Nos. 19-1257, 19-1258

IN THE

Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, 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 ARIZONA SECRETARY OF STATE KATIE HOBBS IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

The court below held that Arizona's policy of refusing to count provisional ballots, even for statewide offices, if they were cast by voters in precincts where the voters did not reside caused a denial or abridgement of the right to vote on account of race in violation of Section 2 of the Voting Rights Act ("VRA"). The court likewise held that an Arizona statute that criminalizes the non-fraudulent collection of another person's absentee ballot not only caused a denial or abridgement of the right to vote on account of race, but also was intentionally discriminatory in violation of both Section 2 and the Fifteenth Amendment. The questions presented are:

1. Does this case merit review where the court below correctly interpreted the plain text of Section 2 and applied the same test adopted by its sister circuits to find that the Arizona out-of-precinct policy and ballot-collection statute violate Section 2?

2. Does this case merit review where Petitioners concede there is no circuit split on whether the ballot-collection statute is intentionally discriminatory in violation of Section 2 and the Fifteenth Amendment?

3. Does this case merit review where no Petitioner has standing to appeal the holding below as to the out-of-precinct policy and where the ballot-collection holding is independently supported by a finding of discriminatory intent?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

In a carefully reasoned decision, the en banc Ninth Circuit examined the facts before it and concluded that Arizona's policy of refusing to count ballots cast out of precinct ("OOP Policy") and its law prohibiting non-fraudulent third-party ballot collection ("H.B. 2023") violated Section 2 of the Voting Rights Act, and that H.B. 2023 independently violated the Fifteenth Amendment. The petitions for certiorari offer no persuasive reason for this Court to review that decision.

The court below applied the well-established two-part test for analyzing Section 2 vote-denial claims: first, whether a policy results in a disparate burden on minority voters; and second, whether that policy interacts with social and historical conditions to cause that disparate burden. This test is consistent with Section 2's text and purpose, as well as with this Court's decisions.

Lacking any basis in either Section 2's text or this Court's precedent to justify review, Petitioners attempt to manufacture a circuit split, but their efforts are unavailing. Petitioners cannot even agree on the nature of the split they purport to identify, nor on which courts fall on either side of it. When Petitioners' illusory "circuit split" is set aside, their true ask becomes clear. Petitioners call on this Court to correct what they view as an incorrect application of the Section 2 test in this particular case.

Petitioners' real issue is with Section 2's text rather than its test. But the Ninth Circuit faithfully followed the text of the statute and ultimately grounded its holding in overwhelming evidence that the OOP Policy

and H.B. 2023 "result[] in a denial or abridgement" of the right to vote "on account of race," within Section 2's plain meaning. *See* 52 U.S.C. § 10301(a).

In any event, this case presents a poor vehicle to consider the questions Petitioners present. No Petitioner has standing to continue to defend the OOP Policy on appeal. The Arizona Republican Party ("ARP") Petitioners, who were defendant-intervenors below, lack standing to appeal any part of the Ninth Circuit's decision because they were not ordered to do or refrain from doing anything. Nor can the Brnovich Petitioners appeal as to the OOP Policy, because Arizona law charges the Secretary of State alone with promulgating and interpreting such policies. Indeed, state law expressly *prohibits* the Brnovich Petitioners from appealing on behalf of a state officer who—like the Secretary of State here—does not wish to appeal.

As to H.B. 2023, the en banc Ninth Circuit found that it violated not only Section 2's results test but also the intent test that applies under both the Fifteenth Amendment and Section 2. Petitioners do not even attempt to argue that there is any disagreement among the circuits as to the constitutional question, which is an independent and adequate basis for the Ninth Circuit's holding.

Because this case involves no circuit split and no error below, it presents a poor vehicle for examining Section 2's standards. This Court should deny certiorari.

STATEMENT

A. Arizona's Election-Administration Structure

Elections in Arizona are conducted under the authority of the Secretary of State, "Arizona's chief elections officer." Pet. App. 392; *accord* Ariz. Rev. Stat. § 16-142(A)(1); *see also Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003) (per curiam). The Secretary must certify all election results, *see* Ariz. Const. art. V, § 10; Ariz. Rev. Stat. § 41-121(A)(6), (9), approve voting equipment, Ariz. Rev. Stat. § 16-442, and conduct recounts, *id.* § 16-664, among other duties.

The Secretary also must examine, approve, and train county election officials, including county recorders and clerks of county boards of supervisors. Ariz. Rev. Stat. § 16-407(A)–(D). In concert with the Secretary and under her supervision, "county officials are responsible for counting ballots and verifying proper voter registration." Pet. App. 412–13; *see Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *6 (D. Ariz. Nov. 3, 2016).

Like most States, Arizona provides for voting either by mail or in person. Ariz. Rev. Stat. § 16-541; Pet. App. 406. Since 2011, Arizona has allowed counties to choose whether to conduct in-person voting at precinct sites or through county-wide "vote centers." Pet. App. 409–10. The vote-center model "allow[s] any voter in that county," regardless of the precinct where she resides, "to receive the appropriate ballot for that voter on election day" at a voting center "and to lawfully cast the ballot." Ariz. Rev. Stat. § 16-411(B)(4). Maricopa County—home to over 60% of Arizona's population, Pet.

App. 67—recently shifted to the vote-center model for the August 2020 primary. *See* Press Release, Maricopa Cty. Elections Dep't, *Maricopa County Officials Approve August Primary Election Plans* (June 22, 2020).[1]

Arizona law charges the Secretary with drafting an Elections Procedures Manual to govern how elections are conducted in the State. The Manual "prescribe[s] rules" for, among other things, "the procedures for early voting and voting," as well as for "producing, distributing, collecting, counting, tabulating and storing ballots." Ariz. Rev. Stat. § 16-452(A); *see Ariz. Libertarian Party*, 351 F.3d at 1280 ("The Secretary of State in Arizona is responsible for promulgating rules and procedures" for elections under § 16-452(A)). Though she need not follow their advice, the Secretary must consult with county election officials before prescribing these rules. Ariz. Rev. Stat. § 16-452(A).[2]

Where state statutes do not mandate a single policy, the Secretary may choose between permissible alternatives and may enshrine her choice in the Manual. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 404 (9th Cir. 2012) (noting that the Secretary, "acting under statutory

[1] URLs for online sources in Table of Authorities.

