No. 19-____

IN THE

Supreme Court of the United States

ARIZONA REPUBLICAN PARTY, ET AL.

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2 of the Voting Rights Act prohibits voting practices that "result[] in a denial or abridgement of the right of any citizen ... to vote on account of race or color." 52 U.S.C. § 10301(a). Such a discriminatory "result" occurs if an election is not "equally open to participation" by racial minorities, giving them "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Arizona gives all citizens an equal opportunity to vote in person or by mail, and authorizes ballots to be turned in by a family member, household member, or caregiver. In the decision below, however, the Ninth Circuit held that Arizona violated § 2 by (1) requiring in-person voters to cast ballots in their assigned precincts; and (2) prohibiting "ballot-harvesting," *i.e.*, third-party collection and return of ballots. The court held that because racial minorities disproportionately vote out-of-precinct and use ballot-harvesting, the Act compels the State to allow those practices.

The questions presented are:

1. Whether § 2 of the Voting Rights Act compels states to authorize any voting practice that would be used disproportionately by racial minorities, even if existing voting procedures are race-neutral and offer all voters an equal opportunity to vote.

2. Whether the Ninth Circuit correctly held that Arizona's ballot-harvesting prohibition was tainted by discriminatory intent even though the legislators were admittedly driven by partisan interests and by supposedly "unfounded" concerns about voter fraud.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners, who were Appellees in the Ninth Circuit, are the Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero. Arizona Attorney General Mark Brnovich and Secretary of State Katie Hobbs were also Appellees in the Ninth Circuit. The State of Arizona was an Intervenor in the Ninth Circuit.

Respondents, who were Appellants in the Ninth Circuit, are the Democratic National Committee, DSCC (Democratic Senatorial Campaign Committee), and the Arizona Democratic Party.

Pursuant to Supreme Court Rule 29.6, Petitioner Arizona Republican Party certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Democratic Nat'l Comm. v. Reagan, No. 2:16-cv-01065, U.S. District Court for the District of Arizona. Judgment entered May 8, 2018.

Democratic Nat'l Comm. v. Hobbs, No. 18-15845, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 27, 2020.

Feldman v. Ariz. Sec'y of State's Office, No. 16-16698, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 1, 2018.

Feldman v. Ariz. Sec'y of State's Office, No. 16-16865, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 1, 2018.

Ariz. Sec'y of State's Office v. Feldman, No. 16A460, Supreme Court of the United States. Judgment entered November 5, 2016.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Section 2 of the Voting Rights Act forbids voting qualifications, standards, and practices that—even if not intentionally discriminatory—"result[]" in "denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. § 10301(a). As Congress explained, such a discriminatory result occurs if a state's voting procedures are "not equally open to participation" by minorities, in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

That provision was historically used to challenge the *dilution* of minority voting strength. But over the past decade, a proliferation of lawsuits have invoked § 2 to challenge an array of ubiquitous, race-neutral "time, place, and manner" voting procedures, such as how voters may register to vote, when they can vote early or absentee, and what they must show to prove their identities. Although such rules leave the voting process equally open to everyone, the theory behind these challenges—part of a concerted effort to use the federal courts to radically transform the Nation's voting practices for partisan advantage—is that any voting regimes that are not proportionately utilized by racial minorities are discriminatory "denials" of the right to vote. On that construction of § 2, the Voting Rights Act *requires* states to adopt any alternative voting rule or procedure that would *maximize* participation by racial minorities, even if the existing procedures are race-neutral, do not block anyone from voting, and offer all voters an equal *opportunity* to participate in the political process.

Three Courts of Appeals have rejected that theory, and with it lawsuits seeking to compel early voting, same-day registration, and voting without photo identification (all disproportionately used by minorities). As those courts recognized, ordinary race-neutral regulations of the time, place, and manner of voting do not "deny or abridge" the right to vote. So long as all voters have equal "opportunity" to vote—meaning that the procedures afford equal access and impose only the ordinary burdens of voting—federal law does not require the adoption of alternative protocols to maximize participation by racial minorities. Minorities may be less likely to vote for a host of reasons, but a state does not "cause" that disparity by adopting reasonable, race-neutral, and minimally burdensome voting procedures.

Below, however, over vigorous dissents by Judges O'Scannlain and Bybee, the *en banc* Ninth Circuit held that a voting rule violates § 2 if the plaintiffs' desired alternative would achieve greater racial proportionality in voting. The court applied that rationale to invalidate two typical, race-neutral voting practices in the critical swing state of Arizona: one restricting in-person voting to assigned precincts, and another forbidding "ballot-harvesting," *i.e.*, the collection and return of ballots by third parties. In the court's view, Arizona *must* allow people to vote outside their precincts and to collect ballots from strangers, simply because minorities disproportionately vote in those ways—even though Arizona's neutral rules undeniably provide an equal *opportunity* to vote and do not impose any barrier beyond the normal "burden" of casting one's own ballot and voting in the assigned precinct.

In short, instead of focusing on state-created barriers to voter *opportunity* as the Fourth, Sixth, and Seventh Circuits have done, the Ninth Circuit expanded § 2 to condemn voting rules that stand in the way of racially proportionate *outcomes* in voting. This Court should grant review to resolve that split and correct that error. This issue is exceedingly important, because the Ninth Circuit's sweeping view threatens virtually all ordinary election rules, forcing states to fundamentally restructure their voting rules to achieve racial proportionality. And this is a perfect vehicle for resolving the split, clarifying the law, and putting a stop to these misguided challenges, because it arises from a final judgment after a full trial and because the court below stayed its mandate to allow for this Court's considered plenary review.

In addition, the Court should grant review to reverse the Ninth Circuit's additional holding (this one joined by only a bare *en banc* majority) that the ban on ballot-harvesting was motivated by *discriminatory intent*. The trial court found that a majority of legislators voted for the law out of sincere anti-fraud concerns. Nevertheless, the Ninth Circuit inferred a discriminatory purpose from *partisan* motives, the fact that fears of voter fraud were supposedly "unfounded," and the unprecedented notion that a single legislator's supposedly "racially-tinged" motives could be attributed to the entire legislature under a "cat's paw" theory. That "intent" holding independently warrants review, as it conflicts in numerous ways with this Court's precedents and threatens to further turn our courts into instruments of a partisan agenda.

