Nos. 19-1257, 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.

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

REPLY BRIEF FOR STATE PETITIONERS

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INTRODUCTION

Section 2 of the Voting Rights Act requires vote-denial plaintiffs to prove a substantial disparate impact caused by the challenged state law. Nothing about that interpretation is novel; it is the law in at least three circuits. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (Easterbrook, J.); *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020) (Easterbrook, J.); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628-629 (6th Cir. 2016); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202 (11th Cir. 2020); *see also Veasey v. Abbott*, 830 F.3d 216, 310-312 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part).

Rather than answering those arguments, Respondents ignore them. The DNC twice contends that "[n]o court has ever required plaintiffs to make a threshold showing of 'substantial' disparity in a §2 vote-denial case." DNC Br. 26; *accord* DNC Br. 20 ("Neither this Court nor any other has ever required this[.]"). No court, that is, except those cited above—which the State Petitioners cited so frequently in their opening brief that those cases appear as *passim* cites. Far from "invent[ing]" those requirements "from whole cloth" (Hobbs Br. 16), Arizona cuts from the §2 tapestry the courts of appeals have woven.

As to §2's causation requirement, Secretary Hobbs admits (at 13) that "Section 2 requires … but-for causation," but ignores that the Ninth Circuit required no such showing. The DNC, in turn, ignores the concept of but-for causation and instead substitutes the "objective Senate Factors." DNC Br. 32. That follows the discredited approach of legislative

history trumping text—indeed, what even Secretary Hobbs admits §2's text demands.

Respondents also discount the severe constitutional concerns that their interpretations raise. Indeed—despite this Court's teachings in *Northwest Austin* and *Shelby County*—the DNC and Secretary Hobbs both disclaim any requirements of congruence and proportionality for legislation enacted under §2 of the Fifteenth Amendment, even though those requirements apply to legislation enacted under §5 of the Fourteenth Amendment. But because both sections have virtually identical text, history, and context, that standard governs legislation enacted under each section. Beyond that, Respondents' interpretations necessarily require overtly race-conscious decisionmaking for election laws, resulting in §2 forcing state legislatures to persist in the "sordid business … [of] divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part). Section 2's text does not require any of this.

Applying §2 as Congress enacted it, Plaintiffs' claims fail. After a ten-day trial, Plaintiffs' evidence established that the out-of-precinct policy had no impact on 99.9% of non-minority voters or 99.8% of minority voters. *See* State Br. 35. And Plaintiffs' evidence of the ballot-collection law's impact was "circumstantial and anecdotal." JA 324. Neither establishes a substantial disparate impact sufficient to trigger §2 liability. What's more, Plaintiffs' evidence did not establish that the out-of-precinct policy or the ballot-collection law were but-for causes of any impact. Plaintiffs' failures of proof on both showings for both claims require reversing the en banc majority's judgment and directing judgment for Defendants.

ARGUMENT

I. Section 2 requires plaintiffs to prove that a challenged law causes a substantial disparity in opportunities for members of a protected class to participate in the political process and to affect electoral outcomes.

The parties appear to agree that a §2 vote-denial claim should be evaluated under a two-step inquiry. They also agree, in broad strokes, that step one requires a showing of a disparate impact and that step two requires proof of causation.

But that is where the agreement ends. Respondents' interpretation allows federal courts to rewrite state election laws under §2 based on anything more than a de minimis disparate impact linked to social or historical conditions that the State itself did not cause. This view stretches §2 beyond its textual bounds and raises grave constitutional concerns. The Court should reject it and adopt the State Petitioners' text-based interpretation instead.