[2] The Attorney General and Governor must approve the Manual before it is published, Ariz. Rev. Stat. § 16-452(B); but the Attorney General has described this duty as "ministerial," State Defs.' Reply in Supp. of Mot. to Dismiss Second Am. Compl. at 2, 4 n.4, *Democratic Nat'l Comm. v. Ariz. Sec'y of State's Office*, 2017 WL 840693 (D. Ariz. Feb. 14, 2017) (No. 2:16-CV-01065-DLR), ECF No. 262.

authority" through § 16-452, "promulgated a procedure specifying [which] 'forms of identification' [would be] accepted under" a voter-ID statute), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). The Manual "has the force and effect of law," independent of the statutes it implements and interprets. *Id.* at 397.

The current Secretary of State, Respondent Katie Hobbs, took office in January 2019. Notice of Substitution of Party, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 18-15845), ECF No. 82. She ran for office in 2018 on a platform designed to combat Arizona's long history of disenfranchising minority voters through literacy tests, systematic voter challenges, and other measures. *See* Pet. App. 51–69. She therefore emphasized "removing barriers that can make it harder for minorities, seniors and low-income people to vote." Dustin Gardiner, *Gaynor, Hobbs Have Vastly Different Views on Access to Ballot, Dark Money in Elections*, The Republic (Oct. 26, 2018). Secretary Hobbs actively opposed H.B. 2023 as part of her campaign, stating that it was "certainly meant to disenfranchise voters" and was "unnecessary because voter fraud already is a felony" in Arizona. *Id.* By contrast, her opponent supported H.B. 2023 and advocated, among other things, that election materials should no longer be printed in Spanish. *Id.*

Upon entering office, the Secretary inherited this lawsuit from her predecessor. She never defended H.B. 2023 in court. *See* Notice of Substitution of Party, *supra*. Following the Ninth Circuit's en banc ruling, she consulted with county officials and decided that she also

would no longer defend the OOP Policy. Press Release, Ariz. Sec'y of State, *Hobbs Opposes AG's Appeal of* DNC v. Hobbs (Jan. 29, 2020). She noted that she had engaged in "conversations with county recorders and election officials in all 15 counties," and that she was "confident in their ability to address the issues associated with out-of-precinct voting without needlessly extending this litigation." *Id.* The Secretary therefore determined that she would not seek further review of the Ninth Circuit's decision. *Id.*

B. Arizona's Policy Regarding Provisional Ballots Cast "Out of Precinct"

Arizona's OOP Policy "derives from the collective effect of" several Arizona statutes "and related rules in the Arizona Elections Procedures Manual." Pet. App. 390. Statutory provisions require that voters appear on the register in the precinct in which they reside, Ariz. Rev. Stat. § 16-122, and provide that those not listed on a precinct's register be allowed to cast provisional ballots, *id.* §§ 16-135(B), 16-584(B)-(C). As a result of the Help America Vote Act, election officials must offer provisional ballots to anyone who declares she is a registered voter "in the jurisdiction in which the individual desires to vote" but does not appear on the precinct's voter rolls. 52 U.S.C. § 21082(a). Election officials must post at each polling place "information on the right of an individual to cast a provisional ballot." *Id.* § 21082(b)(2)(E).

No Arizona statute prohibits county recorders from counting votes for offices for which OOP voters are eligible to vote, including of course all statewide offices. That policy comes only from the Manual. Ariz. Sec'y of

State, *2019 Elections Procedures Manual* 187–88 (Dec. 2019). The Manual states that county recorders may not count a provisional ballot unless "the voter voted in the correct polling place or voting location or cast the ballot for the correct precinct." *Id.* at 204. "[O]nly" ballots that meet this and the other requirements listed in the Manual can be delivered to the County Boards of Supervisors for counting. *Id.*

County officials "are not empowered to count or reject ballots at their discretion." Pet. App. 413. Instead, "[a]ll proceedings at the counting center … shall be conducted in accordance with the approved instructions and procedures manual." Ariz. Rev. Stat. § 16-621(A). The Manual is therefore the operative source of the OOP Policy. *See* Pet. App. 413 (holding that plaintiffs' injuries from the OOP Policy were redressable because the court could require the Secretary "to prescribe [plaintiffs' proffered] procedure in the Elections Procedures Manual, which county election officials then would be bound by law to follow").

Relying on the district court's factual findings but disagreeing with its ultimate conclusion, the en banc Ninth Circuit held that the OOP Policy violates Section 2 of the VRA. Pet. App. 84. The court looked to this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied the two-part Section 2 test previously adopted by the Ninth Circuit as well as by its sister circuits. Pet. App. 37. Under that test, the court first looked to whether the challenged standard, practice, or procedure resulted in a disparate burden on members of the protected class. *Id.* Next, the court looked at whether "there was a relationship between the

challenged 'standard, practice, or procedure,' on the one hand," and "'social and historical conditions,' on the other," that interacted to cause that disparate burden. *Id.* at 38.