OPINIONS BELOW

The Ninth Circuit's *en banc* opinion (Pet.App.1a) is reported at 948 F.3d 989. Its previous panel decision (Pet.App.170a) is reported at 904 F.3d 686. The district court's decision (Pet.App.300a) is reported at 329 F. Supp. 3d 824.

JURISDICTION

The Ninth Circuit issued its *en banc* decision on January 27, 2020. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 2 of the Voting Rights Act:

> **(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> **(b)** A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301.

STATEMENT

A. Arizona's Voting Practices

Arizona administers one of the most convenient voting systems in the United States. It gives voters three options for casting their ballots: early voting by mail, early in-person voting, and in-person voting on Election Day. The early-voting period lasts 27 days, among the nation's longest. Pet.App.316a. Early voting requires no excuse, and approximately 80% of Arizona voters voted early in 2016. *Id.*

Voters can request early ballots or receive them automatically by joining the Permanent Early Voter List. *Id.* Any voter can return an early ballot in person or by postage-free mail. Pet.App.317a. For in-person voting on Election Day, Arizona's counties have two options. They can use a traditional precinct-based system, which requires voters to vote at their assigned precincts. Or they can use a "vote-center" system, which allows voters to appear at any designated vote center in the county. The vast majority of Arizonans live in counties that use the precinct-based system. Pet.App.320a. Like most states that use a precinct-based voting system, Arizona provides that any in-person vote cast in the wrong precinct will not be counted. Pet.App.319a.

Precinct-based voting serves important purposes. It ensures that voters receive ballots reflecting only the candidates and issues they are eligible to vote for, which often vary within counties. Pet.App.362a. It also allows election officials to estimate how many voters will show up at each polling place, which helps reduce waiting times. *Id.*

Voters are assigned to precincts near where they live. Pet.App.359a. Before Election Day, registered voters receive notices by mail identifying their polling place. Pet.App.360a. Arizona also sends voters a separate pamphlet (in English and Spanish) on how to locate their polling places. *Id.* Several Arizona counties operate online polling-place locators. *Id.* If a polling place changes, voters are notified by mail. *Id.*

If a voter arrives at a precinct but is not on the register, officials must direct the voter to the correct precinct. Pet.App.360a-361a. The voter may still cast a provisional ballot, but must be informed that the ballot will count only if the precinct is correct. *Id.*

In the 2016 election, 2,661,497 people voted in Arizona, and only 3,970 (or 0.15%) voted out of precinct. Pet.App.389a. Roughly 665,374 voters were minorities, and 1,924 of them voted out-of-precinct.[1] Thus, roughly 99.7% of minority voters successfully voted without having their ballots invalidated for voting in the wrong precinct.

B. H.B. 2023

In 2016, Arizona joined many other states by enacting H.B 2023 to prohibit "ballot-harvesting." Under the law, voters may submit a ballot via a caregiver, family member, household member, mail carrier, or election official. A.R.S. § 16-1005(H). Otherwise, no person may "knowingly collect[] voted or unvoted early ballots from another person." *Id.*

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[1] Dkt. 27 at ER1053, *DNC v. Hobbs*, 18-15845 (9th Cir. July 4, 2018); Dkt. 379 at 62-63, *DNC v. Reagan*, 2:16-cv-01065 (D. Ariz. Oct. 6, 2017).

Experts have long recognized the opportunity for fraud created by absentee voting and ballot harvesting. In 2005, former President Jimmy Carter and former Secretary of State James Baker chaired the bipartisan Commission on Federal Election Reform, which found that "[a]bsentee ballots remain the largest source of potential voter fraud." Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005), available at https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf. As they explained, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* Among other things, "[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.*

Accordingly, the Carter-Baker Report recommended that, with narrow exceptions, states "should prohibit [third parties] from handling absentee ballots." *Id.* at 47. In particular, "[t]he practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated." *Id.* Many experts also recognize the need for restrictions. For example, election-law scholar Richard L. Hasen recommends "tighten[ing] rules related to the handling of absentee ballots" by third parties. *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy* 134 (Yale 2020).

Just last year, ballot-harvesting fraud in North Carolina caused a congressional election to be invalidated. Pet.App.166a-167a. In 2004, Indiana ordered a new primary in East Chicago after rampant ballot fraud that involved "inducing ... the

infirm, the poor, and those with limited skills in the English language, to engage in absentee voting." *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145 (Ind. 2004). In 1998, Miami's mayoral election was invalidated due to a "pattern of fraudulent, intentional and criminal conduct" in submitting absentee ballots. *In re Election for City of Miami*, 707 So. 2d 1170, 1171 (Fla. Dist. Ct. App. 1998). And in 1994, a Philadelphia election was overturned due to absentee-ballot fraud. *See Marks v. Stinson*, 19 F.3d 873, 877 (3d Cir. 1994).

Arizona's legislature passed H.B. 2023 to reduce the opportunity for such fraud. Pet.App.405a.

C. The Ninth Circuit's Injunction and This Court's Stay Order in 2016

In April 2016, Plaintiffs filed suit challenging Arizona's policy of not counting out-of-precinct ballots and H.B. 2023's ban on ballot-harvesting. Plaintiffs claimed that both policies have a discriminatory "result" under § 2 of the Voting Rights Act, and that the ban on ballot-harvesting discriminated based on political party. The Arizona Republican Party and several elected officials intervened as defendants.

Plaintiffs sought a preliminary injunction, but the district court denied it. 208 F. Supp. 3d 1074. In late October 2016, a divided panel of the Ninth Circuit affirmed the denial. 840 F.3d 1057. But then, on November 2, less than a week before the election, the Ninth Circuit voted to rehear the case *en banc* and, two days later, the *en banc* court granted a preliminary injunction against H.B. 2023. 843 F.3d 366. This Court issued a stay of the preliminary injunction the next day. 137 S. Ct. 446.

Plaintiffs subsequently dropped their partisan discrimination claim and replaced it with a claim that the ban on ballot-harvesting was enacted with *racial* discriminatory intent. Dkt. 233, *DNC v. Reagan*, 2:16-cv-01065 (D. Ariz. Dec. 28, 2016).

D. The District Court's Decision

The district court proceeded to hold a ten-day bench trial in October 2017. At the end of that trial, the court ruled in favor of Defendants on all counts.

