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 Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ELIJAH HAAHR, PAUL GAZELKA, DAVID RALSTON, RON RYCKMAN, BRADY BRAMMER, AND MATT SIMPSON IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Elijah Haahr has served in the Missouri House of Representatives since 2012. Upon his selection in 2018 as Speaker of the Missouri House of Representatives, he became the youngest Speaker in the nation.

Paul Gazelka is Majority Leader of the Minnesota Senate and a long-standing Minnesota legislator. From 2005 to 2007 he served in the Minnesota House of Representatives. In 2010 he was elected to the Minnesota Senate, and in 2016 became the Senate Majority Leader.

David Ralston is Speaker of the Georgia House of Representatives and a long-serving legislator. From 1992 to 1998, he served as a member of the Georgia Senate. In 2002 he was elected to the Georgia House of Representatives and became its Speaker in 2010.

Ron Ryckman is Speaker of the Kansas House of Representatives. He has served in the Kansas House since 2013 and became its Speaker in 2017.

Brady Brammer is a member of the Utah House of Representatives, representing District 27. He assumed office in January 2019.

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[1] This brief is filed with the consent of all parties and pursuant to United States Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, *amici* state that no party or person other than *amici* and their counsel participated in or contributed money for the drafting of this brief. The parties received timely notice of the intent to file this brief.

Matt Simpson is a member of the Alabama House of Representatives, representing District 96. He has been a member since 2018.

Speaker Haahr, Majority Leader Gazelka, Speaker Ralston, Speaker Ryckman, and Representatives Brammer and Simpson are committed to supporting voting laws that ensure fair, honest, and orderly elections. They submit this amicus brief to urge the Court to review the Ninth Circuit's decision and clarify the limits Section 2 of the Voting Rights Act places on state legislators with respect to voting laws and regulations.

INTRODUCTION

The Ninth Circuit's en banc decision in this case widens a circuit split on Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and threatens election laws across the country. Four circuits employ a two-step test for vote denial claims under Section 2, but the Seventh Circuit has questioned that test. Moreover, the Ninth Circuit and Fifth Circuit hold that a statistical disparity in voting behavior between minority and non-minority voters may be a sufficient basis for a Section 2 claim. By contrast, the Fourth, Sixth, and Seventh Circuits require that the challenged voting structure or practice impair minority voters' "[equal] *opportunity*" to vote. 52 U.S.C. § 10301(b) (emphasis added).

Speaker Haahr, Majority Leader Gazelka, Speaker Ralston, Speaker Ryckman, and Representatives Brammer and Simpson respectfully submit this *amicus* brief to emphasize the importance of and need

for clarity under Section 2 as they consider laws to guarantee fair and non-discriminatory elections.

BACKGROUND

The Democratic National Committee, Democratic Senatorial Campaign Committee ("DSCC"), and The Arizona Democratic Party[2] challenge two Arizona election laws under Section 2 of the Voting Rights Act. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020). The first law states that a ballot cast in the incorrect precinct will not be counted. *See* Ariz. Rev. Stat. §§ 16-122, 16-135, 16-584 (2018). The second makes it a felony for anyone other than a voter to possess a completed early ballot, with exceptions for a caregiver, family or household member, mail carrier, or election official. *See* Ariz. Rev. Stat. § 16-1005(H)-(I) (2018). The Democratic Party Plaintiffs also challenge the ballot-collection law under the Fifteenth Amendment to the United States Constitution. *Hobbs*, 948 F.3d at 998.

After filing their complaint, Plaintiffs sought a preliminary injunction, which the district court denied. *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1079 (D. Ariz. 2016). The Ninth Circuit affirmed, 840 F.3d 1057 (9th Cir. 2016), but an en banc panel reversed and granted the preliminary injunction against the ballot-collection law, less than

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[2] Although the district court determined that the Democratic Party committees have standing, *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018), the Ninth Circuit's en banc opinion did not address that issue. *See generally Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 2049076 (11th Cir. Apr. 29, 2020).

one week before the 2016 election, 843 F.3d 366, 367 (9th Cir. 2016). The next day, this Court issued a stay of the preliminary injunction. 137 S. Ct. 446 (Nov. 5, 2016) (Mem).