As to the first step, the court found that the OOP Policy clearly resulted in a disparate burden on minority voters. "Uncontested evidence in the district court established that minority voters in Arizona cast OOP ballots at twice the rate of white voters." *Id.* at 42; *see id.* at 19–21, 479–80. This was not surprising given that minority voters in Arizona experience 30% less polling-place stability than white voters. *Id.* at 15, 448. In other words, polling-place locations were changed far more frequently in minority neighborhoods. And OOP voting rates are 40% higher among voters whose polling-place locations have changed. *Id.* In some counties, polling places were placed on the edges of precincts, with Hispanic and American Indian voters left further from their polling places than white voters. *Id.* at 17–18. "Voters who live more than 1.4 miles from their assigned polling place are 30 percent more likely to vote OOP than voters who live within 0.4 miles of their assigned polling place." *Id.* at 17. The undisputed evidence also showed that Arizona is an "extreme outlier" in rejecting OOP ballots, rejecting them at a rate more than 11 times higher than the next highest State. *Id.* at 13–14. Relying on this evidence, the en banc court concluded that "[t]he challenged practice—not counting OOP ballots at all—results in 'a prohibited discriminatory result': [A] substantially higher percentage of minority votes than white votes are discarded." *Id.* at 47 (citation omitted).

As to the second step, to help elucidate the relationship between the burden on minority voters and social and historical circumstances, the court considered several of the Senate Report factors this Court embraced in *Gingles*. *Id.* at 48-49; *see Gingles*, 478 U.S. at 45, 48 n.15 (noting "the enumerated factors" in the 1982 Senate Report on the VRA "will often be pertinent to certain types of § 2 violations," but that "some Senate Report factors are more important to" a given claim "than others"). The court below found "Senate factors five (the effects of discrimination in other areas on minorities' access to voting) and nine (the tenuousness of the justification for the challenged voting practices) as particularly important," while also "regard[ing] factor one (history of official discrimination) as important, as it bears on the existence of discrimination generally and strongly supports [the court's] conclusion under factor five." Pet. App. 49.

Relying on the expert report of Dr. David Berman, an Arizona State University political-science professor whose views the district court gave "great weight," the en banc court found that "Arizona has a long history of race-based discrimination against its American Indian, Hispanic, and African American citizens." *Id.* at 49–50, 396. This history included extensive and longstanding use of literacy tests. *Id.* at 50–64. The record also showed that during the 1980s and 1990s, the U.S. Department of Justice (DOJ) issued 17 preclearance objections to Arizona jurisdictions under Section 5 of the VRA. *Id.* at 67.

Discriminatory behavior has continued in recent years, with conditions in Maricopa County "of

considerable concern to minorities." *Id.* (citation omitted). For instance, Maricopa County reduced its number of polling places by 70% between the 2012 election and the 2016 primary, with the harshest reductions in minority-heavy areas. *Id.* at 67–68. Maricopa has also "repeatedly misrepresented or mistranslated key information in Spanish-language voter materials." *Id.* at 68; *see id.* at 487–88.

The en banc court also determined that the effects of discrimination in other areas "'hinder' minorities' ability to participate effectively in the political process." *Id.* at 72. This followed the district court's findings that "[r]acial disparities between minorities and nonminorities in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona." *Id.* at 490.

Finally, the en banc court noted that "[t]here is no finding by the district court that would justify, on any ground, Arizona's policy of entirely discarding OOP ballots." *Id.* at 80. The State (and the district court) justified the OOP Policy solely by pointing to the importance of Arizona's precinct-based voting system. *Id.* at 79–80. However, the district court made "no finding that counting or partially counting OOP ballots would threaten the integrity of Arizona's precinct-based system." *Id.* at 80.

The en banc court therefore held that the "discriminatory burden imposed by the OOP policy is in part caused by or linked to 'social and historical conditions' that have or currently produce 'an inequality in the opportunities enjoyed by [minority] and white

voters to elect their preferred representatives' and to participate in the political process." *Id.* at 84 (quoting *Gingles*, 478 U.S. at 47, and 52 U.S.C. § 10301(b)).

Absent the OOP Policy, Arizona would count an OOP ballot for all elections for which the voter is eligible, including national and statewide elections. The Secretary, in consultation with county election officials, has determined that the counties are fully capable of implementing such a system. *See* Ariz. Sec'y of State, *supra*. The district court likewise acknowledged that it was "administratively feasible" to properly count OOP ballots. Pet. App. 454. Indeed, Arizona's largest county has abandoned the precinct model for the next election, confirming the Secretary's view that counties are capable of counting OOP ballots only in the races for which OOP voters are eligible. Maricopa Cty. Elections Dep't, *supra*. Given these determinations, and the Secretary's acceptance of the Ninth Circuit's ruling, no state interest remains in continuing the OOP Policy.

C. Arizona's Ballot-Collection Statute, H.B. 2023

Arizona introduced "early" voting-by-mail in the 1990s. Pet. App. 406. Since 1997, Arizona has prohibited anyone from possessing another voter's unmarked early ballot. *Id.* at 407 (citing Ariz. Rev. Stat. § 16-542(D)). Arizona also "has long" criminalized fraudulent ballot-collection practices, including "knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to fix an election." *Id.* at 440 (quoting Ariz. Rev. Stat. § 16-1005(A)) (alteration in original). However, in 2016, Arizona passed H.B. 2023, which criminalized *non*-fraudulent third-party ballot collection. *Id.* at 30. Except for a "family member, household member or caregiver of

the voter," any "person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony." Ariz. Rev. Stat. § 16-1005(H), (I)(2).

The State provided two justifications for the statute: preventing absentee voter fraud, and maintaining the reality and public perception of election integrity. Pet. App. 435. However, "[t]here is no evidence of any fraud in the long history of third-party ballot collection in Arizona," *id.* at 26, even after subpoenas were issued to Arizona counties in this case seeking such evidence, *id.* at 437. Fraudulent ballot collection was already a felony in Arizona; H.B. 2023 added only a lesser felony offense for non-fraudulent third-party ballot collection. Moreover, the district court found no evidence, either in the record or before the Arizona Legislature when it passed H.B. 2023, of widespread public concern about ballot-collection fraud. *Id.*

While there is *no* record evidence of absentee voter fraud in Arizona, there is "[e]xtensive and uncontradicted evidence … that prior to the enactment of H.B. 2023, third parties collected a large and disproportionate number of early ballots from minority voters." *Id.* at 84; *see id.* at 472–77. The district court received "direct evidence from witnesses who had themselves acted as third-party ballot collectors" or who had "personally supervised" or "witnessed" third-party ballot collection. *Id.* at 86. These witnesses "established that many thousands of early ballots were collected from minority voters by third parties" while, as the district court found, white voters "did not significantly rely on third-party ballot collection." *Id.*

The en banc court, relying on the district court's factual findings but again disagreeing with its ultimate conclusion, found that H.B. 2023 had a significant, discriminatory effect on minority voters. The district court found that minority voters in Arizona are far more likely than white voters to rely on third-party ballot collection, in part because third-party ballot collection efforts over the last decade have been focused primarily on "low-efficacy voters, who trend disproportionately minority." Pet. App. 476.