First, the court found that Arizona's policy of not counting out-of-precinct ballots did not result in less voting opportunity for minorities compared to whites. In the 2016 election, only 3,970 out of 2,661,497 voters (or 0.15%) had their ballots invalidated for voting out of precinct. Pet.App.389a. Although this small sample included disproportionately more minorities than whites, the state did not "cause the observed disparit[y]" by giving minorities less opportunity to vote in their assigned precincts. Pet.App.391a. For example, the plaintiffs offered "no evidence" that "precincts tend to be located in areas where it would be more difficult for minority voters to find them, compared to non-minority voters." *Id.*

Second, the court rejected Plaintiffs' challenge to H.B. 2023 because the ban on ballot-harvesting applied equally to all voters and did "not impose burdens beyond those traditionally associated with voting." Pet.App.386a. Indeed, not a single voter "testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." *Id.* The court noted that "there are no records of the numbers of people who, in past elections, have relied on" third-party ballot collection,

and "no quantitative or statistical evidence comparing the proportion that is minority versus non-minority." Pet.App.376a-377a. The court credited some anecdotal evidence that, in past elections, "minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." Pet.App.385a. But that mere statistical disparity did not show that they otherwise lacked equal "opportunity" to vote. Pet.App.386a. Instead, the disparity apparently resulted from the fact that "the Democratic Party and community advocacy organizations have focused their ballot collection efforts on low-efficacy voters, who trend disproportionately minority." Pet.App.384a.

Third, the court also rejected Plaintiffs' claim that H.B. 2023 was enacted with discriminatory intent. The court found that "the majority of H.B. 2023's proponents were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." Pet.App.405a. While some legislators were motivated by partisanship, the court found "the legislature acted in spite of opponents' concerns that the law would prohibit an effective GOTV strategy in low-efficacy minority communities, not because it intended to suppress those votes." Pet.App.412a.

E. The Ninth Circuit's Decision

While a divided Ninth Circuit panel affirmed, the *en banc* court then reversed.

The court held that Arizona's practices impose a "disparate burden" on minorities because they vote out-of-precinct and use ballot-harvesters at a higher rate than whites. Accordingly, not counting out-of-precinct votes results in a "higher percentage of minority votes than white votes [being] discarded," and prohibiting ballot-harvesting likewise "results in a disparate burden on minority voters" because "third parties collected a large and disproportionate number of early ballots from minority voters" in the past. Pet.App.46a, 82a, 84a.

Having found these "disparate burdens," the court proceeded to a second step, looking for a "legally significant relationship" to the "social and historical conditions" affecting minority voters. Pet.App.37a. The court considered the "factors ... laid out in the Senate Report accompanying the 1982 amendments to the VRA." *Id.* Disagreeing with the district court's application of these factors, the court found a discriminatory result based on "Arizona's history of discrimination dat[ing] back to 1848," the existence of "racially polarized voting" in the state, the "effects" of historical discrimination, the existence of "racial appeals" in campaigns, the "number of minorities in public office," and officials' lack of "responsiveness to the needs of minority groups." Pet.App.49a-77a.

Finally, the Ninth Circuit found clear error in the district court's finding that no discriminatory purpose tainted H.B. 2023. The court did not disturb the finding that most legislators voted for the ban for a

"sincere," "non-race-based" purpose of combating "fraud in third-party ballot collection." Pet.App.99a, 405a. Nevertheless, the court attributed discriminatory intent "under the familiar 'cat's paw' doctrine," because a state senator previously proposed similar legislation to reduce Democratic (and thus minority) turnout. Pet.App.99a. The Ninth Circuit imputed what it saw as the senator's "discriminatory purpose" to the entire legislature. *Id.*

Judge O'Scannlain dissented. As to the "results" test, he rejected "the suggestion implicit in the majority opinion that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory." Pet.App.130a. As to discriminatory intent, he criticized the majority for inferring *racial* motives from one senator's *partisan* motives, and for imputing those motives to the entire legislature as a "cat's paw." Pet.App.138a-141a.

Judge Bybee dissented separately, noting that the challenged practices are ordinary "[t]ime, place, and manner restrictions" that do not deny or abridge the right to vote and thus "stand on different footing from status-based restraints on vote qualifications and legislative malapportionment." Pet.App.145a. By ignoring that distinction, the majority's reasoning threatens to invalidate many ordinary election rules, including "rules governing voting on the day of the election, registering with the Secretary of State, and bringing identification with you." Pet.App.147a-148a.

The Ninth Circuit stayed its mandate pending certiorari. Pet.App.415a.

REASONS FOR GRANTING THE PETITION

This case satisfies every certiorari criterion. *First*, it presents federal questions that have divided the federal appellate courts: Three Circuits have rebuffed efforts to invalidate voting rules just because alternative rules would maximize minority participation, but the Ninth Circuit struck down two of Arizona's voting rules on that basis. There is thus a clear conflict over the meaning of § 2 of the Voting Rights Act.

Second, this question is exceptionally important. Not only did the Ninth Circuit invalidate two state laws, but its approach would imperil nearly every voting rule and practice in the nation, since one can always hypothesize other voting regimes that would increase minority turnout. If this decision is allowed to stand, the federal courts will become instruments of an aggressive campaign to dramatically reshape American democracy to favor one political party.

Third, the opinion below is plainly wrong and contrary to § 2's plain language. Section 2 bars voting qualifications that disparately strip minorities of eligibility to vote (*e.g.*, limiting voting to college graduates), and forbids rules that *unequally* burden minorities' opportunities to vote (*e.g.*, placing lots of polling places in white suburbs but too few in black downtown cores). Such rules deny (outright) or abridge (in relative terms) the right to vote based on race. By contrast, neutral and equally applied time, place, and manner regulations do neither and thus do not implicate the Voting Rights Act. By definition, such neutral procedures are "equally open" to all, and they give minorities no "less opportunity" than others

to vote. The fact that minorities might not proportionately *take advantage* of this equal opportunity is irrelevant. Section 2 regulates only the voting practices and procedures "imposed by" the State. If they are "equally open," § 2 is satisfied regardless of disproportionate utilization. Otherwise, § 2 would require altering voting systems for the purely racial purpose of maximizing minority voting strength. *But see Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of § 2.").

Finally, this is an ideal vehicle. Challenges to voting rules are often litigated under severe time pressure, leading to preliminary rulings based on incomplete records and rushed requests for stays. That was true, for example, of the only other federal appellate decision that embraced this sweeping vision of § 2. But it is not true here. The district court held a trial and issued a final judgment; the Court of Appeals permanently invalidated the two rules; and a stay of the mandate has left this Court with ample time to weigh and resolve these important issues.