The case then returned to the trial court. After a ten-day bench trial and extensive findings of fact, the district court ruled for Arizona on all claims. *Hobbs*, 948 F.3d at 998. A three-judge panel of the Ninth Circuit affirmed. *Id.*

Again, however, an en banc panel reversed. *Id.* It ruled that a plaintiff can establish a violation of Section 2 by proving small statistical disparities—here, approximately 0.5%[3]—in voting behavior between minority and non-minority voters. *Id*. at 1046. Further, the court ruled that Arizona's legislature acted with discriminatory intent in passing the ballot-collection measure because, in the absence of direct evidence of voting fraud, the legislature's stated desire to prevent voter fraud was pretextual, and because a campaign video by the state Republican Party chairman was "racially-tinged" and certain statements by one Senator suggested discriminatory intent of the *entire* legislature. *Id.* at 1040–41.

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[3] With respect to the out-of-precinct law, the district court found, "approximately 99 percent of minority voters and 99.5 percent of non-minority voters cast their ballots in their assigned precincts." *Hobbs*, 948 F.3d at 1051 (O'Scannlain, J., dissenting).

SUMMARY OF ARGUMENT

State legislators need the Court's guidance concerning the scope of vote denial claims under Section 2 of the Voting Rights Act. The Court has never addressed the standard for vote denial claims under Section 2, and a split between the circuits has now emerged. The circuits disagree on the applicability of a two-step test for such claims. They further disagree about whether small statistical disparities in voting behavior satisfy that test. On one hand, the Ninth and Fifth Circuits hold that small statistical disparities in voting behavior between minority and non-minority voters are enough to show that a challenged structure or practice causes a prohibited discriminatory result. *Hobbs*, 948 F.3d at 1016; *Veasey v. Abbott*, 830 F.3d 216, 250–51 (5th Cir. 2016). On the other, the Fourth, Sixth, and Seventh Circuits require proof that the challenged structure or practice reduces the *opportunity* of minority voters to participate in an election. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637–38 (6th Cir. Aug. 23, 2016); *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

The Court's guidance is critical. Almost every voting law imposes "some burden upon individual voters," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and those burdens are never evenly distributed among different groups, *Frank*, 768 F.3d at 754. Accordingly, the standard adopted by the Ninth and Fifth Circuits may well subject a vast number of commonplace voting regulations across the country to invalidation under Section 2.

The Ninth Circuit's holding that Arizona's law regarding ballot collection was motivated by discriminatory intent also merits review. It threatens the ability of state legislators to enact commonsense, prophylactic measures to safeguard elections. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194–95 (2008) (upholding ballot identification requirement against an Equal Protection challenge). Of equal or greater concern is the Ninth Circuit's imputation of discriminatory intent to the entire legislature based on remarks by a single legislator and one campaign video.

ARGUMENT

I. STATE LEGISLATORS NEED GUIDANCE FROM THIS COURT TO PASS LAWS THAT DO NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.

To ensure that elections are "fair and honest" and conducted with "some sort of order, rather than chaos," there must be "substantial regulation." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). This Court has acknowledged that the Constitution and common sense compel government's "active role" in regulating elections. *Burdick v. Takushi*, 504 U.S. at 433.

The task of enacting laws to regulate elections falls largely to state legislators. The Constitution provides that "the Times, Places and Manner of holding Elections for Senators and Representatives, *shall* be prescribed in each state by the Legislature thereof," subject to laws enacted by Congress to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1 (emphasis added).

Consistent with these obligations, the state legislator *amici* desire to enact commonsense and generally applicable voting regulations. These regulations must evolve to meet changing circumstances. Unfortunately, the circuit split regarding the standard for vote denial claims under Section 2 of the Voting Rights Act casts a pall over many if not most of these legislative efforts.