After finding that H.B. 2023 caused a burden on minority voters at step one, the en banc court examined the Senate factors at step two to evaluate the social and historical circumstances linked to this burden. Pet. App. 87. The court repeated much of its analysis from its discussion of the OOP Policy, and it also included additional relevant information.

First, the court noted that H.B. 2023 "grows directly out of" Arizona's history of race discrimination. Pet. App. 88. Legislators abandoned their first attempt to ban non-fraudulent ballot collection in 2011 after DOJ requested further information in support of Arizona's preclearance request under Section 5 of the VRA. *Id.* There "was evidence in the record that the provision intentionally targeted Hispanic voters." *Id.* Legislators passed a second such law in 2013, but they soon faced a voter referendum that would have both repealed the law and imposed a supermajority requirement for any future legislation on the topic. *Id.* To avoid this result, legislators repealed the law themselves. *Id.* Only after this Court eliminated the preclearance coverage formula in *Shelby County v. Holder*, 570 U.S. 529 (2013), did the

Arizona Legislature pass H.B. 2023, in a campaign "marked by race-based appeals." Pet. App. 88.

Second, "H.B. 2023 is closely linked to the effects of discrimination that 'hinder' the ability of American Indian, Hispanic, and African American voters 'to participate effectively in the political process.'" *Id.* at 89 (quoting *Gingles*, 478 U.S. at 37). Most relevant, "[r]eady access to reliable and secure mail service is nonexistent in some minority communities," including on Arizona's 21 Indian reservations. *Id.* at 474. The district court found that "[a] surprising number of voters in the Hispanic community also distrust returning their voted ballot via mail" and that "unsecure mailboxes are an impediment for urban minorities who distrust the mail service and prefer instead to give their ballots to a volunteer." *Id.* Significant disparities in education, wage levels and structure, and transportation access also contribute to minority voters' disparate reliance on third-party ballot collection. *Id.* at 89, 474.

Third, "[t]he enactment of H.B. 2023 was the direct result of racial appeals in a political campaign." *Id.* at 90; *see id.* at 491. Proponents of H.B. 2023's predecessors asserted that third-party ballot collection generated fraud, but lacked any evidence for that claim. *Id.* "In 2014, the perceived 'evidence' arrived in the form of a racially charged video created by Maricopa County Republican Chair A.J. LaFaro … and posted on a blog." *Id.* The LaFaro Video featured "surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots" and included commentary from LaFaro stating that he "did not know if the person was an illegal alien, a [D]reamer, or citizen, but knew that he

was a thug." *Id.* The video played a prominent role in the debates over H.B. 2023 and featured in ads for Secretary Hobbs's predecessor, Michele Reagan, in her campaign for Secretary of State. *Id.* at 492.

Finally, the en banc court determined that the justifications for H.B. 2023 were tenuous in light of the record evidence. *Id.* at 91. The State justified H.B. 2023 as a fraud-prevention and election-integrity measure. *Id.* at 435. But the district court found "no direct evidence that the type of ballot collection fraud the law is intended to prevent or deter has occurred." *Id.* at 494. This despite extensive efforts by the bill's advocates to find such fraud. *Id.* at 92–93, 437. Nor was election integrity a strong justification: "[T]hird-party ballot collection has had a long and honorable history" in Arizona, and any recent distrust of third-party ballot collection likely stemmed from "the fraudulent campaign mounted by proponents of H.B. 2023." *Id.* at 94–95.

In addition to finding that H.B. 2023 failed Section 2's results test, the en banc court held that H.B. 2023 was passed with discriminatory intent in violation of both Section 2 and the Fifteenth Amendment. *Id.* at 106. The court canvassed the factors enumerated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977), and found that all four supported the finding that racial discrimination was "a motivating factor" for H.B. 2023's passage. Pet. App. 99. Both Arizona's general history of race discrimination and H.B. 2023's specific history "reveal[ed] invidious purposes." *Id.* Senator Don Shooter spearheaded the efforts to criminalize non-fraudulent ballot collection starting in 2011, in part

motivated by a desire to eliminate what had become an effective get-out-the-vote strategy for minority-preferred candidates in his racially polarized district. *Id.* at 26-27, 498. Later, the LaFaro Video provided a racially tinged motivation for legislators. *Id.* at 99. And as the district court found, "the legislature 'was aware' of the impact of H.B. 2023 on what the court called 'low-efficacy minority communities.'" *Id.* at 104.

The district court discounted this evidence because some legislators held a "sincere belief" that third-party ballot collection was a problem. *Id.* at 101. However, as the district court itself acknowledged this belief came about *because* "Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud." *Id.* at 499. Thus, "[c]onvinced by the false and race-based allegations of fraud, [these legislators] were used to serve the discriminatory purposes" of their colleagues. *Id.* at 103. Because the district court found that H.B. 2023 would not have been enacted without these race-based allegations, *id.* at 504, the en banc court concluded that Arizona could not prove that it would have enacted H.B. 2023 without race discrimination as a motivating factor, *id.* at 105.

