on voting, including absentee voting.

V. Given the lack of evidence of voter fraud in contemporary U.S. or Arizona elections, restrictions that lead to the rejection of absentee ballots pose a greater threat to the outcomes and legitimacy of

elections than do the overwhelmingly unfounded allegations of voter fraud.

ARGUMENT

In 2016, over the objections of Arizona’s Hispanic, Native-American, and African-American voters, Arizona enacted H.B. 2023, 52d Leg., 2d Reg. Sess. (Ariz. 2016), criminalizing voter assistance practices involving the collection and delivery of early vote mail-in ballots by individuals, political parties, and community organizers.³

The legislative record cited by the district court in this case indicates that there were two main justifications for H.B. 2023: (1) the prevention of absentee ballot fraud and (2) maintaining public confidence in the integrity of Arizona’s elections. These are important state interests. As concerns justifying adopting H.B. 2023, however, they are misplaced for the simple reason that absentee ballot fraud in contemporary U.S. elections is rare, and “there has never been a case of voter fraud associated with ballot collection charged in Arizona.” JA289.

In an atmosphere of heightened partisan political polarization, it is critical to the integrity of our elections that allegations of voter or election fraud, and public opinion regarding perceptions of fraud, not be confused with actual empirical evidence of fraud.

³ Amici focus on the ballot collection restrictions at issue, but the evidence on the absence of voter fraud undermines the justifications for Arizona’s out-of-precinct policy as well.

I. Voter Fraud, Including Absentee Ballot Fraud, Is Exceedingly Rare in U.S. Elections.

There is an overwhelming consensus among political scientists that voter fraud in contemporary U.S. elections is rare. This consensus has evolved over the last decade or so as the issue of voter fraud began to play a larger role in shaping policy debates about election reform and electoral integrity. There are no systematically collected statistics or data on the incidence of voter fraud. To address this problem, one elections scholar, Lorraine C. Minnite, used a mixed methods approach to compile and analyze evidence from a wide range of sources, including: a review of the scholarly literature on voter fraud and all pertinent federal and state election statutes; database searches of hundreds of news sources and thousands of news stories across the U.S. at the state and local levels; searches of legal databases and cases, and review of relevant legal materials and opinions at the state and federal levels; documents and material produced through public records requests sent to thousands of election and law enforcement officials in every state; Freedom of Information Act requests to various agencies within the U.S. Department of Justice; analysis of a longitudinal data set produced by the Administrative Office of the United States Courts; analysis of voluminous records of contested federal and state elections; and interviews with a wide range of people with relevant expertise, including, but not limited to, prosecutors, defense lawyers, election officials, voters, academics, and advocates working on

voter registration drives, to name a few. *See* Lorraine C. Minnite, *The Myth of Voter Fraud* (2010). She concluded that voter fraud, defined as the intentional corruption of the voting process by voters, is exceedingly rare in contemporary U.S. elections. *Id.*

Since publication of *The Myth of Voter Fraud* a decade ago, the issue of voter fraud has moved front and center in partisan battles over electoral outcomes. With each federal election, voices raising allegations of voter fraud have gotten louder, while evidence of actual voter fraud has remained scant. *See* Margaret Groarke, *The Impact of Voter Fraud Claims on Voter Registration Reform Legislation*, 131 *Pol. Sci. Q.* 571 (2016).

A. Social Scientific Studies

Social scientific research finds very little evidence of voter fraud in contemporary U.S. elections. In 2014, the GAO published a performance audit of issues related to state voter identification laws. U.S. Gov't Accountability Off., GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* (2014). For its report, the GAO sought only to identify the challenges to determining a complete measure of in-person voter fraud, not to estimate the incidence of voter fraud overall.

Part of the report involved a review of “academic literature, organizational studies, peer-reviewed journals, books, and other regularly cited research published from January 2004 through April 2014 to identify studies that attempted to estimate in-person

voter fraud, using a documented methodology.” *Id.* at 7. The GAO analyzed more than 300 studies to determine whether they contained data on in-person voter fraud and provided an adequate description of the methodology used for collecting the data. The GAO excluded studies based on anecdotal reports of in-person voter fraud.

Only five studies met the above criteria.⁴ While each study had limitations for estimating a complete count of cases of in-person voter impersonation, two GAO analysts and a GAO statistician reviewed the research and determined that “the design, implementation, and analyses of the studies were sufficiently sound to support the studies’ results and conclusions based on generally accepted social science principles.” *Id.* at 3–4.