A bare majority of the Ninth Circuit's *en banc* panel also issued an alternative holding as to one of the two Arizona voting rules, reversing the district court and concluding that prohibiting ballot-harvesting was motivated by discriminatory *intent*. That holding only increases the need for certiorari. It flies in the face of multiple lines of this Court's precedent—by confusing *partisan* motives with *racial* ones, imputing racism based on policy disagreement, and extending an inapt employment doctrine to invalidate duly enacted state laws.

I. THE NINTH CIRCUIT'S INTERPRETATION OF THE § 2 "RESULTS" TEST WARRANTS REVIEW.

The first question presented, as to the scope of § 2's "results" test, warrants review. The Circuits are split over this issue; it is exceptionally important because it controls the legality of numerous common voting rules across the country; and the opinion below conflicts with the statutory text and forces states to unconstitutionally tailor their voting rules to achieve racial balancing instead of equal opportunity.

A. The Circuits Are Split on Whether § 2 Mandates Any Alternative Voting Rule That Would Maximize Participation by Racial Minorities.

The Ninth Circuit's decision deepens a circuit split over the reach of § 2's "results" test. On one side of the conflict, the Fourth, Sixth, and Seventh Circuits hold that the statute prohibits only practices that deprive minorities of an equal *opportunity* to vote. A statistical disparity in voting patterns is therefore insufficient to establish a violation, and the mere fact that some alternative regime would increase minority participation does not render the regime compulsory. By contrast, the Fifth and now Ninth Circuits hold that racially disparate participation rates establish a *prima facie* discriminatory result. This boils down to a requirement that any alternative voting system that enhances racial proportionality *must* be adopted.

1. The Sixth Circuit applied the proper rule in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (2016). Plaintiffs there challenged Ohio's decision to reduce early-voting days and eliminate "same-day registration." *Id.* at 624. African-Americans voted

early and same-day registered "at a rate higher than other voters." *Id.* at 627-28. Reducing early-voting days and requiring prior registration thus disparately affected voting by African-Americans. *Id.*

Nevertheless, the Sixth Circuit found no "cognizable" discriminatory result under § 2 because Ohio's voting rules did not "caus[e] racial inequality in the *opportunity* to vote." *Id.* at 638 (emphasis added). As the court explained, a § 2 claim "requires proof that the challenged standard ... afford[s] protected group members less *opportunity* to participate." *Id.* at 637-38 (emphasis added). Absent such a disparity in "opportunity," the "existence of a disparate impact" in voting rates cannot "establish the sort of injury that is cognizable and remediable under Section 2." *Id.* at 637. Thus, because Ohio gave all voters an equal *opportunity* to register and vote within the allowed time frame, it was irrelevant that more African-Americans would vote if same-day registration and more early voting were allowed.

The Seventh Circuit recognized the same rule in *Frank v. Walker*, 768 F.3d 744 (2014), *cert. denied*, 575 U.S. 913 (2015). There, plaintiffs alleged that Wisconsin's voter-ID law had a discriminatory result because whites "are more likely to possess qualifying photo IDs" than minorities. *Id.* at 752. But "the district judge did not find that [minorities] have less 'opportunity' than whites to get photo IDs," only that they are "less likely to *use* that opportunity." *Id.* at 753. The fact that minorities "do not get photo IDs at the same frequency as whites" does not show unequal voter *opportunity*, only unequal "outcomes." *Id.* That is not enough; § 2 "does not condemn a voting practice just because it has a disparate effect." *Id.*

If the rule were otherwise, Judge Easterbrook wrote, § 2 would condemn nearly all voting rules, as "no state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Id.* at 754. Thus, if bare disparate voting participation were enough to establish a discriminatory result, then requiring voter registration would violate § 2 because whites are statistically "more likely to register than … blacks." *Id.* at 754. "[T]he requirement of in-person voting" would also violate § 2, because white turnout is often "higher" on election day. *Id.* Even "[m]otor-voter registration … would be invalid, because black and Latino citizens are less likely to own cars." *Id.* The Seventh Circuit rejected this reading of § 2, as it would impose an "equal-outcome command" instead of an *equal-opportunity* command, "sweeping away almost all registration and voting rules." *Id.*

The Fourth Circuit recognized the same point in *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (2016). The court upheld Virginia's voter-ID law because all voters in the state were "afforded an equal opportunity to obtain a free voter ID." *Id.* at 600. Thus, the fact that "a lower percentage of minorities ha[d] qualifying photo IDs" was not enough to establish a discriminatory burden, because they had an equal opportunity to *obtain* IDs subject only to "'the usual burdens of voting.'" *Id.* (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)). Even if it was less *convenient* for minorities to obtain an ID, "the disparate inconveniences that voters face" does not establish a discriminatory "denial or abridgement of the right to vote." *Id.* at 601. Section 2 prohibits states from

causing inequality in voter opportunities, but does not compel them to equalize convenience of navigating the usual burdens of voting. Otherwise, states would have to "forever tip-toe around certain voting provisions that would have more effect on the voting patterns of one group than another." *Id*. The Fourth Circuit rejected that radical view of the "results" test.

To summarize: The Fourth, Sixth, and Seventh Circuits hold that statistical disparities in voting patterns cannot establish a discriminatory "result" without a showing of unequal "opportunity." As such, states are not *compelled* by § 2 to adopt whatever time, place, and manner regulations would maximize minority voting. Even if whites are more likely to register, to obtain IDs, or to show up at assigned precincts, imposing those procedural requirements does not "deny or abridge" the right to vote based on race or color. The relevant question is whether voters of all races have an equal *opportunity* to take those required steps. As long as the state gives all voters the same opportunity to vote, with no obstacles beyond the usual burdens of voting, there can be no discriminatory "result" under § 2—and certainly not a discriminatory result *caused by* the state.

2. By contrast, the Fifth and now the Ninth Circuit have held that a statistical disparity among racial groups is enough to implicate § 2, even without any disparity in voter "opportunity." If that is correct, then states are compelled by federal law to affirmatively adopt any voting regime that would increase minority voting rates.