REASONS FOR DENYING THE PETITION

The Court's review is not warranted. There is no division among the circuits as to the proper application of Section 2 to vote-denial claims. The Ninth Circuit faithfully followed the text of the statute and reached the correct result based on the record before it. And even if this Court were inclined to address the questions presented, this case is not the right vehicle given that

Respondent Secretary Hobbs—the official charged under State law with asserting the State's interest in elections—has no interest in keeping the OOP Policy or H.B. 2023 for future elections.

I. Petitioners' "Circuit Split" Is Illusory.

Petitioners appear to believe that there is a split among the circuits as to the application of Section 2 to vote-denial claims simply because not all courts have reached the same outcomes. But the test that all of the courts apply is fact-intensive, consistent with the text of Section 2. As such, applying the test requires attention to the particularities of the case at hand. It is therefore unsurprising that courts may reach different results given the different records before them. Indeed, these divergent results are proof positive that the courts are applying the test correctly.

A. The Circuits Agree on the Applicable Test for Section 2 Vote-Denial Claims.

There is no real dispute among the circuits as to the test that governs Section 2 vote-denial claims. Under the well-established two-part inquiry, courts first look at whether the challenged standard, practice, or procedure results in a disparate burden on members of a protected class. Pet. App. 37–38 (quoting *Gingles*, 478 U.S. at 44). If it does, courts then look to how that policy interacts with social and historical circumstances to cause that disparate burden. *Id.* at 38 (citing *Gingles*, 478 U.S. at 47). Every circuit to have addressed Section 2 vote-

denial claims has agreed on this same two-part test.[3] *See id.*; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244–45 (5th Cir. 2016) (en banc); *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 353 (6th Cir. 2018).[4]

Given the agreement among the circuits on the applicable test, Petitioners focus their energy on trying to drum up a split as to what suffices to satisfy step one. But the circuits uniformly hold that under Section 2's results test, plaintiffs bear the burden of establishing at step one that the challenged law or policy *causes* a discriminatory burden on a protected class. Pet. App. 37–38. In satisfying that burden, courts agree that a "'bare statistical showing' of a disparate impact on a racial minority, in and of itself, is not sufficient"; rather, as the en banc Ninth Circuit explained below, there must

[3] *See* Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 Yale L.J. Forum 799, 802 (2018) (discussing the "consensus around the appropriate legal standard" in the circuits).

[4] The panel in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), adopted the standard two-part test "for the sake of argument," but did not expand on how to apply the test because it believed the claim at issue so clearly failed. *Id.* at 755. The same panel recently claimed that its standard in *Frank* actually differed from the Fourth and Sixth Circuit's standards, but did not explain how. *See Luft v. Evers*, Nos. 16-3003 & 16-3052, 2020 WL 3496860, at *4 (7th Cir. June 29, 2020). As described *infra* at 20-22, any difference is merely semantic. *See id.* (stating—in agreement with other circuits—that Section 2(b) "provides the standard for interpreting Section 2(a)'s 'denial or abridgement" result" and that the "comparative 'baseline'" under Section 2 is "opportunity to participate").

be a "causal connection" between the challenged practice and the prohibited discriminatory result. *Id.*; *see also Gonzalez*, 677 F.3d at 405 (en banc) ("[A] § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected." (quotation marks omitted)); *Smith v. Salt River Project Agric. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (same).

The Ninth Circuit's approach in this case is fully consonant with the approach of the circuits on the other side of Petitioners' purported "split." For example, in *Ohio Democratic Party v. Husted*, the Sixth Circuit clarified that at the first step of the test, plaintiffs' burden is to show that "the challenged standard or practice causally contributes to the alleged discriminatory impact." 834 F.3d 620, 637–38 (6th Cir. 2016). In so holding, the Sixth Circuit cited *the very same* Ninth Circuit rule that the en banc court applied below. *See id.* at 637 (citing *Gonzalez*, 677 F.3d at 405).

Similarly, in *League of Women Voters of North Carolina*, the Fourth Circuit identified and applied the identical operative test: whether the challenged measures *themselves* "disproportionately impact" minority voters—that is, whether they *cause* the discriminatory burden that Section 2 was designed to prevent. 769 F.3d at 245.

The same goes for the Fifth Circuit—which the ARP and Brnovich Petitioners confusingly place on opposite sides of their supposed "splits." In reality, the Fifth Circuit is in accord with the Fourth, Sixth, and Ninth Circuits. The Fifth Circuit describes the test's first

element as causal, "inquir[ing] about the nature of the burden imposed and whether it *creates* a disparate effect." *Veasey*, 830 F.3d at 244 (emphasis added). In applying the test, the Fifth Circuit, like the Fourth and Sixth Circuits, as well as the en banc Ninth Circuit, analyzed the causal connections between the law at issue and the disparate adverse impact. *See id.* at 264.

All of these circuits have uniformly held that to prevail on a Section 2 vote-denial claim, plaintiffs must furnish sufficient evidence that the challenged practices "caused" a discriminatory burden. Tellingly, the ARP Petitioners ultimately abandon their effort to identify a split on this point. They concede that the en banc Ninth Circuit, like its sister circuits, held that a mere statistical disparity was not enough to satisfy the test's first prong. *See* ARP Pet. 20–21. The ARP Petitioners then ask this Court to grant certiorari to correct the Ninth Circuit's supposed error in applying this uncontroversial test. But this Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see* S. Ct. R. 10.

B. The Test that the Circuits Have Applied Is Fact-Intensive and so Yields Different Results in Different Circumstances.

Lacking a real split on the proper application of the two-part test, Petitioners attempt to reverse-engineer one from different outcomes obtained in different cases. Fundamentally, Petitioners ignore a basic principle: Facts matter. They matter particularly under the text of Section 2 and its test for vote-denial claims, which call for an "intensely local appraisal" of the challenged practices. *Gingles*, 478 U.S. at 78 (citation omitted). The

cases to which Petitioners point to establish a putative split stand instead for the common-sense proposition that applying a fact-intensive test to different records will yield different results.

