No. 18-15845

In the United States Court of Appeals
for the Ninth Circuit

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR
Hon. Douglas Rayes

PLAINTIFF-APPELLANTS' PETITION FOR REHEARING *EN BANC*

Attorneys for the Democratic National Committee; DSCC, a/k/a Democratic Senatorial Campaign Committee; and the Arizona Democratic Party:

Daniel C. Barr
Sarah R. Gonski
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
DBarr@perkinscoie.com
SGonski@perkinscoie.com

Joshua L. Kaul
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 294-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
Alexander G. Tischenko
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

INTRODUCTION

At issue in this case are two Arizona election procedures: (1) House Bill 2023 ("HB2023"), which criminalizes most ballot collection [and] serves no purpose aside from making voting more difficult, and keeping more African American, Hispanic, and Native American voters from the polls than white voters," Doc. 52-1 (Thomas, C.J., dissenting) ("Dissent") at 77; and (2) "Arizona's policy of wholly discarding—rather than partially counting—votes cast out-of-precinct" ("the OOP Policy"), which "has a disproportionate effect on racial and ethnic minority groups." Dissent at 77. The largely unrefuted evidence in this case overwhelmingly demonstrates that both practices violate § 2 of the Voting Rights Act ("VRA"), and unconstitutionally burden the right to vote guaranteed by the First and Fourteenth Amendments. HB2023 was further enacted with discriminatory intent in violation of the Fifteenth Amendment.

Nevertheless, in an opinion issued earlier this morning, a sharply divided panel of this Court affirmed the district court's determination that HB2023 and Arizona's OOP policy are in harmony with § 2 and the Constitution. In reaching that conclusion, the majority made several errors of law that cannot be reconciled with prior decisions of this Court—including an *en banc* decision issued just two years ago—other courts of appeals, and the Supreme Court. If not remedied by the *en banc*

court, these errors will fundamentally change the landscape of voting rights law in the Ninth Circuit.

LEGAL STANDARD

Rehearing en banc is merited where the proceeding (1) involves a question of exceptional importance, (2) conflicts with decisions from the Ninth Circuit or sister circuits, or (3) "substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35–1; Fed. R. App. P. 35(a)(1)-(2). "En banc rehearing would give all active judges an opportunity to hear a case where ... there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other ... judges of the court." *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (citing *Comm'r v. Textile Mills Secs. Corp.*, 117 F.2d 62, 70 (3d Cir. 1940)). A conflict in panel opinions must be resolved by an *en banc* court. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 989 (1988).

ARGUMENT

This case meets every test for *en banc* consideration: it (1) implicates profoundly important issues; (2) conflicts with prior circuit law and law of sister circuits; and (3) affects a rule of national application for which there is an overriding need for uniformity. 9th Cir. R. 35–1; Fed. R. App. P. 35(a)(1)-(2).

First, this case undoubtedly presents issues of exceptional importance. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The voting rights implicated here are precisely the type of "exceptional[ly] important" issues that merit *en banc* consideration. Fed. R. App. P. 35(b); Dissent at 101 ("A democracy functions only to the degree that it fosters participation"). This Court has a long history of granting *en banc* review to consider constitutional or Voting Rights Act challenges to state election laws,[1] and it should do so again here.

Second, the majority opinion rests on several significant errors of law that, if left standing, will profoundly change the landscape of voting rights law in the Ninth Circuit and will persist in conflict with several prior decisions of this Court—errors

[1] *See Pub. Integrity All., Inc. v. City of Tucson*, 820 F.3d 1075, 1076 (9th Cir. 2016) (granting rehearing *en banc* to consider whether Tucson election law violated Equal Protection Clause); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (giving *en banc* consideration to whether Washington's felon disenfranchisement law violated Voting Rights Act); *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006) (granting rehearing *en banc* to consider whether school district recall petitions were subject to Voting Rights Act provision regarding translation of election materials); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (granting *en banc* review to consider equal protection challenge to use of "punch-card" balloting machines in California initiative and gubernatorial recall elections); *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (granting *en banc* review to equal protection challenge to California's term limits for state officeholders); *Geary v. Renne*, 2 F.3d 989 (9th Cir. 1993) (granting rehearing *en banc* to consider facial constitutionality of California Elections Code).

which were further discussed in two *en banc* decisions issued just two years ago in this very case.[2] *See Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366 (9th Cir. 2016); *see also Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1165, 1166 (9th Cir. 2016) (per curiam). For instance, the majority applies an overly deferential standard of review and appears to apply clear error review to mixed questions of law and fact, even though this Court has explained that it "retains the power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (citation omitted); *see also* Dissent at 88 (taking "no issue with the district court's finding of fact" but disagreeing with "the application of law to the facts, and the conclusions drawn from them"); *see also N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (reversing district court where court drew erroneous legal conclusions from facts and observing that "the court seems to have missed the forest in carefully surveying the many trees"). The majority also improperly applies an overly deferential standard of review to the district court's application of the law to the facts by incorrectly casting the OOP Policy claim as a

[2] Because of the emergency nature of this motion, with the impending general election only 55 days away, the discussion here is necessarily abbreviated. Appellants respectfully rest on the Dissent for a fuller discussion of the errors evident in the majority opinion, and on their Opening and Reply briefs, Docs. 26 and 45, for a fuller discussion of the errors evident in the district court's opinion.

challenge "to an electoral system, as opposed to a discrete election *rule*." Dissent at 85 n.3.