The Fifth Circuit adopted a version of that flawed approach in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). A majority of the *en banc* court reasoned that because "Hispanic registered voters and Black registered voters were ... more likely than their Anglo peers to lack [voter] ID," Texas's voter-ID law "disparately impact[ed]" them. *Id.* at 250-51. The court did not ask if the state gave minorities less *opportunity* than whites to obtain ID. Instead it simply noted that generic and ubiquitous socioeconomic inequalities contributed to the statistical disparity. *Id.* As the dissent explained, this approach allows "[v]irtually any voter regulation that disproportionately affects minority voters [to] be challenged," including "days allowed and reasons for early voting; mail-in ballots; time limits for voter registration; language on absentee ballots; the number of vote-counting machines a county must have; registering voters at a DMV (required by the federal Motor Voter law); [or] holding elections on Tuesday." *Id.* at 310 (Jones, J., dissenting).

Although Texas officials sought certiorari, the Chief Justice observed that "[t]he issues will be better suited for certiorari review" after the district court entered a "final remedial order" and resolved a remanded discriminatory-intent claim. *See Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (mem.) (Roberts, C.J., respecting denial of certiorari). But Texas then amended the challenged voter-ID law, and a Fifth Circuit panel denied any relief. *See Veasey v. Abbott*, 888 F.3d 792, 799 (5th Cir. 2018).

In the opinion below, the Ninth Circuit likewise relied on a statistical disparity. It held that Arizona's in-precinct-voting rule imposed a "discriminatory

burden" under § 2 because minorities historically voted out-of-precinct at a higher rate than whites and thus "a substantially higher percentage of minority votes ... are discarded" for voting out-of-precinct. Pet.App.46a. The court did not require any proof that minority voters have less *opportunity* than whites to vote in their assigned precincts, or even that the in-precinct rule made voting less *convenient* for minorities. Any such finding would have been impossible, because approximately 99.7% of minority voters in Arizona successfully voted either in person or by mail. *Supra* at 6.

The Ninth Circuit likewise held that Arizona's ban on ballot-harvesting imposed a discriminatory burden because, based on anecdotal evidence from Democratic operatives unsupported by any statistical analysis, "third parties collected a large and disproportionate number of early ballots from minority voters." Pet.App.82a. Again, the court did not require evidence that, absent ballot-harvesting, minority voters had less *opportunity* than whites to vote. In fact, the court noted that the only reason minorities were historically more likely to vote through ballot-harvesting was because the Democratic Party deliberately targeted minority communities for ballot-harvesting as part of its get-out-the-vote strategy. Pet.App.83a. In other words, more minorities had their ballots harvested because Democrats deliberately harvested more minority ballots. In the court's view, that racially targeted strategy meant that banning ballot-harvesting was a discriminatory abridgement of minority voting rights.

To be sure, the Ninth Circuit paid lip service to the notion that a "bare statistical showing" of "disparate

impact on a racial minority, in and of itself, is not sufficient." Pet.App.37a. But by that it meant only that "more than a *de minimis* number of minority voters must be burdened." Pet.App.43a. Accordingly, the court held that a statistical disparity *is* enough to implicate § 2, as long as it is more than "de minimis." The court thus found that Arizona's in-precinct rule imposed a discriminatory burden because "substantially" more minorities voted out-of-precinct, which meant that a "substantially higher percentage of minority votes than white votes are discarded." Pet.App.46a. The court likewise found that banning ballot-harvesting is discriminatory because substantially more minority voters had their ballots harvested, and "the number of ballots collected by third parties from minority voters surpasse[d] any de minimis number." Pet.App.84a. Beyond those numerical disparities, the court did not (unlike the Fourth, Sixth, or Seventh Circuits) require any showing that minorities had less *opportunity* than whites to vote. Instead, the disparate minority utilization of plaintiffs' preferred maximizing alternative was the sole basis upon which the court overturned the district court's finding that the in-precinct and ballot-harvesting rules did not cognizably burden minority voting.

B. The Scope of § 2's "Results" Test Is an Issue of Exceptional Importance.

In addition to the circuit split, the decision below also warrants review because the scope of § 2's "results" test is exceptionally important. By adopting an overbroad interpretation, the Ninth Circuit's decision not only invalidates two of Arizona's election laws, but also condemns similar rules enacted by

virtually every other state. Indeed, allowing the decision to stand will radically alter the nation's electoral landscape. It will force states to choose between overhauling election laws to achieve racial balancing, or else facing a wave of litigation modeled on the Ninth Circuit's sweeping reading of § 2.

When a federal court invalidates a "state statute[]," that is "ordinarily sufficiently important to warrant Supreme Court review," even "without regard to the existence of a conflict" among the Circuits (which, as shown, exists here). Shapiro et al., SUPREME COURT PRACTICE 480 (9th ed. 2013). That is "particularly" true when the state law at issue is "representative of those in other states," *id*., because the decision casts a shadow over the validity of those other laws. And it is even *more* true when the state law regulates the time, place, and manner of holding elections, since the framers "found [it] necessary to leave the regulation of [elections], in the first place, to the state governments, as being best acquainted with the situation of the people." 3 Records of the Federal Convention of 1787, p. 312 (M. Farrand ed. 1911). If federal courts are going to invalidate a wide swath of ordinary election laws all across the country, this Court should at least have the final say.

Here, the Ninth Circuit's holding would invalidate over three dozen election laws across the country. At the time of the decision below, 26 states (including four in the Ninth Circuit) did not count out-of-precinct votes. Pet.App.150a-151a (Bybee, J., dissenting). Likewise, well over a dozen states (including three in the Ninth Circuit) restrict ballot harvesting, and many criminalize this maligned practice. Pet.App.160a-163a.

But that is not all. The logic of the Ninth Circuit's decision would condemn an infinite number of other race-neutral election rules in every state. After all, "*any* procedural step filters out some potential voters," and this almost *always* has a disparate racial impact due to socioeconomic disparities among racial groups. *Frank*, 768 F.3d at 749. No matter what the voting rule, it will impact some racial groups more than others: A different percentage of each group will register, show up at the proper polling place, bring a proper ID, mail ballots on time, and so on. That is why "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Id*. at 754. If that is enough to establish a discriminatory burden, then § 2 will "sweep[] away almost all registration and voting rules." *Id*. In their place, states will be required to adopt any alternative rules that maximize minority turnout. For example, if blacks disparately fail to register in advance, states will have to adopt same-day registration. If Latinos disparately fail to vote on weekdays, states will have to allow voting on weekends. If Asians disparately vote by mail, states must allow voting by mail.