For example, with respect to voter-ID laws, the circuits have reached different results about the permissibility of different States' practices because of the starkly different records before them. Thus, the Seventh Circuit denied a Section 2 claim challenging Wisconsin's voter-ID law after finding that the plaintiffs had not furnished particularized evidence that minority voters faced a disparate burden due to the challenged requirement. *Frank*, 768 F.3d at 755; *see also Luft*, 2020 WL 3496860, at *4–5 (expressing skepticism that Wisconsin's process for allowing people who lack the documents required for a photo ID to obtain a receipt valid for voting "results in race-based problems," but remanding for further review).

The en banc Fifth Circuit reached the opposite conclusion with respect to Texas's voter-ID law, because of extensive record evidence proving that minority voters faced excessive burdens on their ability to participate in the political process as a direct result of Texas's ID requirement. *See Veasey*, 830 F.3d at 254–56. The Fifth Circuit directly distinguished *Frank*'s result, explaining that, under the governing test, the Texas "record contain[ed] more particularized evidence of the discriminatory burden imposed by [that law] than did the record in *Frank*." *Id.* at 248. As the court recognized, different records compel different outcomes under Section 2's fact-bound inquiry.

The Fourth Circuit's approach to the Virginia voter-ID requirement at issue in *Lee v. Virginia State Board of Elections*, 843 F.3d 592, 600 (4th Cir. 2016), is in accord. In *Lee*, the court determined that the record evinced no excessive burden on minority voters because Virginia's voter-ID law provided sufficient accommodations such that "every registered voter in Virginia has the full ability to vote," and have their votes counted, "when election day arrives." *Id.* However, the Fourth Circuit expressly noted that "[i]f Virginia had required voters to present identifications without accommodating citizens who lacked them, the rule might arguably deprive some voters of an equal opportunity to vote." *Id.* at 601. The court thus acknowledged the record evidence that Section 2's settled test would require in order to produce a different result in that case.

The importance of the factual record in applying the Section 2 test is just as critical in contexts beyond voter-ID laws. For example, in *Ohio Democratic Party*, the Sixth Circuit ruled against the plaintiffs after finding that there was no evidence in the record that a law shortening the early-voting and registration period had any adverse impact on minority voting. 834 F.3d at 640. In so holding, the court straightforwardly applied the Section 2 test: It assessed the empirical evidence in the record and concluded that "African Americans' participation was at least equal to that of white voters in 2014 under a version of [the law] that afforded even less convenience than the current version." *Id.* at 639.

In contrast, in *League of Women Voters of North Carolina*, the Fourth Circuit determined that the record before it overwhelmingly showed that a state law

eliminating a week of early voting, ending same-day registration, and prohibiting counting ballots cast "out-of-precinct" effectuated a disparate adverse impact on African American voters. 769 F.3d at 244. In discussing North Carolina's out-of-precinct policy—critically similar to the one at issue here—the Fourth Circuit scrutinized the evidence and found that "failure to count out-of-precinct provisional ballots will have a disproportionate effect on [African American] voters." *Id.* (citation omitted) (alteration in original).

Each of these cases stands for the same, unsurprising proposition: The test under Section 2 requires a fact-bound and "intensely local appraisal" of the record for these challenged practices. *Gingles*, 478 U.S. at 78. Petitioners attempt to back their way into a circuit split by pointing to the different *results* reached in applying the same test. But that ignores the text of Section 2 and the nature of the test.

There is likewise no circuit split as to the en banc court's holding that H.B. 2023 is intentionally discriminatory in violation of Section 2 and the Fifteenth Amendment. *See* Pet. App. 104–05. Petitioners do not even attempt to claim a division of opinion exists on this point. Thus, Petitioners seek only error correction with respect to the lower court's intentional-discrimination holding, *see* Brnovich Pet. 31–33; ARP Pet. 34–37, a purpose for which certiorari is "rarely granted," S. Ct. R. 10.

II. The Decision Below Was Correct.

Illusory circuit split aside, Petitioners ultimately ask this Court to grant certiorari to correct supposed error by the en banc Ninth Circuit. But the Ninth Circuit faithfully followed the text of Section 2, applied the right test, and reached the right result. This Court's review is not warranted.

A. The Decision Below Followed the Statute's Plain Text.

1. Petitioners' complaints are not so much with Section 2's test, but with its text. Following this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended that text explicitly to prohibit States from adopting any procedure that "results in a denial or abridgement" of the right to vote "on account of race." 52 U.S.C. § 10301(a). Congress prescribed that such a discriminatory "result" occurs whenever, considering the "totality of circumstances," minorities 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). Congress further defined the terms "vote" and "voting" to encompass "all action necessary to make a vote effective," including "registration, … casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." *Id.* § 10310(c)(1).

This text mandates a broad sweep. *First*, because Section 2's language was amended to "refer[] to the consequences of actions and not just to the mindset of actors," Section 2 imposes disparate-impact liability.

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015).

Second, a State cannot justify a policy under Section 2 by claiming that it affects only a small number of voters. Section 2 protects "the right of *any* citizen of the United States to vote," 52 U.S.C. § 10301(a) (emphasis added); thus the text indicates that the "focus should be on individuals" rather than the broader electorate. *Bostock v. Clayton Cty.*, No. 17-1618, 2020 WL 3146686, at *6 (U.S. June 15, 2020); *see* Pet. App. 45 ("Section 2 safeguards a personal right to equal participation opportunities." (quoting DOJ Amicus Br. 28–29)).

Third, Section 2 applies whenever the right to vote—as expansively defined by the statute—is denied or abridged "*on account of* race or color [or membership in a language-minority group]." 52 U.S.C. § 10301(a) (emphasis added). The phrase "on account of" means that Section 2 "incorporates the "'simple' and 'traditional' standard of but-for causation." *Bostock*, 2020 WL 3146686, at *4 (citation omitted). As this Court has noted, but-for causation "can be a sweeping standard": "a defendant cannot avoid liability just by citing some *other* factor that contributed to" the denial or abridgement of someone's electoral opportunity if race also contributed. *Id.* at *5.