None of the five scientifically sound studies found material evidence of voter fraud in contemporary U.S. elections. Three used quantitative methods to

⁴ The five studies are: John S. Ahlquist, Kenneth R. Mayer & Simon Jackman, *Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment*, 13 *Election L.J.* 460 (2014); Ray Christensen & Thomas J. Schultz, *Identifying Election Fraud Using Orphan and Low Propensity Voters*, 42 *Am. Pol. Res.* 311 (2013); M.V. Hood III & William Gillespie, *They Just Do Not Vote Like They Used To: A Methodology to Empirically Assess Election Fraud*, 93 *Soc. Sci. Q.* 76 (2012); Minnite, *supra*; and Corbin Carson, *Exhaustive Database of Voter Fraud Cases Turns Up Scant Evidence That It Happens*, News21 (Aug. 12, 2012), <https://votingrights.news21.com/article/election-fraud-explainer>.

identify anomalies in registration and voting data as proxies for voter fraud, finding very little fraud. Hood and Gillespie performed an audit of the 2006 general election in Georgia “to ascertain the extent to which deceased registrants are being used in a fraudulent manner.” Hood & Gillespie, *supra*, at 81. Using a data mining technique, they first identified 66 suspect ballots out of approximately 2.1 million cast. Further research showed that none of the in-person ballots and almost none of the absentee ballots (57 of the remaining 62 suspect ballots) were fraudulently cast. They could not obtain enough information from county registrars to make a determination about five ballots, and it is possible, therefore, that none of the absentee ballots were fraudulent. They found “no evidence that election fraud was committed under the auspices of deceased registrants” in Georgia’s 2006 election. *Id.* at 76. Ahlquist, Mayer, and Jackman used a different technique to search for proxies for voter impersonation in the 2012 national general election, finding “no evidence of systematic voter impersonation” in that election. Ahlquist, Mayer & Jackman, *supra*, at 473. Christensen and Schultz used yet another quantitative technique to search for anomalies in election returns that might suggest the presence of fraud. Their findings “support[ed] the conclusion that electoral fraud, if it occurs, is an isolated and rare occurrence in modern U.S. elections.” Christensen & Schultz, *supra*, at 313.

Carson’s report, *Exhaustive Database of Voter Fraud Cases Turns Up Scant Evidence That It*

Happens (this is the News21 evidence explored below), and *The Myth of Voter Fraud* do not rely solely on quantitative methodologies, focusing instead on identifying actual instances of voter fraud in recent U.S. elections.

Only a few other empirical social scientific studies of the incidence of voter fraud have been conducted since the 2014 GAO report, specifically, two academic papers that rely on quantitative methodologies and proxy measures to estimate the probability of fraud.⁵

In the first, Sharad Goel and colleagues used statistical techniques to look for proxy evidence of double voting in the 2012 presidential election. Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, *One Person,*

⁵ Not included in this discussion is a set of methodological papers addressing elections forensics techniques as a means for detecting election fraud. This work focuses on developing statistical techniques for addressing anomalous patterns in election data and does not claim to prove fraud. In addition, this discussion excludes a discredited paper that analyzed survey data and concluded that “non-citizens participate in U.S. elections, and that this participation has been large enough to change meaningful election outcomes including Electoral College votes, and Congressional elections.” See Jesse T. Richman, Gulshan A. Chattha & David C. Earnest, *Do Non-citizens Vote in U.S. Elections?*, 36 *Electoral Stud.* 149, 149 (2014). The authors’ methodology was widely criticized as faulty, including by the political scientists who generated the survey data. See Stephen Ansolabehere, Samantha Luks & Brian F. Schaffner, *The Perils of Cherry-Picking Low Frequency Events in Large Sample Surveys*, 40 *Electoral Stud.* 409 (2015).

One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections, 114 Am. Pol. Sci. Rev. 456 (2020). They found that “double voting is not currently carried out in such a systematic way that it presents a threat to the integrity of American elections.” *Id.* at 467. They estimated that “at most,” assuming no errors in the data caused by administrative mistakes (a human impossibility), one in 4,000 votes (1/40th of one percent) out of approximately 126 million votes cast in 2012 was a double vote. Moreover, “measurement error in turnout records,” the authors wrote, could “possibly explain . . . a significant portion, if not all, of this.” *Id.* The authors estimated that “a 1.3% clerical error rate would be sufficient to explain all of these apparent double votes.” *Id.* at 457. In other words, given the level of precision in the statistical methods used in the study, a tiny number of clerical mistakes could account for what otherwise appeared to be duplicate votes.

A second paper, by Cottrell, Herron, and Westwood, investigated claims made by President Donald J. Trump that his election in 2016 was tainted by voter fraud. See David Cottrell, Michael C. Herron & Sean J. Westwood, *An Exploration of Donald Trump’s Allegations of Massive Voter Fraud in the 2016 General Election*, 51 Electoral Stud. 123 (2018). The researchers used several statistical modeling techniques and county-level election returns, census data, and other federal and state government data to estimate the likelihood of invalid non-citizen voting in

that election. *Id.* at 123–42. “Our empirical results share a common theme,” they wrote: “[T]hey are inconsistent with fraud allegations made by Trump. The results are, however, consistent with various state-level investigations conducted in the initial months of 2017, all of which have failed to find any evidence of widespread voter fraud in the 2016 General Election.” *Id.* at 140.

One survey conducted after the 2016 election involved inquiries about voter fraud to state election authorities in all 50 states (only Kansas failed to respond). The authors found “what researchers and scholars have said for years: Fraud by voters casting ballots illegally is a minuscule problem, but a potent political weapon.” See Michael Wines, *All This Talk of Voter Fraud? Across U.S., Officials Found Next to None*, N.Y. Times (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/voter-fraud.html>.