This is particularly true because the Ninth Circuit's interpretation of § 2 would invalidate even voting practices that serve important or compelling state interests, treating any state practice as *ipso facto* illegal merely because of the barely cognizable "burdens" and infinitesimal racial impact of the sort present here. Section 2 does not authorize any defense or justification for a proscribed discriminatory "result," analogous to "business necessity" under Title VII, so even the most

necessary anti-fraud or similar measures are doomed if they flunk the Ninth Circuit's proportionality mandate. Indeed, the holding below dramatically illustrates this danger. The Ninth Circuit considered the importance of the invalidated procedures only as *one of the nine* (wholly inapposite and manipulable) Senate Report factors. That analysis proves only how easy it is for federal courts to engage in unfettered policymaking to overturn voting rules entrusted to state legislatures under the Elections Clause.

Although everyone conceded the obvious "importance" of Arizona's "precinct-based voting system," the Ninth Circuit nonetheless instructed the Arizona legislature that it could not *enforce* this important policy, notwithstanding the obvious confusion and administrative burdens engendered by non-compliance. Pet.App.363a. Similarly, despite the strong bipartisan consensus that ballot harvesting, particularly by partisan operatives, is the "largest source of potential voting fraud," *supra* at 7, the Ninth Circuit instructed the legislature that it could not act to prevent such fraud. Thus, under the Ninth Circuit's regime, legislatures seeking to *expand* voting opportunities through mail-in (or non-precinct) voting are foreclosed from taking commonsense steps to prevent the obvious dangers posed by such expansion.

This is not speculative. Past and present litigation demonstrates how the Ninth Circuit's rule has and will be used to override common election procedures to achieve racial balancing and partisan gains. Due to polarized voting, maximizing minority turnout also raises the odds of victory by Democratic candidates. Accordingly, the party's committees (like Respondent

DNC) have undertaken a years-long, massively funded effort to weaponize the Voting Rights Act for partisan advantage by turning § 2 into a mandate to maximize voting participation by racial minorities. They have, to that end, supported suits arguing that § 2 requires same-day registration, early voting, late voting, no-fault absentee voting, straight-ticket voting—and now ballot-harvesting and out-of-precinct voting.[2] Their success in the Ninth Circuit will only expedite this strategy and further enmesh the federal courts in this partisan project. Indeed, the DNC has wasted no time exploiting the Ninth Circuit's ruling: It recently sued to challenge Arizona's rule requiring mail-in ballots to be received by the state no later than 7 p.m. on election day, on the theory that minority voters disproportionately cast late ballots. *See* Dkt. 1, *Voto Latino Inc. et al. v. Hobbs*, No. 2:19-cv-5685 (D. Ariz. Feb. 24, 2020).

Actually, the problem of partisan manipulation is even worse. Under the Ninth Circuit's reasoning, if a voting procedure is used disproportionately by racial minorities, it becomes untouchable under § 2. Thus, a political party becomes empowered to alter what § 2 requires by targeting minority groups to vote with a particular method. That is precisely what occurred here: Democrats *targeted* minority voters for ballot-harvesting, by sending campaign workers to minority

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[2] *E.g.*, *Michigan State A. Philip Randolph Inst. v. Johnson*, 326 F. Supp. 3d 532, 572 (E.D. Mich. 2018) (straight-ticket voting); *Bruni v. Hughs*, No. 5:20-cv-35 (S.D. Tex.) (same); *N.C. State Conf. of NAACP v. Cooper*, No. 1:18-cv-1034 (M.D.N.C.) (voter-ID law); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016) (limits on early voting).

neighborhoods to collect ballots. Pet.App.384a. So they *created* a racial disparity in ballot-harvesting, and the Ninth Circuit held that Arizona is forbidden to stop that practice. The rule adopted below thus allows parties to *manufacture* racial disparities by encouraging racial groups to use a particular method of voting, which then becomes sacrosanct.

In short, the Ninth Circuit's interpretation of § 2's "results" test would imperil countless ordinary voting rules across the nation and conscript federal judges into a partisan campaign to mandate every election rule that helps the Democratic Party. This dangerous abuse of the Voting Rights Act demands this Court's attention and review.

C. The Ninth Circuit's Decision Is Wrong.

The Ninth Circuit's interpretation of § 2 cannot be squared with the statutory text or constitutional principles. States violate the law only by *denying or abridging* the right to vote through qualifications or practices that deprive minorities of equal *opportunity* to participate. Neutral, equally applied regulations of the time, place, and manner of voting do not offend § 2 because they do not deny or abridge voting rights or discriminate in voter opportunity—even if some groups *exercise* that opportunity at different rates. Indeed, any broader reading would exceed Congress's power to enforce equal voting rights and run afoul of the Equal Protection Clause by mandating voting rules based on racial balancing.

1. By its terms, § 2 prohibits a voting rule only if it "results in a *denial or abridgment* of the right ... to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Congress clarified that a

discriminatory "result[]" occurs only if the electoral process is not "equally open" to minorities because they have "less *opportunity* ... to participate in the political process." *Id.* § 10301(b) (emphasis added). And, of course, it must be the "State" that causes the discriminatory result. Section 2 reaches only voting procedures "imposed by" the State that "result[]" in—*i.e.*, cause—the State's political processes not to be "equally open." *Id*. As Justice Brennan put it, § 2 protects only against inequality "proximately caused by" the state. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). Putting these principles together, § 2 prohibits states from *causing* discrimination by adopting voting qualifications or procedures that *deny or abridge* minorities' right to vote in the form of unequal voting *opportunities*. It does not condemn disproportionately lower minority voter participation attributable to other factors.

In practice, § 2's scope is therefore clear. Most obviously, a state cannot "deny" minorities the right to vote by imposing voting qualifications (*e.g.*, property-ownership requirements) that disparately strip them of eligibility to vote. By contrast, time, place, and manner regulations do not "deny" the right to vote because they specify only when, where, and how to vote. (Similarly, for example, states do not "deny" someone's Due Process right to a hearing by setting a time and place for it). Nonetheless, in rare circumstances, a time, place, or manner rule could "abridge" the right to vote by imposing greater barriers for minorities than whites—for example, putting very few polling places in minority neighborhoods, but abundant ones in non-minority areas. *Cf. Reno v. Bossier Parish Sch. Bd.*, 528 U.S.