The two-part test that circuit courts have developed and that the en banc Ninth Circuit applied below tracks Section 2's text. The first part of the test precisely mirrors Section 2 by asking whether the challenged policy "results" in a disparate burden on minority voters—that is, whether because of the policy minority voters "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(b); *see also Gingles*, 478 U.S. at 47 (asking whether the policy "cause[s] an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives").

The second part of the test similarly maps Section 2's mandate that courts examine "the totality of circumstances." 52 U.S.C. § 10301(b). The test's second prong also ensures that plaintiffs have proved that the challenged policy "interacts with social and historical conditions to cause an inequality" that would not have been caused but for race. *Gingles*, 478 U.S. at 47.

2. Petitioners lament that Section 2 is being used to "challenge an array of ubiquitous, race-neutral 'time, place, and manner' voting procedures." ARP Pet. 1. But Section 2 does not inoculate such policies. *See Bostock*, 2020 WL 3146686, at *11 ("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."). Rather, Congress intentionally drafted Section 2 broadly to apply to *any* policy—however seemingly neutral or reasonable on its face—that may result in reduced electoral opportunity for some minority voters, as long as race is a but-for cause of that diminished opportunity.

Indeed, Section 2 "covers all manner of registration requirements," as well as "the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted." *Holder v. Hall*, 512 U.S. 874, 922 (1994)

(Thomas, J., concurring). Section 2's broad coverage means that "[i]f, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity 'to participate in the political process' than whites, and § 2 would therefore be violated." *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting); *see also Harman v. Forssenius*, 380 U.S. 528, 541–42 (1965) (explaining that a prohibition on "abridgement" reaches any "cumbersome procedure[s]" and "material requirement[s]" that "erect[] a real obstacle to voting").

This Court has long recognized that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). Consistent with that tenet, this Court has admonished that Section 2 "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403 (majority opinion) (quoting *Allen*, 393 U.S. at 567).

B. The Decision Below Correctly Applied Section 2's Results Test.

Following this Court's directives as to how to interpret the plain text of the statute, the Ninth Circuit carefully assessed whether the challenged practices "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Pet App. 36; *accord* 52 U.S.C. § 10301(a). To determine as much, the en banc court looked to the

"totality of the circumstances." Pet. App. 38; *accord* 52 U.S.C. § 10301(b).

The en banc court's review of the evidence led it to conclude that the OOP Policy violated Section 2. The court relied on expert testimony showing that minority voters were less likely to have continuity in their polling-place locations. It cited record evidence showing that polling-place changes disadvantaged American Indian and Hispanic voters disproportionately because they were significantly more likely to live far from their new polling places. The en banc court likewise credited the district court's findings that minority voters have disproportionately higher rates of residential mobility, and that the OOP Policy disproportionately harmed voters with high residential mobility. And the en banc court found—as the district court had below—that the OOP policy caused "a substantially higher percentage" of votes cast by American Indians, Hispanics, and African Americans (when compared to those cast by white voters) to be entirely discarded. Pet. App. 47 (citation omitted); *see id.* at 15–21; *supra* at 8.

Similarly, the en banc court reviewed the evidence as to H.B. 2023 and found that the law "results in a disparate burden on minority voters." Pet. App. 87. Like the district court, the en banc court found that many minority voters relied on third-party ballot collection, while white voters did not. Both courts also found that racially disparate levels of poverty, education, and access to transportation and mail services helped drive the ballot-collection differential. And the en banc court therefore determined that, by cutting off a voting method widely used by minority voters but not by white

voters, H.B. 2023 caused a racially disparate result. *Id.* at 84–87; *see supra* at 12–13.

In accordance with this Court's guidance in *Gingles*, the en banc court then analyzed the relevant Senate factors for both policies, relying on the facts as found by the district court. Based on the views of an expert to which the district court gave great weight, the en banc court found a long history of electoral discrimination in Arizona. Likewise, both courts found that unequal access to mail, transportation, and stable housing interacts with and exacerbates the racially disparate effects of the challenged policies. And the en banc court found that no evidence supported the proffered reasons for either policy. Pet. App. 49–82, 88–95; *see supra* at 9–11, 13–15.

In sum, the en banc court credited the district court's findings of fact, and then did exactly what Section 2 commands, to find that the challenged policies "result[ed] in a denial or abridgement" of the voting rights of minority citizens in Arizona. 52 U.S.C. § 10301(a). Its decision was correct and does not merit review.

C. The Decision Below Correctly Found Discriminatory Intent.

The en banc court also followed the evidence on intent, finding that "racial discrimination was *a* motivating factor in enacting H.B. 2023" and that "Arizona has not carried its burden of showing that H.B. 2023 would have been enacted without the motivating factor of racial discrimination." Pet. App. 105. The facts found by the district court demonstrated a "long history

of race-based voting discrimination" in Arizona; illustrated "the Arizona legislature's unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat"; laid bare "the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023"; documented "the substantial increase in American Indian and Hispanic voting attributable to ballot collection that was targeted by H.B. 2023"; and confirmed "the degree of racially polarized voting in Arizona." *Id.* at 104.

Because the district court "made a factual finding that H.B. 2023 would not have been enacted without racial discrimination as a motivating factor," the en banc court correctly found H.B. 2023 violated Section 2's intent test and the Fifteenth Amendment. Pet. App. 105. That decision likewise was correct and does not merit review.

III. This Case Is a Poor Vehicle for Addressing the Questions Presented.

Even if there were an actual split as to the application of Section 2 to vote-denial claims (and there is not), this case is not a "clean" vehicle to address it. ARP Pet. 34; *see* Brnovich Pet. 34. No Petitioner has standing to seek review of the Ninth Circuit's decision on the OOP Policy. And although the Attorney General may have standing to defend H.B. 2023, the court below independently found the statute intentionally discriminatory—an issue on which no Petitioner argues there is any disagreement among the circuits. This case is therefore a poor vehicle to address questions regarding Section 2's results test.