B. Government Data, Investigations, and Reports

Recent findings from another GAO report examining the federal enforcement effort against election fraud align with prior findings on the scant record of voter fraud. See U.S. Gov’t Accountability Off., GAO-19-485, *Voter Registration: Information on Federal Enforcement Efforts and State and Local List Management* (2019). The GAO analyzed data for the period 2001 through 2017, drawn from two different U.S. Department of Justice case management systems used by the two Department components responsible

for prosecuting election fraud: the Criminal Division's Public Integrity Section and the U.S. Attorneys' Offices.

The federal government defines election fraud broadly to include the corruption of "the obtaining and marking of ballots, the counting and certification of election results, or the registration of voters." *Federal Prosecution of Election Offenses 2* (Richard C. Pilger ed., 8th ed. 2017). The data analyzed by the GAO went beyond the precise definition of voter fraud developed by Minnite to measure the incidence of fraud intentionally committed by voters, to include crimes committed by public officials, politicians, and their campaigns, and fraud committed through voter intimidation, such as vote-buying conspiracies in which the powerful use money and other inducements to lure the powerless into selling their votes. The GAO assessed the reliability of the DOJ case management databases and "found the data sufficiently reliable to provide information on the nature and characteristics of DOJ's efforts to address potential instances of election fraud." GAO-19-485, *supra*, at 4.

Keeping in mind that the GAO's analysis was overbroad, its principal findings nonetheless align with prior findings by political scientists that, overall, voter fraud in U.S. elections is exceedingly rare:

i) Over the period of fiscal years 2001 through 2017, the Public Integrity Section launched 1,408 criminal investigations or "matters," filing charges in

695 cases. *Id.* at 30. Of the matters initiated, about two percent (33 matters) were categorized by Section attorneys as election fraud-related, which includes instances of absentee ballot fraud; of the cases filed as a result of the Section's investigations, 19 cases involving 37 individual defendants were election fraud-related. *Id.* at 29–30.

ii) Over the same study period, U.S. Attorneys' Offices initiated more than 2.2 million criminal investigations, of which 525 were election fraud-related, two one-hundredths of a percent of their overall criminal matters. The U.S. Attorneys' Offices filed over one million criminal cases during this period; of these, 185 cases were election fraud-related, or two one-hundredths of a percent of their overall caseload. Fifteen of these cases were jointly filed by U.S. Attorneys Offices and the Public Integrity Section (and double counted in the Public Integrity Section equivalent category cited above). *Id.* at 35–36.

iii) In sum, “[a]ccording to officials from EOUSA [the Executive Office of the U.S. Attorneys], which provides guidance, direction, and oversight to the U.S. Attorneys' Offices, election fraud was one of the *least* frequent crimes addressed by U.S. Attorneys' Offices.” *Id.* at 36 (emphasis added). The GAO report continued: “Officials further noted that *election fraud related cases were taken seriously and thoroughly investigated when facts supporting such charges were uncovered.*” *Id.* at 36 (emphasis added).

Further corroboration of the finding that voter fraud in contemporary U.S. elections is exceedingly rare was recently provided by FBI Director Christopher Wray, in sworn testimony before the U.S. Senate Homeland Security and Governmental Affairs Committee. Director Wray testified that the FBI takes “all election-related threats seriously, whether it’s voter fraud, voter suppression, whether it’s in-person, whether it’s by mail.” *Threats to the Homeland Before the S. Comm. On Homeland Security and Governmental Affairs*, 116th Cong. (2020) (statement of Christopher Wray, Director of the FBI), www.hsgac.senate.gov/09/14/2020/threats-to-the-homeland. But the FBI had “not seen historically any kind of coordinated national voter fraud effort in a major election, whether it’s by mail or otherwise.” *Id.* It had “seen voter fraud at the local level from time to time” and took seriously its “responsibility to investigate such incidents,” recognizing “the potential impact those things could have on the local level,” but “to change a federal election outcome by mounting that kind of fraud at scale would be a major challenge for an adversary.” *Id.* Asked to confirm that the FBI had “not seen any widespread fraud by mail and it’s something the FBI watches continuously to make sure that that’s not happening,” Director Wray responded, “That’s something that we would investigate seriously” and “aggressively.” *Id.*

Investigations conducted by state agencies responsible for the administration of elections and

state law enforcement and auditing agencies provide other important official sources of data for analyzing the incidence of voter fraud in U.S. elections. Minnite's case study of election administration records in the State of Oregon is of particular interest here because Oregon began experimenting with mail balloting 40 years ago, and, in 2000, became the first state in the nation to conduct a presidential election entirely by mail. Minnite, *supra*, at 69–76.