A. This Court Has Not Articulated the Standard for a Vote Denial Claim Under Section 2 of the Voting Rights Act.

When Congress first enacted the Voting Rights Act of 1965, Section 2 "was viewed largely as a restatement of the Fifteenth Amendment," and accordingly, the Court determined there was no violation "absent proof of intentional discrimination." *Chisom v. Roemer*, 501 U.S. 380, 392–93 (1991) (citation omitted).

Congress amended the Act in 1982 to broaden its coverage beyond intentional discrimination. Section 2 now 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) (emphasis added). And it specifies that such a violation occurs "if, based on the totality of circumstances, it is shown that the political processes . . . are *not equally open* to participation by members of" a protected class such that they have "*less opportunity . . . to participate* in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). The Act also cautions that "nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

The Senate Report that accompanied the 1982 amendments ("Report") clarified that the new subsection "(b)" "delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester* (412 U.S. 755 (1973))." S. Rep. 97-417, at 2, 1982 U.S. Code Cong. & Admin. News, 179. In *White*, the plaintiffs challenged the constitutionality of a redistricting plan, and the Court held that plaintiffs must show that members of the protected group "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White*, 412 at 766. This language from *White* was incorporated into the amended Section 2. The Report also provided that "[t]o establish a violation, the plaintiffs could show a variety of factors, depending on the kind of rule, practice, or procedure called into question." S. Rep. 97-417, at 28, 1982 U.S. Code Cong. & Admin. News, 206. By way of example, the Report listed nine "typical factors." *Id*.

This Court analyzed the amended statute in *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). *Gingles* involved a claim that a multimember districting plan violated Section 2 through "vote dilution." *Gingles*, 478 U.S. at 46. The Court concluded that Congress's revisions to Section 2 "make clear that a violation [can] be proved by showing discriminatory effect alone," and "establish[ed] as the relevant legal standard the 'results test.'" *Id*. (citing the "results test" in *White*). It remarked that the "essence" of a Section 2 claim is that the electoral law, practice, or structure at issue "interacts with social and historical conditions to *cause an inequality in the opportunities enjoyed*" by members of a protected class to "elect their preferred

representatives." *Gingles*, 478 U.S. at 47 (emphasis added). The Court stated that "many or all" of the nine factors listed in the Report "may be relevant to a claim of vote dilution." *Id*. at 47–50. The Court also listed three "pre conditions" that are necessary but not sufficient to prevail on a vote dilution claim. *Id*. at 50-51. Read in context, the preconditions are specific to vote dilution claims.

Amici need additional guidance with respect to vote denial claims under Section 2. Vote dilution and vote denial claims implicate different concerns. A vote dilution case concerns representation and is a case "in which multimember electoral districts have been formed, or in which district lines have been drawn, so as to dilute" minority votes. *Hobbs*, 948 F.3d at 1043. A vote denial case bears on the opportunity of voters to participate in elections; it is a case in which "voters are prevented from voting or in which votes are not counted." *Id*. Given these differences, it is unsurprising that the vote dilution test in *Gingles* does not seamlessly apply to vote denial claims. For example, the three "pre conditions" enumerated in *Gingles* do not apply to a claim of vote denial. Numerous courts have remarked that "a clear standard for" application of the "results test" to vote denial claims "has not been conclusively established." *E.g., Ohio Democratic Party*, 834 F.3d at 636–37 (gathering cases).

B. Courts of Appeals Disagree about Whether the Two-Step Test Used in Vote Dilution Cases Applies to Vote Denial Claims.

Many circuits have adopted the vote dilution two-step test for vote denial claims. The first step analyzes

whether "[t]he challenged 'standard, practice, or procedure' . . . impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity to participate in the political process and to elect representatives of their choice.'" *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 626 (6th Cir. 2016); *Veasey*, 830 F.3d at 243–45; *League of Women Voters v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). The second step requires that the "burden must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Ne. Ohio Coal.*, 837 F.3d at 627; *Veasey*, 830 F.3d at 244–45; *League of Women Voters*, 769 F.3d at 240.