320, 334 (2000) (explaining that "abridgement" "necessarily entails a comparison" against an objective baseline).

By contrast, if states adopt time, place, or manner regulations that treat all voters equally and give everyone equal opportunity to participate, then § 2 is not implicated. Consider, for example, a requirement to register a week before election day, or to vote on election day absent a good excuse. These regulations do not "deny" or "abridge" anyone's right to vote. There is no denial, because nobody is precluded from participating. Nor is there abridgement, because all voters are subject to the same rules. The system is equally open to all and the state has not caused any disparity in opportunity. To be sure, these election rules—like *all* election rules—"will invariably impose some burden." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But they are only the "usual burdens of voting," *Crawford*, 553 U.S. at 198, inherent in the process, and so they cannot be said to *deny or abridge* the right to vote, so long as they are imposed equally on all voters.

Some of these voting rules may generate disparate participation rates: A racial group might find it less convenient to vote, or may be less likely to vote as a result of socioeconomic disadvantage. But this does not mean that the state has *denied or abridged* their right to vote on account of race—only that not all voters are equally willing to shoulder the ordinary burdens of voting. It does not mean that the state has afforded disparate voting *opportunity* to any racial group—only that certain groups are less likely to take advantage of the same opportunity. And it does not mean that the state has proximately caused the

disparate participation—only that the state has not equalized social inequalities that manifest in the form of voter convenience.

2. Here, Arizona's election laws do not violate § 2 because the state affords all citizens an equal opportunity to vote, subject to nothing more than the usual burdens of voting. Indeed, voting in Arizona is much *less* burdensome than it traditionally was, because all citizens have an equal right to cast a ballot either in person or by mail up to 27 days before election day. There is no evidence that minorities in Arizona lack an equal opportunity to vote, much less that any such inequality was *caused* by the state.

As to out-of-precinct voting, the district court properly found that Arizona gives all voters an equal opportunity to vote in person by showing up at their assigned precinct. Pet.App.391a. Voting in-precinct is nothing more than the usual burden of voting (and even that typical "burden" is greatly ameliorated by Arizona's expansive mail- and early-voting options). It thus does not "deny or abridge" anyone's right to vote. Nor was the in-precinct rule applied *unequally*, as plaintiffs offered "no evidence" that "precincts tend to be located in areas where it would be more difficult for minority voters to find them," or otherwise "challenge the manner in which Arizona counties allocate and assign polling places." Pet.App.390a-391a.

For this and other reasons, approximately 99.7% of minority voters were not affected by the in-precinct rule. Nevertheless, the Ninth Circuit found that the in-precinct rule had a discriminatory result because minorities were slightly overrepresented in the

infinitesimal number of out-of-precinct votes (0.15% of all votes cast). Pet.App.41a-42a. That reasoning is mistaken. The fact that minorities disproportionately fail to *comply* with Arizona's in-precinct rule does not show that they lacked an equal *opportunity* to do so, or that Arizona denied or abridged their right to vote.

The district court also correctly found that minorities have an equal opportunity to vote despite Arizona's ban on ballot-harvesting. Pet.App.386a. All white and minority voters have exactly the same opportunity to vote: They can cast a ballot in person at their assigned precinct on election day, or up to 27 days beforehand. Alternatively, they can give their ballot to a family member, household member, or caregiver. And if that is not convenient, they can mail an absentee ballot (with the assistance of these third parties), no questions asked.

Arizona's ban on ballot-harvesting does not "deny or abridge" anyone's right to vote because, as the district court explained, it "does not impose burdens beyond those traditionally associated with voting." Pet.App.386a. A citizen's right to vote is obviously not infringed by having the citizen cast his own vote (with the assistance of these designated third parties). Indeed, far from denying or abridging the right to vote, Arizona has greatly *expanded* it, since "[t]here is no constitutional or federal statutory right to vote by absentee ballot." Pet.App.158a (Bybee, J., dissenting). Again, there was no evidence that the ban on ballot-harvesting applies unequally. At most, ballot-harvesting might make voting more *convenient* for some minorities, but § 2 does not mandate maximization of minority voter convenience.

Despite these findings, the Ninth Circuit held that Arizona's ban on ballot-harvesting imposed a discriminatory burden based solely on anecdotal evidence from previous elections that "third parties collected a large and disproportionate number of early ballots from minority voters" (although the number was never identified) Pet.App.82a. As a matter of law and logic, however, merely showing that minorities had more ballots harvested than whites does not show that they otherwise would have had less *opportunity* to vote. Indeed, as the court admitted, the unequal rate of ballot-harvesting simply reflects one political party's opportunistic campaign strategy, not any inequality of opportunity. Pet.App.83a. In this regard, there was no finding that it was difficult for minority voters to cast absentee ballots through the mail (or otherwise) with the assistance of the designated third parties, rather than strangers with obvious partisan motives.

3. The Ninth Circuit purported to apply a second stage of analysis after concluding that Arizona's laws imposed disparate burdens. This only exacerbated the court's flawed approach to the statute.

At the supposed second step, the Ninth Circuit asked whether "there is a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them." Pet.App.37a. To answer that muddled question, the court looked to "factors" drawn from a 1982 Senate Report. *Id.* Answering in the affirmative, the court relied on "Arizona's history of discrimination dating back to 1848," "racially polarized voting," "racial appeals" in political campaigns, the "number of minorities in public

office," low minority registration rates, and state officials' "responsiveness to the needs of minority groups." Pet.App.49a-77a.

The Ninth Circuit did not explain how this jumble of factors has any bearing on whether minorities have "less opportunity" to vote than whites in Arizona today. Nor could it. Obviously, 19th-century discrimination, racial appeals, and registration differences cannot affect the relative ability of minority voters to find their precinct or mail their ballots without third-party assistance. The Senate Report factors play no reasonable role in vote-*denial* cases, because they were designed for "vote-dilution cases." *Frank*, 768 F.3d at 755. While the Senate Factors may make some sense in that context, here they simply allow generalized racial grievances to invalidate ordinary race-neutral laws.