Minnite obtained a complete file from the Oregon Secretary of State's Election Division of 6,605 election law complaints, 5,345 of which pertained to Oregon's vote-by-mail system. Investigators found no criminal violation in 2,748 cases (51.4 percent). Administrative actions were taken in 2,023 cases (37.8 percent) in which voter or administrative error was the source of the problem and investigators found no intent to commit fraud. Only 21 cases (0.4 percent) led to convictions or guilty pleas for criminal violations of Oregon's election laws, or about one case per year over the 15-year study period.⁶

Several states in recent years have conducted investigations of alleged voter fraud. For example, a multi-year investigation by the Iowa Secretary of State led to 27 prosecutions out of approximately 1.6 million votes cast. *See* Iowa Sec'y of State, *DCI Voter Fraud Investigations Report* (May 8, 2014), <https://pub>

⁶ The outcome for 553 cases was undetermined when the complaint file and complaint logs were produced by the Election Division. *See* Minnite, *supra*, at 69–76 (especially Table 4.4).

lications.iowa.gov/16874/1/DCI%20Voter%20Fraud%20Report%205-8-14.pdf. A 2013 investigation by the Colorado Secretary of State alleged that 155 non-citizens had illegally voted. On further investigation, however, only four people were charged and only one was convicted. *See Gessler Voter Sting Nets 1 Conviction Despite Accusation of Widespread Fraud*, *The Sentinel* (Mar. 13, 2015), <https://sentinelcolorado.com/news/gessler-voter-sting-nets-1-conviction-despite-accusation-widespread-fraud>.

A recent study by the Brookings Institution used the Heritage Foundation's database (discussed in more detail below) to look at the number of fraudulent votes attempted by mail for the four states voting entirely by mail before 2018—Colorado, Oregon, Utah, and Washington. The researchers reported that there were fewer than 30 fraudulent votes attempted by mail in these four states over a period in which some 43 million votes were cast. Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, Brookings Inst. (June 2, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks>.

Notable for the issues raised in the extant litigation, officials in Oregon, Colorado, Washington, Delaware, and Maryland participated in a months-long study of voting irregularities in the 2016 presidential election. None of these states have bans

on ballot carrying as strict as Arizona's under H.B. 2023. Colorado, Oregon, and Washington are three of the five states that conduct elections entirely by mail (the other two, Utah and Hawaii, have only recently adopted all-mail balloting).

Out of the approximately 11.5 million votes cast in the five study states in 2016, there were 112 total instances of *possible* improper voting, mostly duplicate voting. In Colorado, where roughly 2.6 million of the total 2.9 million votes cast were mail-in ballots, there were just 48 instances of *possible* improper ballots, or 0.0016 percent of all ballots cast. See Jesse Paul, *10 People in Colorado May Have Cast Two Ballots in 2016 Election, While 38 Might Have Also Voted in Another State, Study Says*, Denver Post (Sept. 15, 2017), <https://www.denverpost.com/2017/09/15/colorado-2016-improper-voting-study>. State officials were careful not to label the irregularities “voter fraud” because administrative or voter error could not be ruled out as the source of a problem that looked like double voting (but was not) without further investigation. Similar analysis of data from other all-mail-balloting states finds very little evidence of fraud in mail-in ballots. See, e.g., Elise Viebeck, *Minuscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks*, Wash. Post (June 8, 2020), <https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercut-s-trump-claims-about-election-risks/2020/06/08/1e78>

aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html; Chris Lehman, *10 Oregon Voters Plead Guilty to Voter Fraud in 2016 Presidential Election*, The Oregonian/OregonLive (Apr. 29, 2019), <https://www.oregonlive.com/politics/2019/04/10-oregon-voters-plea-guilty-to-voter-fraud-in-2016-presidential-election.html>.

Despite variation in the context, scope, type of fraud, time period, and investigating agency, the government studies summarized here show a clear and consistent pattern of findings: very little actual voter fraud in contemporary U.S. elections. Most potential instances involved irregularities and anomalies in the data that are more likely the result of administrative or voter error or confusion than they are intentional voter fraud.

C. Other Sources of Data on Election and Voter Fraud

The Heritage Foundation has created an online, publicly accessible database of what it calls, “A Sampling of Recent Election Fraud Cases from Across the United States.”⁷ See Heritage Found., *A Sampling of Recent Election Fraud Cases from Across the United States*, <https://www.heritage.org/voterfraud> (last visited Jan. 20, 2021). The Foundation has not

⁷ As recently as last November, the Heritage Foundation labeled the database “Election Fraud Cases from Across the United States.” Adding “sampling” to that title is misleading because no information is provided about the universe from which the so-called sample was drawn or how the sample was drawn.

provided an explanation of the methodology used to create the database or the criteria for inclusion of cases. The database website states that “[t]his database is not an exhaustive or comprehensive list . . . [but] is intended to demonstrate . . . the many ways in which fraud is committed,” although specific numbers of what are called “proven instances of voter fraud,” along with criminal convictions, civil penalties, and diversion programs are tallied and reported on the homepage (*e.g.*, “1,308 Proven instances of voter fraud”). And contrary to the claim of “proven instances of voter fraud,” the database lumps the few instances of voters committing fraud with other forms of election or public corruption and malfeasance, such as cases of “altering the vote count,” “ballot petition fraud,” and “buying votes”—crimes voters in their capacity as voters cannot commit.

Despite these shortcomings, the Heritage Foundation’s election fraud database is useful because it represents the evidence the organization has relied on for years to promote the idea that voter fraud is “real,” by which it means easy to commit and easy to hide. While the full database itself does not appear to be publicly available as a downloadable spreadsheet file, there is a helpful online interface that allows users to select cases based on type of fraud, one of which is “Fraudulent Use of Absentee Ballot.” *See* Heritage Found., List of Fraudulent Use of Absentee Ballot Cases, https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_t

ype=All&fraud_type=24489 (last visited Jan. 20, 2021). The database contains 211 so labeled cases in the U.S. dating to 1988, or roughly six or seven cases per year over the last three decades. In federal elections alone, voters cast roughly two billion votes during this period. Thus, by the Heritage Foundation's own evidence, absentee ballot fraud in the U.S. is exceedingly rare.