The Seventh Circuit questioned this approach in *Frank*, 768 F.3d at 755. It expressed skepticism with respect to the second step because that step does not "distinguish discrimination by the defendants from other persons' discrimination." *Id.* The court noted that unlike vote dilution cases, where "the government itself draws the district lines[, and] no one else bears responsibility," *id.*, in vote denial claims, the historical and cultural conditions may not be caused by the government. The link between the law in question and the discrimination is critical because Section 2 "does not require States to overcome societal effects of private discrimination." *Frank,* 768 F.3d at 753.

Similarly, although the Fourth Circuit adopted the two-step test in *League of Women Voters*, 769 F.3d at 240, it recently did not rely on that test and instead listed five statutory requirements pulled from Section 2. *Lee*, 843 F.3d at 600. The *Lee* court's decision not

to walk through the two-step test underscores the confusion in this area.

C. The Circuits Are Split on Whether Evidence of a Small Statistical Disparity in Voting Behavior Is Sufficient To Establish that a Voting Structure or Practice Causes Members of a Protected Class To Have "Less Opportunity" To Vote.

Whatever framework is used, the circuits are fundamentally divided with respect to whether a small statistical disparity in voting behavior between minority and non-minority voters is sufficient to establish that a voting structure or practice provides minority voters "less opportunity . . . to participate in the political process." 52 U.S.C. § 10301(b).

The Fourth, Sixth, and Seventh Circuits hold evidence of a small statistical disparity is not sufficient to trigger Section 2 and that the practice or procedure must cause a deprivation of an *equal opportunity* to vote. This tracks the statute in two ways: the challenged voting practice or procedure must "result[]" in a "denial or abridgment" to vote on account of race or color, 52 U.S.C. § 10301(a), and the protected class must "have less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b).

Lee illustrates this approach. There, the Fourth Circuit addressed a challenge to Virginia's voter identification law under Section 2. *Lee*, 843 F.3d at 594. The parties agreed that "African Americans were slightly more likely than Caucasians to lack

appropriate identification," and the district court concluded that the law "added a layer of inconvenience to the voting process." *Id.* at 597–98 (quotation marks omitted). Nevertheless, the circuit court affirmed the district court's final judgment dismissing the claim because there was no "evidence that members of the protected class have less of an *opportunity* than others to participate in the political process." *Id.* at 600 (emphasis added). The court reasoned that all voters had the same *opportunity* to participate because if "a voter shows up without identification [on election day], he or she is able to cast a provisional ballot, which can be cured by later presenting a photo [identification]." *Id.* The voter identification law "d[id] not diminish the right of any member of the protected class to have an equal opportunity to participate in the political process. . ." *Id.* The court suggested that if, in contrast, Virginia had required voter identification but did not offer a process to accommodate those who lacked an approved identification, there might have been less opportunity to participate in the political process. *Id.* at 601.

The Seventh Circuit took a similar approach in *Frank*. *Frank* addressed a voter identification requirement in Wisconsin. *Id.* at 745. The court concluded that Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities," and remarked that "[i]f things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive factors in vote dilution cases." *Id.* at 753. Although evidence suggested whites in Wisconsin were more likely to possess qualifying photo identification or documents sufficient to obtain the identification, that evidence "d[id] not show a 'denial' of

anything by Wisconsin," because Wisconsin did not make "it *needlessly* hard to get photo ID." *Id.*

Likewise, the Sixth Circuit emphasized that its Section 2 test "cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2." *Ohio Democratic Party*, 834 F.3d at 637–38. Rather, the challenged voting regulation must "causally contribute[] to the alleged discriminatory impact by affording protected group members *less opportunity to participate* in the political process." *Id.* at 638 (emphasis added). The plaintiffs challenged an Ohio statute that reduced the number of days available for early voting and eliminated same-day registration, *id.* at 624, because African Americans voted early in person and used "same-day registration" "at a rate higher than other voters." *Id.* at 627–28. Reversing the district court, the Sixth Circuit held that the statute did not provide less opportunity for African Americans to vote, *id.* at 639, and thus did not violate Section 2. *Id.* at 640.