4. Finally, the Ninth Circuit's interpretation of § 2 would also render it unconstitutional.

First, it would exceed Congress's power to enforce the Fifteenth Amendment. That amendment bans only "purposeful discrimination." *City of Mobile v. Bolden*, 446 U.S. 55, 56 (1980). Although Congress may proscribe certain discriminatory "results," it may do so only as a "congruen[t] and proportional[] … means" to "remedy or prevent" intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). Properly interpreted, the "results" test is legitimate enforcement legislation. It prohibits laws that deprive minorities of equal "opportunity" to vote, raising suspicion of discriminatory intent, *see Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978). But the Ninth Circuit's reading condemns

ordinary election rules based on numerical disparities vaguely linked to "social and historical conditions." Pet.App.81a, 93a. That is not congruent or proportional.

Second, the Ninth Circuit's approach would violate the Constitution's equal-protection guarantee by requiring states to restructure their election laws to maximize racial proportionality in voting. Forcing such race-conscious decisionmaking is impermissible. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007).

D. This Is an Ideal Vehicle for Review of § 2's "Results" Test.

Often, election-law cases give rise to hasty proceedings and preliminary injunctions that are not well-suited for certiorari review. They are interlocutory and lack a well-developed record, and time pressure from an imminent election may also hamper plenary review.

This Court apparently denied review in *Veasey* for such reasons. The Chief Justice's statement respecting denial observed that the case was interlocutory, remedial issues remained, and an overlapping "intent" claim was unresolved. *Abbott*, 137 S. Ct. at 613. As a result, the issues were "better suited for certiorari review" in a later case. *Id.*

This petition suffers from none of those defects. The district court held a full trial and issued a final judgment. Pet.App.301a. The Court of Appeals ruled as a matter of law that the Arizona laws were illegal. Pet.App.112a-113a. And, although an election is

imminent, the Ninth Circuit stayed its own mandate, so there is no time pressure to interfere with this Court's review. *See* Pet.App.415a.

In sum, this case presents as clean a vehicle to address the meaning of § 2's "results" test as this Court is likely ever to see.

II. THE NINTH CIRCUIT'S "INTENT" HOLDING ALSO WARRANTS REVIEW.

The Ninth Circuit also ruled that Arizona's ban on ballot-harvesting was illegal because it was supposedly enacted with discriminatory *intent*. Far from insulating the court's decision from review, that holding also urgently requires this Court's intervention. In imputing racist motives to Arizona's legislature, the Ninth Circuit contradicted multiple lines of this Court's precedent and provided a roadmap to strike down as "racist" virtually any anti-fraud election measure.

First, in "defiance of Supreme Court precedent," the Ninth Circuit "assume[d] that a legislature's stated desire to prevent voter fraud must be pretextual when there is no direct evidence of voter fraud in the legislative record." Pet.App.139a. (O'Scannlain, J., dissenting). The district court found that "the majority of [the law's] proponents were sincere in their belief that ballot collection increased the risk of early voting fraud." Pet.App.405a. The Ninth Circuit did not reject that finding; to the contrary, it admitted that legislators had a "sincere" and "non-race-based belief" that there was fraud. Pet.App.99a. Yet the court held that, "[b]ecause there was 'no direct evidence of ballot collection fraud ... presented to the legislature or at trial,'" a desire to

combat fraud somehow could not have been the real "reason[] the bill passed." Pet.App.97a.

That directly conflicts with this Court's decision in *Crawford*, which rejected the notion that evidence of voter fraud is necessary to enact prophylactic anti-fraud measures. 553 U.S. at 196. "Given its interest in addressing its valid concerns of voter fraud, Arizona was free to enact prophylactic measures even though no evidence of actual voter fraud was before the legislature." Pet.App.140a. (O'Scannlain, J., dissenting). This is particularly true because, as Judge Bybee's dissent points out, Arizona's prohibition "follows precisely the recommendation of the bi-partisan Carter-Baker Commission" that urged states to "reduce the risks of fraud and abuse in absentee voting" by banning ballot-harvesting. Pet.App.163a-164a.

It is preposterous to infer, from a supposed lack of evidence of voter-fraud, that Arizona intentionally discriminated on the basis of race by "follow[ing] bipartisan recommendations for election reform in an area the Carter-Baker Commission found to be fraught with the risk of voter fraud." Pet.App.165a. Recent events in North Carolina and elsewhere exemplify this risk. Pet.App.166a-167a. "Arizona is well within its right to look at the perils endured by its sister states and enact prophylactic measures," Pet.App.168a—and to do so without being unfairly tarred as racist by a federal court.

Second, the Ninth Circuit also disregarded this Court's directives by conflating *partisan* motives with *racial* ones. The district court found that "some individual legislators and proponents of limitations

on ballot collection harbored partisan motives" but that "the legislature as a whole enacted [the ban on ballot-harvesting] in spite of opponents' concerns about its potential effect on" minority turnout, "not because of that effect." Pet.App.404-05a. The district court also found that Senator Shooter, who had previously spearheaded similar legislation, "was in part motivated by a desire to eliminate what had become an effective Democratic [get-out-the-vote] strategy" in his district. Pet.App.405a. From this finding of *partisan* motivation coupled with a racial disparate impact, the Ninth Circuit inferred *racially discriminatory intent*. Pet.App.98a.

This Court's precedent rejects that tendentious inference. Even when "'racial identification is highly correlated with political affiliation,'" and even when legislators are "conscious" of racial disparate impact, a plaintiff nonetheless must show that *racial* motives in particular motivated the legislative action. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)); *Hunt v. Cromartie*, 526 U.S. 541, 542 (1999). Otherwise, partisan measures that reduce Democrats' vote share would *always* be condemned as racist, given the overlap between racial minorities and Democratic voters. That cannot be countenanced.

Finally, the Ninth Circuit compounded its error by attributing the intent of Senator Shooter to the *entire* legislature that passed H.B. 2023. The court invoked a bizarre application of the "cat's paw" doctrine—an agency-law concept that allows employers to be held vicariously liable for bias. Pet.App.99a-100a. No court has ever applied this doctrine to a legislature, because laws cannot be vicariously unconstitutional.

"What motivates one legislator" is not the same as "what motivates scores of others." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Accordingly, "[t]he purpose of a single legislator" cannot be attributed to "the legislature as a whole." *Florida v. United States*, 885 F. Supp. 2d 299, 354 (D.D.C. 2012) (three-judge per curiam).

The Ninth Circuit thus inferred discriminatory intent using three rationales that contradict this Court's teachings, creating a one-way ratchet that benefits the Democratic Party and prevents legitimate anti-fraud measures. That result cannot stand.

CONCLUSION

The Court should grant the petition.

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