The same scant evidence of voter fraud of any kind is corroborated by research conducted by the News21 journalism project at the Walter J. Cronkite School of Journalism and Mass Communications at Arizona State University.

This year-long project, replicating in part Minnite's methodology in *The Myth of Voter Fraud*, compiled cases of alleged voter fraud in the United States between 2000 and 2012 by sending out more than 2,000 public records requests to state elections and law enforcement authorities in every state, and to the U.S. Department of Justice and FBI. News21, *Who Can Vote? You May Not Be Able To*, <https://votingrights.news21.com> (last visited Jan. 20, 2021). The student journalists followed up these document requests with phone calls and emails, and reviewed more than 5,000 court documents, official records, and media reports. They found just over 2,000 *alleged* cases of election or voter fraud nationwide, including just under 500 cases of alleged absentee ballot fraud nationally over the 12-year study period.

Like the Heritage Foundation database, the News21 database may be searched and sorted by type of fraud and by state, but also by “type of accused,” providing a further refinement of the Heritage Foundation’s organization of its data. The News21 database records 491 cases of alleged absentee ballot fraud. But filtering out cases that do not involve voters reduces that number to 103. Further filtering for cases resulting in conviction, guilty pleas, or consent orders reduces the number to 72, or about six actual cases per year nationally over the 12-year study period, the same rate estimated from the Heritage Foundation database covering the longer 1988 to 2020 period.

II. Arizona’s Ballot Collection Ban Is Untethered To Any Actual—and Unlikely—Threat of Ballot Collector Fraud.

A. There Is No Evidence of Fraud in the Long History of Third-Party Ballot Collection in Arizona.

As an en banc Ninth Circuit observed, “[t]here is no evidence of any fraud in the long history of third-party ballot collection in Arizona.” JA601. Amici are unaware of contrary evidence since the Ninth Circuit’s decision, and Petitioners did not receive amicus support from empirical scholars with any contrary position on the state of the evidence of absentee ballot fraud.

B. More Broadly, Voter Fraud in Arizona Is Exceedingly Rare.

Dr. Allan Lichtman, Respondents' expert, provided a report in which he analyzed the legislative debates over H.B. 2023 and its predecessor bills from previous years (S.B. 1412, 50th Leg., 1st Reg. Sess. (Ariz. 2011), and H.B. 2305, 51st Leg., 1st Reg. Sess. (Ariz. 2013)). He found that the sponsors and supporters of these bills "failed to point to a single documented example of . . . election fraud," a principal justification for the proposed legislation restricting ballot collection in Arizona. Expert Report of Dr. Allan J. Lichtman at 13–19, *Feldman v. Ariz. Sec'y of State's Office*, No. 16-01065-PHX-DLR, 2016 WL 4778772 (D. Ariz. June 10, 2016), Dkt. No. 101-2.

The News21 database, covering the 2000 to 2012 period, contains just seven cases of election fraud for Arizona, including two cases of alleged illegal non-citizen voting that were dismissed. The information about these cases is sourced to correspondence from the Arizona Secretary of State's Office. None of the News21 cases involve absentee voting or ballot collection fraud (four are cases of double voting in which the accused entered plea agreements, one involves a candidate for a state senate seat who forged documents to obtain campaign funding, and two are cases of alleged non-citizen voting that were later dismissed).

The Heritage Foundation's database contains additional cases and covers a longer period. None of

these cases involve ballot collection fraud. Altogether, the Heritage Foundation lists 10 cases of double voting, 10 cases of attempted double voting, one case of illegal voting of an unspecified nature, two cases of attempted ineligible voting of an unspecified nature, and one case of voter registration fraud, for 24 cases of voter fraud from the 2008 election to the present.

The Arizona Attorney General's Election Integrity Unit ("EIU") maintains a list of "Prosecutions of Voting Fraud Since 2010" on the agency's website, noting these are only cases prosecuted by the Attorney General's Office. The website states, "The majority of voter fraud cases prosecuted in Arizona are related to double voting." Most of the 23 cases on the list overlap with the News21 and Heritage Foundation cases, and none of them involve ballot collection fraud. *See* Office of Ariz. Attorney Gen., Election Integrity Unit, <https://www.azag.gov/criminal/eiu> (last visited Jan. 20, 2021).

C. Arizona Had Adequate Safeguards Against Voter Fraud in Place Prior to the Enactment of H.B. 2023.

The 2005 Report of the Commission on Federal Election Reform, commonly known as the Carter-Baker Commission, developed proposals and recommendations for improving the administration of elections in the U.S. following the disputed 2000 election in Florida. *See* Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* (2005),

<https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

The Commission’s report included a short section on absentee ballot fraud and recommended “prohibiting ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” *Id.* At the time, most Americans voted in person on Election Day, and the Commission could only theorize about the possible vulnerabilities of absentee balloting to corruption. It did not independently investigate the rate of absentee ballot fraud or base its recommendations on any scientific studies of absentee ballot fraud. The report does note, however, that signature verification is an effective safeguard against efforts to commit voter fraud. *Id.* at 35.