On the other hand, the Fifth and Ninth Circuits have held that evidence of a small statistical disparity in voting behavior between minority and non-minority voters is sufficient to trigger Section 2. *Veasey*, 830 F.3d at 244; *Hobbs*, 948 F.3d at 1015–16.

In *Veasey*, the plaintiffs challenged a Texas voter identification law similar to the law addressed in *Lee*. *Veasey*, 830 F.3d at 225. Like the Virginia law, a voter unable to produce qualifying identification at the polling location could cast a provisional ballot and have his or her vote counted by later producing a valid identification. *Id.* at 226. The Fifth Circuit affirmed the

district court's conclusion that the law caused a discriminatory burden because minority voters were less likely to possess approved forms of voter identification. *Id*. at 250, 256.

Similarly, in the case below, the Ninth Circuit relied on statistical disparities in voting behavior to establish that the voting regulations created unequal opportunities. *Hobbs*, 948 F.3d at 1014–16. Arizona law has long provided that a ballot cast in the wrong precinct will not be counted because, among other reasons, determining where to count each out-of-precinct ballot in numerous local, state, and national elections creates an undue administrative burden. *See* Ariz. Rev. Stat. §§ 16-122, 16-135, 16-584 (2018); *Reagan*, 329 F. Supp. 3d at 840 (noting the longstanding nature of the out-of-precinct rule). Although "minorities are over-represented among the small number of voters casting [out-of-precinct] ballots," *Hobbs*, 948 F.3d at 1014, the district court found that "Arizona's policy of entirely discarding [out-of-precinct] ballots '[was] not the cause of the disparities in [out-of-precinct] voting." *Id*. at 1016 (citation omitted). The Ninth Circuit, however, concluded the district court had committed clear error because plaintiffs need show only that the challenged practice results in "a substantially higher percentage of minority votes than white votes [being] discarded." *Id*. (quotation marks omitted). Arizona also passed a law that made it a felony for anyone other than a voter to possess a completed early ballot, with exceptions for a caregiver, family or household member, mail carrier, or election official. *See* Ariz. Rev. Stat. § 16-1005(H)-(I) (2018). Again, the Ninth Circuit reversed the district court's ruling upholding the provision. *Hobbs*, 948 F.3d at 1032. The Ninth Circuit

based its decision not on statistical evidence but on anecdotal testimony by individuals that "third parties collected a large and disproportionate number of early ballots from minority voters," and the lack of evidence that white voters relied, "to any significant extent[,] on ballot collection by third parties." *Id*.

D. The Circuit Split Over Section 2 Creates Uncertainty for a Wide Range of State Election Laws.

The current circuit split creates uncertainty for a wide range of existing state voting laws as well as future state legislative action. Only guidance from this Court can resolve this uncertainty.

Consistent with their obligations, state legislators have enacted and continue to refine commonsense and non-discriminatory voting regulations. The regulations touch every step of the election process, from eligibility to registration to absentee and in-person voting to how votes are counted and certified. *See, e.g.,* Ala. Code tit. 17 (state election code); Ga. Code Ann. tit. 21 (same); Kan. Stat. Ann. ch. 25 (same); Minn. Stat. Ann. §§ 200–12 (same); Mo. Rev. Stat. chs. 115–30 (same); Utah Code Ann. tit. 20A (same).