The majority also erred in applying § 2 of the VRA. For example, it created and applied a novel requirement that an undefined, yet "substantial" number of minority voters must be burdened before § 2 is triggered, which conflicts with the plain language of the VRA and both the majority and dissenting opinions in *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). Dissent, at 82 n.1, 83-84. The majority also erred by taking precisely the type of narrow view of § 2's causation requirement that was rejected in *Salt River*, *id.* at 595, and *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003). Dissent at 85-88. Similarly, the majority improperly credited the district court's mischaracterization of the evidence regarding the Senate Factors, even though the mischaracterization stemmed in part from the district court's disagreement with the VRA's results test itself—which "was not on trial here." Dissent at 97; *see also id.* at 89-97.

The majority's application of the *Anderson-Burdick* test also is at odds with Ninth Circuit precedent. For example, in assessing the burden on voters, the majority failed to consider the impact of the challenged practices on subgroups of voters, thus contradicting a two-year-old *en banc* decision that reiterated that "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be

more severe." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (en banc); *see also* Dissent at 102. The majority also improperly recasts plaintiffs' challenge to Arizona's practice of discarding votes in races in which OOP voters are otherwise eligible to vote as a challenge to precinct-based voting as a whole. Dissent, at 99-101; *id.* at 99 (characterization of the discarding of OOP ballots as the natural "consequence" of Arizona's precinct system is "semantics;" wholly discarding OOP ballots is not a fundamental requirement of—or even a logical corollary to—a precinct-based model."); *id.* at 99-100 ("Arizona's practice of discarding [OOP] ballots is exactly that—a practice. It can be changed."). It thereby erroneously analyzed the burden imposed by, and the government's interests in, precinct-based voting in general, rather than "the rule" at issue: *i.e.* discarding votes in races in which OOP voters are otherwise eligible to vote. 836 F.3d at 1024. Compounding these errors, the majority then overstates the government's interest in both challenged laws, allowing the government to justify voter disenfranchisement with reasons that are "illogical and unsupported by the facts," Dissent at 104, despite that *Public Integrity Alliance* reaffirmed the Ninth Circuit's commitment to the *Anderson-Burdick* test, which requires the court to carefully consider the "*precise interests* put forward by the State…taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." 836 F.3d at 1024.

The majority also erred in analyzing whether HB 2023 was enacted with racially discriminatory intent in violation of the Fifteenth Amendment. It describes the question as a "pure question of fact" meriting clear error review, Op. at 6, but the issue on appeal is not primarily one of the district court's *factfinding* (which, in fact, overwhelmingly supports a finding of discriminatory intent, Dissent at 109-113), but rather the unsupported *legal* conclusions it drew from them. *See* Dissent at 111-13 (noting that the district court's own factual findings are irreconcilable with its ultimate conclusion); *see also McCrory*, 831 F.3d at 204.

Third, the majority opinion creates uncertainty about a uniform law of national application by conflicting with decisions of other courts of appeals regarding applicable standards for evaluating voting rights claims under § 2 and the Constitution. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), vacated, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Compared to these cases, the majority opinion imposes an exceedingly narrow vision of the "broad remedial purpose of ridding the country of racial discrimination in voting," *Chisom*, 501 U.S. at 403 (quotation omitted), and the fundamental right to vote that the Supreme Court

has deemed both "precious" and "fundamental." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

If left undisturbed, the majority opinion will mark the Ninth Circuit as one of the unfriendliest circuits in the nation for voters—particularly minority voters. "Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed." *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001). It would do a serious disservice to the worthy goals of the VRA and the First, Fourteenth, and Fifteenth Amendments of the Constitution to allow the majority opinion to stand as the new law of this circuit.

CONCLUSION

Given the critical issues in this case implicating the most fundamental of rights, the Court correctly determined at the preliminary injunction phase that this case merited—and still merits today—consideration by the *en banc* Court. *See Wesberry v. Sanders*, 376 U.S. 1, 17, (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined[.]"); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "preservative of all rights"). Appellants respectfully requests that this Court grant a rehearing by the *en banc* court to consider these issues of profound constitutional importance and to correct legal errors evident in the majority opinion that, if left unchecked, will fundamentally alter the legal landscape for years to come.

RESPECTFULLY SUBMITTED this 12th day of September, 2018.

s/ *Sarah R. Gonski*
Daniel C. Barr (AZ# 010149)
Sarah R. Gonski (AZ# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias (WDC# 442007)
Bruce V. Spiva (WDC# 443754)
Elisabeth C. Frost (WDC# 1007632)
Amanda R. Callais (WDC# 1021944)
Alexander G. Tischenko (WDC# 263229)
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

Joshua L. Kaul (WI# 1067529)
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Attorneys for Plaintiffs the Democratic National Committee; DSCC, aka Democratic Senatorial Campaign Committee; and the Arizona Democratic Party

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michelle DePass

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) and Rule 32-2(b). The brief contains 2,071 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*