Absentee and all-mail balloting have greatly expanded in the 16 years since the Carter-Baker Commission released its report. Election administration has evolved. The National Council of State Legislatures (“NCSL”) notes several security measures that protect the integrity of absentee ballots. First, these ballots are hand-marked paper ballots, “considered the gold standard of election security.” NCSL, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options* (July 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>. They provide an auditable paper trail that can be investigated if there is suspicion of tampering or

meddling. The identity of absentee voters can be secured by requiring the voter to sign an affirmation, under the penalty of perjury, and verified through signature matching. A signature is a form of biometric identification unique to each individual. Election officials can compare the signature on an absentee ballot envelope to a signature collected on that voter's registration application and the signature collected on the voter's absentee ballot application. The NCSL also cites the use of bipartisan teams of ballot counters as enhancing the security of the absentee balloting process. In addition, the Help America Vote Act of 2002 requires that first-time voters who register to vote by mail include a copy of their personal identification unless they provided a copy with their registration application. 52 U.S.C. § 21083(b).

Arizona had safeguards against voter fraud in place prior to the passage of H.B. 2023. For example, Arizona law has long provided that any person who knowingly collects voted or unvoted ballots and does not turn them in to an election official is guilty of a Class 5 felony. Ariz. Rev. Stat. § 16-1005. Arizona performs signature matching on mail ballots, and utilizes bi-partisan counting teams. *See* Ariz. Rev. Stat. § 16-550(A); Ariz. Sec'y of State, 2019 Ariz. Elecs. Procs. Manual, at 68–69, 197, https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf. Arizona also uses “tamper evident envelopes” and allows voters to track whether their ballot “has been sent to them and

whether it has been received and accepted by the county.” See Ariz. Sec’y of State, *Voting by Mail*, <https://azsos.gov/votebymail> (last visited Jan. 20, 2021).

The security measures that are part of Arizona state law and regulation function not just to deter but also to detect voter fraud in absentee ballots. Thus, where signature verification, bipartisan counting teams, tamper-proof envelopes, ballot tracking, and other procedures are in effect, it is erroneous to claim that the minimal evidence of absentee voter fraud is because of an inability to detect it. Indeed, when candidates perpetrate fraud *on voters*, they are caught. For example, as described below, the North Carolina State Board of Elections (“NCSBE”) detected a political consultant’s efforts to rig a 2018 congressional election in his candidate’s favor by collecting absentee ballots and falsifying witness certifications. The race was not certified and a new election was ordered. See NCSBE, *In re Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District* (Mar. 13, 2019). And when a candidate for state senate in Pennsylvania perpetrated a scheme of fraud to collect absentee ballots in 1993, the cheating was detected and the offending candidate was ordered out of office. *Marks v. Stinson*, No. 93-CV-6157, 1994 WL 47710, at *15 (E.D. Pa. Feb. 18, 1994), *aff’d in part and vacated in part*, 19 F.3d 873 (3d Cir. 1994); Michelle L. Robertson, *Election Fraud – Winning At All Costs: Election Fraud in the Third Circuit*, 40 Vill. L. Rev.

869 (1995). Both cases are relatively rare incidents of organized absentee ballot abuse—again not *voter* fraud.

D. North Carolina’s Congressional District 9 Absentee Fraud Case Exemplifies the Rarity of Absentee Ballot Fraud and the Limitations of Ballot Collection Restrictions.

A recent case of absentee ballot fraud in North Carolina’s Ninth Congressional District mentioned above highlights how motivated and organized criminal activity is not stopped by restrictive bans on third-party ballot collection.

The case involved the 2018 midterm election in Bladen and Robson Counties, North Carolina. At the time, North Carolina’s absentee ballot laws required witnessing and imposed a ban on non-fraudulent ballot carrying with few exceptions, similar to Arizona’s H.B. 2023.

Despite these uncommon enhanced safeguards, a paid political consultant working for the Republican candidate engaged in a campaign of fraud to rig the election in the candidate’s favor. The consultant hired workers he paid in cash to collect absentee request forms (\$150 per 50 absentee ballot request forms), to collect absentee ballots (\$125 per 50 absentee ballots), and to falsify absent ballot witness certifications. NCSBE, Evidentiary Hearing: Preview of Evidence, *In re Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District* (Dec.

12, 2018), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Executive%20Director's%20Preview%20of%20the%20Evidence.pdf; *see also* Michael C. Herron, *Mail-In Absentee Ballot Anomalies in North Carolina's 9th Congressional District*, 18 *Election L.J.* 191 (2019) (highlighting how easy it is to detect large anomalies in absentee voting).

The consultant's scheme was uncovered, and in March 2019, the NCSBE ordered a new election after an investigation found substantial fraud in the mail-in absentee balloting process. *See* NCSBE, *In re Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District*, *supra.*⁸

III. Challengers to the 2020 Presidential Election Results, Including in Arizona, Alleged—But Could Not Produce—Evidence of Fraud.