Many states have laws similar to those invalidated by the Ninth Circuit. Twenty-six states, the District of Columbia, and three U.S. territories currently disqualify ballots cast in the wrong precinct. *Hobbs*, 948 F.3d at 1064 and Appendix A (Bybee, J., dissenting). Missouri and Alabama are two such states. *See* Mo. Rev. Stat. § 115.430.2(1) (Supp. 2019) (disqualifying out of-precinct votes); *Davis v. Bennett*, 154 So. 3d 114, 131 (Ala. 2014) (confirming that

Alabama requires voters to cast their ballots at the correct polling location). Likewise, Alabama, Georgia, Missouri, and Utah, restrict who can deliver an absentee ballot to a voting location. *Hobbs*, 948 F.3d at 1068 and Appendix C (Bybee, J., dissenting); *see also* Ala. Code §17-11-9 (requiring voter to forward ballot "by United States mail to the absentee election manager or hand it to him or her in person"); Ga. Code Ann. § 21-2-385 (2019) (restricting who can personally deliver an absentee ballot); Mo. Rev. Stat. § 115.291.2 (Supp. 2019) (same); Utah Code Ann. § 20A-3-306(1)(a) (providing that voter must personally mail absentee ballot or deliver it in person). Minnesota allows absentee voters to designate a person who may deliver the ballot on the voter's behalf, but any such person may "deliver or mail the return envelopes of not more than three voters in any election." Minn. Rev. Stat. Ann. § 203B.08 subd. 1 (2019).

The Ninth Circuit's ruling that a disparate impact is sufficient to establish a Section 2 claim may jeopardize an even wider range of state voting laws if other courts apply that ruling. *E.g., Veasey*, 830 F.3d at 310 (Jones, J., dissenting). As this Court has acknowledged, all voting regulations "will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. And, for a variety of reasons, those burdens will never be equally distributed among groups. Indeed, "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank*, 768 F.3d at 754. These concerns are very real. Consider, for example, several basic requirements in the Minnesota and Missouri election codes. Minnesota provides a generous 46-day window for early voting. Minn. Rev. Stat. Ann.

§ 203B.081 subd. 1 (2019). Under *Hobbs*, a plaintiff could establish a Section 2 violation by showing that Minnesota's time period excludes even a small number of minority voters who might have otherwise voted if the window were, say, 50 days. Similarly, under Missouri law, a qualified voter generally must register to vote by 5:00 p.m. on the "fourth Wednesday prior to the election." Mo. Rev. Stat. § 115.135.1 (Supp. 2019). Any person who does not register cannot vote (with limited exceptions). *Id.* § 115.139. If the law's registration cut-off disproportionately affects minority voters, should that be the basis for a Section 2 claim? Also, could Minnesota or Missouri ever change either law to allow a shorter period? A clear standard for passing and challenging such laws under Section 2 is necessary.

E. This Court's Guidance on Section 2 Claims Is Even More Necessary in Light of the Increase in Early Voting and Voting by Mail.

The circuit split over the role of disparate impact analysis in Section 2 vote denial claims is enough to warrant *certiorari*. The rapid evolution of voting behavior in the last decade provides another compelling reason why the Court should hear this case.

The act of voting is changing rapidly, and with those changes, legislators must have the ability to change voting laws. In the last decade, early voting and voting by mail have increased markedly,[4] and

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[4] *See* MIT Election Data and Science Lab, *Voting by Mail and Absentee Voting*, https://electionlab.mit.edu/research/voting-

may increase further during the 2020 election season due in part to the COVID-19 pandemic. Many states have responded to this revolution in voting practices by trying to conform their voting regulations to these changes. As state legislatures strive to achieve fair, safe, and secure elections, they need authoritative guidance on the limits of their discretion under Section 2 of the Voting Rights Act. Without guidance from this Court, election-eve litigation, controversy, and uncertainty will cast doubt on election processes as well as outcomes. For these reasons, it is, *amici* respectfully submit, imperative for this Court to resolve this dispute.

II. THE NINTH CIRCUIT'S INTENT RULING RUNS AFOUL OF THIS COURT'S PRECEDENT AND ALSO MERITS REVIEW.

The Ninth Circuit's holding that the Arizona legislature enacted H.B. 2023 (the ballot-collection law) with discriminatory intent in violation of the Voting Rights Act and the Fifteenth Amendment independently warrants review.