A. The ARP Petitioners Lack Standing.

The ARP Petitioners lack standing to challenge either the OOP Policy or H.B. 2023. They have no concrete stake in an appeal because the court below "ha[s] not ordered them to do or refrain from doing anything." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). Since the ARP Petitioners "claim[] only harm to [their] and every citizen's interest in proper application of the Constitution and laws," their petition "does not state an Article III case or controversy." *Id.* at 706 (citation omitted); *see also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016).

B. The Brnovich Petitioners Lack Standing to Appeal the OOP Policy Against the Secretary's Wishes.

Under Arizona law, the Brnovich Petitioners lack authority to appeal the Ninth Circuit's decision on the OOP Policy. Arizona's constitution and laws reserve to the *Secretary* authority over conducting elections and canvassing votes. *See* Ariz. Const. art. V, § 10; Ariz. Rev. Stat. § 16-142(A); *id.* § 41-121(A)(6), (9); *see also Ariz. Libertarian Party*, 351 F.3d at 1280.

As explained *supra* at 4–5, the Secretary's authority includes the power to "prescribe rules" through the Manual for, among other things, "producing, distributing, collecting, counting, tabulating and storing ballots." Ariz. Rev. Stat. § 16-452(A). Arizona law grants the Secretary discretion to choose between permissible alternatives for counting ballots when promulgating the Manual. *See, e.g.*, *Gonzalez*, 677 F.3d at 404.

No statute mandates the OOP Policy. *See supra* at 6–7. Rather, as the district court recognized, it is a "policy, practice, and *interpretation* of Arizona law that Plaintiffs ask the Court to enjoin and declare unlawful." *Democratic Nat'l Comm. v. Ariz. Sec'y of State's Office*, No. CV-16-01065-PHX-DLR, 2017 WL 840693, at *4 (D. Ariz. Mar. 3, 2017) (emphasis added). And that interpretation is left to the discretion of the Secretary. *See supra* at 4–5. So long as her interpretation remains consistent with Arizona law, the current Secretary has discretion to decide whether to continue her predecessor's OOP Policy or abandon it. Consequently, unless the Arizona Legislature codifies the OOP Policy, neither the Attorney General nor the State has any protectable interest in maintaining a policy that the Secretary—in her discretion as the official authorized to establish Arizona's election procedures—now seeks to abandon.

This Court looks to state law to determine who has standing to represent the State and its officials in federal court. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52 (2019). Here, the Arizona Supreme Court has held that the Attorney General is *prohibited* from attempting to appeal on behalf of another officer who does not wish to appeal. In *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360, 363 (Ariz. 1975), the Arizona Supreme Court held that the Attorney General could not appeal a tax suit when the Director of Property Valuation did not wish to appeal. The court reasoned that "the Attorney General is not the proper person to decide the course of action which should be pursued by another public officer, nor should

he be allowed to maintain a lawsuit at his own instigation under the cloak and in the guise that the action is by the State of Arizona in order to accomplish the same result." *Id.* at 362 (citation omitted).

As other courts have recognized, under *Santa Rita Mining*, "Arizona does not permit its Attorney General to appeal a decision against the wishes of the state agency he represents." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 842 n.9 (5th Cir. 1993); *see Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006); *Yes on Prop 200 v. Napolitano*, 160 P.3d 1216, 1225 (Ariz. Ct. App. 2007).

The Secretary, in consultation with county election officials, has determined that the OOP Policy is discriminatory and unjustified. Neither the State nor the Attorney General has any cognizable interest of its own in maintaining this appeal; they could assert only the Secretary's interest. But under *Santa Rita Mining*, the Attorney General cannot maintain a lawsuit in the guise of an appeal by himself or the State that he could not maintain directly on behalf of the Secretary. 530 P.2d at 362–63.

Because neither the Brnovich Petitioners nor the ARP Petitioners have standing to appeal the Ninth Circuit's decision regarding the OOP Policy, the Court should deny review.

C. The Ninth Circuit's Constitutional Ruling Makes H.B. 2023 a Poor Vehicle for Reviewing Section 2's Results Test.

The en banc Ninth Circuit's decision as to H.B. 2023 likewise presents a poor vehicle for this Court's review. The Ninth Circuit held not only that H.B. 2023 violated Section 2's results test, but also that it violated the Fifteenth Amendment's and Section 2's ban on intentional race discrimination. Pet. App. 106. These were independently adequate bases for striking down H.B. 2023. To revive H.B. 2023, then, this Court would have to reverse *both* the Ninth Circuit's results-test holding *and* its joint constitutional/statutory intent holding. Yet Petitioners do not assert any circuit split regarding the standards for finding intentional discrimination under either Section 2 or the Fifteenth Amendment. *See* Brnovich Pet. 26–33; ARP Pet. 15–34.

At most, Petitioners offer that the court's decision conflicts with statements in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), suggesting that legislators may enact prophylactic restrictions to counter voter fraud. Brnovich Pet. 19, 25–26; ARP Pet. 35. But the Fourteenth Amendment claims in *Crawford* were decided under a different legal standard than either Section 2's intent test or the Fifteenth Amendment. *Compare Crawford*, 553 U.S. at 190 (balancing the burden a law imposes and the weight of interests justifying it), *with Arlington Heights*, 429 U.S. at 265–66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, … judicial deference is no longer justified."). *Cf. Rice v.*

Cayetano, 528 U.S. 495, 522 (2000) (Fifteenth Amendment standard).

Thus, even if a circuit split did exist as to the application of Section 2 to vote-denial claims, this Court should decline Petitioners' invitation "to announce a rule that could not alter the case's disposition." *Halbert v. Michigan*, 545 U.S. 605, 632 (2005) (Thomas, J., dissenting).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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