During a global pandemic, the nation's state and local election officials, poll workers, and volunteers performed the herculean task of running the 2020 presidential election. To deal with the public health crisis and the need to restrict indoor gatherings, many

⁸ Conversely, the evidence suggests that states can have widespread third-party ballot collection without tampering, voter impersonation, or ballots that are not returned by the collector. For example, the Heritage Foundation database reveals no clear convictions in California for an activity that would have been stopped if third-party collection was banned despite California allowing assistance with ballot collection.

states adopted new rules for sending, receiving, voting, and tabulating ballots, expanding opportunities to vote by absentee or mail ballot. Despite these changes, federal national security officials concluded that the November 2020 election was one of the most secure elections in U.S. history. See Cybersecurity & Infrastructure Sec. Agency, *Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Coordinating Executive Committees* (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

The high level of security extended to Arizona's election. The Chairman of the Board of Supervisors of Maricopa County, where 62 percent of the state's residents live, stated in a letter to voters that there was "no evidence of fraud or misconduct or malfunction" in Maricopa's election. Clint Hickman, Ltr. to Maricopa County Voters (Nov. 17, 2020), <https://www.maricopa.gov/DocumentCenter/View/64676/PR69-11-17-20-Letter-to-Voters>. The Board Chairman repeated his findings when he, the county's election director, and two officials with the Arizona Attorney General's EIU testified at a state Senate Judiciary Committee hearing that there was no evidence of fraud, manipulation, or machine tampering in the 2020 election. NTD Television, *Live: Arizona Senate Holds Hearing on Election Integrity* (Dec. 14, 2020), https://www.facebook.com/watch/live/?v=1588329758035906&ref=watch_permalink.

IV. Allegations of Voter Fraud Are Not Equivalent To Evidence of Fraud, Nor Do Public Opinion Concerns About Voter Fraud Constitute Evidence that Fraud Occurred.

A. Allegations of Voter Fraud

“Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court,” as U.S. District Judge Diane J. Humetewa explained in dismissing a case alleging election fraud in the 2020 Arizona general election. *Bowyer v. Ducey*, --- F. Supp. 3d ---, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *16 (D. Ariz. Dec. 9, 2020). In *Bowyer v. Ducey*, the plaintiffs alleged that Arizona election officials engaged in the “insidious, and egregious ploy” of “old-fashioned ‘ballot-stuffing’” causing the “unlawful counting, or fabrication, of hundreds of thousands of illegal, ineligible, duplicate or purely fictitious ballots in the State of Arizona, that collectively add up to multiples of Biden’s purported lead in the State of 10,457 votes.” Compl., *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, at 2 (D. Ariz. Dec. 2, 2020), Dkt. No. 1.

One of the plaintiffs’ specific claims referred to 303,305 ballots marked “unreturned” by Arizona election officials that the plaintiffs asserted must be fraudulent “insofar as these unreturned absentee ballots represent a pool of blank ballots that could be filled in by third parties to shift the election to Joe Biden, and also present the obvious conclusion that

there must be absentee ballots unlawfully ordered by third parties that were returned.” *Id.* at 16 (¶ 57).

The court dismissed the complaint in its entirety (it included many other allegations about election fraud besides one about unreturned absentee ballots), noting that the plaintiffs’ fraud claims “fail[ed] in their particularity and plausibility.” *Bowyer*, 2020 WL 7238261, at *13 & n.16. None of the plaintiffs’ witnesses identified any of the defendants committing alleged fraud. Instead the witnesses used innuendo and made allegations unsupported by any evidence that “absentee ballots ‘*could have* been filled out by anyone and then submitted in the name of another voter” or “‘*could be* filled in by third parties to shift the election to Joe Biden.” *Id.* at *14 (emphasis in original).

The court also stated that perhaps more concerning than the innuendo masquerading as eyewitness accounts was that expert reports appended by the plaintiffs “reach[ed] implausible conclusions, often because they are derived from wholly unreliable sources.” *Id.* For example, the allegations about unreturned absentee ballots rested on one of the plaintiffs’ expert’s opinion that “‘troublesome’ errors by Arizona election officials ‘involving unreturned mail-in ballots . . . are indicative of voter fraud’ and that the election should consequently be overturned.” *Id.* The court noted that the expert relied on data provided by an unknown person, “named ‘Matt Braynard,’” who “may or may

not have tweeted a ‘Residency Analysis of ABS/EV Voters’ on his Twitter account on November 20, 2020.” *Id.* The court explained that the expert’s “cavalier approach to establishing that hundreds of thousands of Arizona votes were somehow cast in error [was] itself troublesome. The sheer unreliability of the information underlying [the expert’s] ‘analysis’ of [the unknown person’s] ‘data’ cannot plausibly serve as a basis to overturn a presidential election, much less support plausible fraud claims against these Defendants.” *Id.*

The court made clear an underappreciated fact: allegations are not evidence. In the world of hard-fought electoral campaigns and close elections, it is not uncommon for the losing side to hurl “fraud!” accusations at the winner. But as documented by voter fraud scholars, nearly all allegations made in the heat of an electoral contest are meritless as cases of actual fraud. *See* Minnite, *supra*, at 6–14; Justin Levitt, *Analysis of Alleged Fraud in Briefs Supporting Crawford Respondents*, Brennan Ctr. for Justice (Dec. 31, 2007), <https://www.brennancenter.org/sites/default/files/legacy/Democracy/Analysis%20of%20Crawford%20Allegations.pdf>.