A bare majority of the en banc court found that the legislature acted with discriminatory intent in passing H.B. 2023 based on (1) a statement by Republican state Senator Don Shooter concerning ballot-collection fraud, which the court considered false and suggested was racially motivated, and (2) a "racially-tinged" video created by Maricopa County Republican Chair A.J. LaFaro, which depicted a man of apparent

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mail-and-absentee-voting (last visited May 25, 2020) (explaining how early voting and voting by mail has increased in recent years).

Hispanic heritage dropping off ballots. *See Hobbs*, 948 F.3d at 1007–09, 1039–41. According to the court, that evidence was enough to find that the *entire* legislature acted with discriminatory intent in passing H.B. 2023. *Id.* at 1040–41.[5] It relied on the "cat's paw doctrine," an employment law concept under which the bias of a supervisor or subordinate can be deemed to affect an employment decision, to conclude that "well meaning legislators were used as cat's paws" in a purportedly discriminatory scheme conducted by Senator Shooter and state chairman LaFaro. *Id.* (internal quotations omitted). The court imputed discriminatory intent to the entire legislature even though H.B. 2023 is consistent with the recommendations of a renowned bipartisan commission on election reform. *See* Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, § 5.2.1 (Sept. 2005) ("the Carter–Baker Report"), available at http://www.lb7.uscourts.gov/documents/15-324URL1savedon08-04-2016.pdf (recommending laws to prevent ballot collection by candidates or party workers).

A. The Ninth Circuit's Intent Holding Impedes the Ability of State Legislators To Enact Commonsense Measures To Safeguard Elections.

The Ninth Circuit's ruling warrants review because it conflicts with this Court's holding in *Crawford*, 553 U.S. 181, and impedes state legislators'

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[5] This ruling is illogical for numerous reasons, including that Party chairman LaFaro did not vote on H.B. 2023, and there was no evidence that Shooter's bias against ballot harvesting was racial rather than partisan.

ability to enact prophylactic election regulations. In *Crawford*, the Court affirmed that states have legitimate interests in enacting prophylactic measures to prevent fraud. Even though there was "no evidence" of in-person voter fraud in Indiana, the Court found there was "no question about the legitimacy or importance" of Indiana's "interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 194–95. Yet, in the case below, the Ninth Circuit suggested that a state can remedy a problem under its election system only after presentation of persuasive if not compelling evidence of an actual problem *in that very state*. Specifically, the Ninth Circuit found that, "[b]ecause there was 'no direct evidence of ballot collection fraud [in Arizona] . . . presented to the legislature or at trial,' the district court understood that Shooter's allegations and the LaFaro [v]ideo were *the* reasons the bill passed.'" *Hobbs*, 948 F.3d at 1039 (citation omitted).[6]

The Ninth Circuit's holding also contrasts with the bipartisan Carter–Baker Commission, which concluded that "[w]hile election fraud is difficult to

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[6] The Ninth Circuit's portrayal of the district court's reasoning is not entirely accurate. The district court also found that the Senators who voted for H.B. 2023 "appear to have been sincere in their beliefs that [ballot-collection fraud] was a potential problem that needed to be addressed." *Reagan*, 329 F. Supp. 3d at 880. In addition, the bill "found support among some minority officials and organizations," and not all of H.B. 2023's opponents "accused their Republican counterparts of harboring partisan or racially discriminatory motives." *Id.*

measure, it occurs,"[7] and "[t]he best way to maintain ballot integrity is to investigate all credible allegations of election fraud and otherwise prevent fraud *before it can affect an election*." *See* Carter–Baker Report § 5.1 (emphasis added).

B. The Ninth Circuit's Use of a "Cat's Paw" Theory To Discern Legislative Intent Warrants Review by this Court.

The Ninth Circuit's discriminatory intent holding is troubling for another reason. In concluding that the Arizona legislature enacted H.B. 2023 with discriminatory intent under the "cat's paw" doctrine, the court used Senator Shooter's false allegations about election fraud and the LaFaro video to tarnish the entire legislature with a discriminatory motive. If that conclusion stands, a court may strike down a state law based on the inappropriate or unwise comments of a single legislator, or even the actions of an unelected party official.