B. Public Opinion of Voter Fraud

Public opinion surveys reflect that a growing portion of the public thinks voter fraud is a serious problem in U.S. elections. *See, e.g.*, Chris Kahn, *Half of Republicans Say Biden Won Because of a ‘Rigged’ Election: Reuters/Ipsos Poll*, Reuters (Nov. 18, 2020),

<https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ>. But public opinion is increasingly misaligned with what scholars who study the empirical basis for such concerns have shown and what courts of law have found.

Instead, public perceptions of voter fraud, which until recently had been most prominently tied to the voter identification debate, manifest what scholars of public opinion call “elite to mass opinion transmission.” See John R. Zaller, *The Nature and Origins of Mass Opinion* (1992); Ahlquist, Mayer & Jackman, *supra*, at 460; Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 *Stan. L. Rev.* 1455 (2016). As Gronke and colleagues argue, “elites within the major parties and their ideologically inspired intellectual contemporaries, are the messengers of the voter ID narrative.” Paul Gronke, et al., *Voter ID Laws: A View from the Public*, 100 *Soc. Sci. Q.* 215, 215 (2019) (citation omitted). And attitudes towards voter fraud and voter identification laws systematically differ by race, along with politics. See, e.g., David C. Wilson & Paul R. Brewer, *The Foundations of Public Opinion on Voter ID Laws: Political Predispositions, Racial Resentment, and Information Effects*, 77 *Pub. Opinion Q.* 962 (2013); Antoine J. Banks & Heather M. Hicks, *Fear and Implicit Racism: Whites’ Support for Voter ID Laws*,

37 Pol. Psychol. 641 (2016). The sheer volume of allegations of fraud and rigged or stolen elections emanating from elites, and the Internet world of social media that amplifies them, are having an outsized effect on public opinion on this issue, splintering it from the everyday reality of election administration and the empirical findings of journalists and political scientists. See Daniel A. Smith, Brian Amos, Carl Klarner, Daniel Maxwell, Thessalia Merivaki & Tyler Richards, *Rigged? Assessing Election Administration in Florida's 2016 General Election, in Florida and the 2016 Election of Donald J. Trump* (Matthew T. Corrigan & Michael Binder eds., 2019).

As a result, the argument that voter identification or restrictive ballot collection laws are necessary because the public expresses a belief that voter fraud has occurred must be understood in the context of how that public opinion has been generated in the first place.

V. Restrictions and Errors in Delivering, Processing, and Counting Absentee Ballots Are a Larger Threat To Accurate Vote Counting Than Absentee Voter Fraud.

More research is necessary before we can concur with the Carter-Baker Commission's assertion that "[a]bsentee ballots remain the largest source of potential voter fraud." Comm'n on Fed. Election Reform, *supra*, at 46. The evidence strongly suggests that absentee ballot fraud is rare in contemporary U.S. elections and in Arizona over the last 20 years.

A concern for election integrity must go beyond a concern about voter fraud and recognize the distortions to election outcomes when unnecessarily restrictive administrative rules, bureaucratic failures, and preventable human errors thwart citizens' efforts to cast valid ballots. Indeed, restrictions based on the false premise of fraud can result in disenfranchisement, as preventing one asserted case of fraud can result in orders of magnitude more voters being prevented from voting. *See* Groarke, *supra*.

What we know about absentee ballot *rejection* rates should raise far more concern than the boogeyman of voter fraud. More than 300,000 absentee ballots submitted in the 2016 election were rejected. U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey 2016 Comprehensive Report*, at 25 (2017), https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf. This number for just one election far exceeds any credible allegations of absentee ballot fraud in that election or beyond (recall that the Heritage Foundation's database records only six or seven "fraudulent use of an absentee ballot" cases on average per year over the past three decades). Thousands of mail ballots have been rejected in recent Arizona elections for being received after Election Day. *See, e.g.*, Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-In Ballots Rejected for Tardiness*, NPR (July 13, 2020), <https://www.npr.org/2020/07/13/889751095/sig>

ned-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness. Thus, voters who need assistance returning their ballots may be most burdened by a ban on ballot collection. These problems disproportionately affect minority communities. See David Cottrell, Michael C. Herron & Daniel A. Smith, *Vote-by-Mail Ballot Rejection and Experience with Mail-in Voting* (Oct. 8, 2020) (unpublished manuscript), http://www.dartmouth.edu/~herron/VBM_experience.pdf; Anna Baringer, Michael C. Herron & Daniel A. Smith, *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, 19 Election L.J. 289 (2020).

CONCLUSION

For the foregoing reasons, Arizona's ballot collection restrictions cannot be sustained based on the illusory fear of voter fraud and the judgment of the Ninth Circuit should be affirmed.

January 20, 2021

Respectfully submitted,

MAXWELL V. PRITT

Counsel of Record

ALEXANDER J. HOLTZMAN

BOIES SCHILLER FLEXNER LLP

44 Montgomery Street, 41st Floor

San Francisco, CA 94104

(415) 293-6800

mpritt@bsflp.com