The court relied on two decisions to ascribe discriminatory intent to the legislature under the "cat's paw" doctrine, though neither decision involved a challenge to a state law. In the first case, *Mayes v. WinCo Holdings, Inc.*, the plaintiff sued her former employer for gender discrimination under Title VII (among other claims). 846 F.3d 1274, 1276–77 (9th Cir. 2017). As relevant here, the *Hobbs* court relied on

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[7] *See also* The Heritage Foundation, *A Sampling of Recent Election Fraud Cases from Across the United States*, available at https://www.heritage.org/voterfraud (last visited May 25, 2020). That report provides an overview of voter fraud in each state, finding a total of 1,285 proven instances of voter fraud.

the observation in *Mayes* that the "animus of a supervisor" could "affect an *employment* decision if the supervisor influenced or participated in the decisionmaking process." *Id.* at 1281 (emphasis added). Although the *Hobbs* court never clarified how that observation applied to Arizona's passage of H.B. 2023, it was presumably trying to compare Senator Shooter—one of many co-equal legislators—to a prejudiced *supervisor*. *See Hobbs*, 948 F.3d at 1040. But *Mayes* itself, which never discussed legislative intent (or even used the word "legislature,") provides no support for that analogy.

The only other case the Ninth Circuit cited for its "cat's paw" theory was an employment law case which allowed the animus of a *subordinate* to be imputed to a *supervisor*. *See Poland v. Chertoff*, 494 F.3d 1174, 1177 (9th Cir. 2007) (Age Discrimination in Employment Act). There, the court held that a subordinate's bias can be imputed to the employer where the subordinate "sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action" if "the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process." *Id.* at 1182. Again, there is no support for applying this precept to a legislature, where legislators each have an equal vote and no legislator is "subordinate" to another.

The Ninth Circuit's use of the "cat's paw" doctrine to assess whether a legislature acted with discriminatory intent was particularly inappropriate in light of this Court's warning that "[i]nquiries into [legislative]

motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). There, the Court rejected the plaintiff's argument that Congress intended to suppress free speech when it passed a law prohibiting the destruction of draft certificates. *Id.* at 369–70, 382–83. This Court refused to invalidate a statute that was "constitutional on its face" based on "what fewer than a handful of Congressmen said about it." *Id.* at 384. Critically, this Court observed that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.*; *see also Va. Uranium, Inc. v. Warren*, 587 U.S. __, 139 S. Ct. 1894, 1906–07 (2019) ("State legislatures are composed of individuals who often pursue legislation for multiple and unexpressed purposes, so what legal rules should determine when and how to ascribe a particular intention to a particular legislator?").

There is no support for the Ninth Circuit's use of the "cat's paw" doctrine in a case challenging a state statute, and doing so was inappropriate in light of this Court's warnings in *O'Brien*, which it repeated only last year in the *Virginia Uranium* case. *See* 139 S. Ct. at 1907 (warning against "too hastily accepting a litigant's invitation to become embroiled in attempting to ascertain state legislative motives," as "such inquiries often prove unsatisfactory ventures") (quotation marks and alterations omitted). As *O'Brien* teaches, legislators are presumed to act independently. But taken to its logical end, the Ninth Circuit's ruling could allow a plaintiff to build a discriminatory intent case based on the comments of a single legislator. Further, the Ninth Circuit's ruling raises numerous

issues, such as how long a legislature might be tainted by the ill-advised comments of one of its members.

The "cat's paw" doctrine, whatever its validity in the employment context, cannot be applied in any fair or predictable fashion to the legislative context. The state legislative *amici* respectfully urge this Court to grant certiorari to correct this ruling by the Ninth Circuit.

CONCLUSION

For the reasons set forth above and in the petitioners' briefs, *amici* urge the Court to review the Ninth Circuit's decision.

Respectfully Submitted,

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