A. Respondents' proposed standard breaks from §2's text and precedent.

1. As the State Petitioners explained (at 19-23), §2's first step imposes liability only for substantial disparate impacts. That requirement arises from what §2(a) forbids—state laws that "den[y] or abridg[e]" the right to vote, 52 U.S.C. §10301(a)—and from what §2(b) mandates: equal "opportunity" for all voters, regardless of race, to "participate in the political process and to elect representatives of their choice," *id.* §10301(b). Indeed, as the State Petitioners showed, no fewer than three circuits have recognized the substantiality requirement this text imposes. In the Sixth Circuit, "[a] law cannot disparately

impact minority voters if its impact *is insignificant* to begin with." *Ne. Ohio Coal.*, 837 F.3d at 628 (emphasis added). In the Fourth Circuit, a law that "does not impose a substantial burden" does not trigger §2, since it is an "unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgement of the right to vote*." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600-601 (4th Cir. 2016). And the Seventh Circuit does not allow insubstantial differentials—such as "if whites are 2% more likely to register than are blacks"—to state a §2 claim because that would "sweep[] away almost all registration and voting rules." *Frank*, 768 F.3d at 754; *see also id.* at 752 n.3 (explaining that a §2 claim would fail "if 99.9% of whites had photo IDs, and 99.7% of blacks did"). This all comports with this Court's teaching that a disparate impact establishes "less opportunity . . . to participate in the political process," §10301(b), only when the disparity between "minority group members" and other members of the electorate is "substantial." *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986).

Respondents answer those arguments by ignoring them. The DNC contends (at 26) that "*[n]o court has ever* required plaintiffs to make a threshold showing of 'substantial' disparity in a §2 vote-denial case" and repeats (at 20) that "[n]either this Court *nor any other* has ever required this[.]" (Emphasis added). Never mind that *Northeast Ohio Coalition, Lee*, and *Frank* did just that. The DNC, however, never cites *Northeast Ohio Coalition*, and cites *Lee* and *Frank* only for their outcomes without answering their reasoning. Yet that is a step closer than Secretary Hobbs, who does not cite any of those cases *at all*.

The DNC also tries to limit (at 26 n.5) *Gingles*'s statement that a cognizable burden must be "substantial" to the context of "multimember district vote dilution cases." But the DNC's central premise is that a single "test … applie[s] to vote-denial and vote-dilution cases alike." DNC Br. 22; *accord* DNC Br. 5-6, 33. Taking the DNC at its word requires applying *Gingles*'s substantiality test to every §2 claim "alike."

Nor does the DNC or Secretary Hobbs meaningfully engage with the State Petitioners' argument (at 22) that §2 requires an impact to minority voters' "opportunity … to elect representatives of their choice." Instead, the DNC argues (at 27) that §2 liability should attach even when "the number of voters affected is too small to affect the outcome of an election[.]" But Congress's use of the conjunctive "and" requires impact both to opportunity to participate *and* to ability "to elect representatives of their choice." §10301. The DNC's arguments ignore that conjunctive construction. *See* DNC Br. 27-28.

Secretary Hobbs, in turn, suggests (at 30) that "the size of a disparity may bear on whether causation can be established, or whether the totality of circumstances *shows a discriminatory result*." (Emphasis added). Secretary Hobbs's acknowledgment that the size of a disparity can "bear" on whether there is a "discriminatory result"—and presumably answer that question in the negative where it is insubstantial—buttresses the State Petitioners' (and the Fourth, Sixth, and Seventh Circuits') position that §2 liability arises only for substantial disparate im-

pacts.[1] In any event, Secretary Hobbs supplies no textual basis for considering the size of the disparity only at step two (causation) and not also at step one (impact).

Scholars have already confirmed the dangers of Respondents' diluted step-one standard: In courts that have adopted it, the step-one outcome is a "near-perfect" predictor of ultimate outcome. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1592 (2019). Except for a single district court case involving "idiosyncratic preferences," in "every other case, if a court discerned a disparate impact, it also managed to link that impact to past and present discrimination as illuminated by the Senate factors." *Id.* at 1591-1592.

This empirical data belies Respondents' contentions that their proposed step-two standard will address the practical and constitutional problems inherent in their approach. Instead, the data confirms that Respondents' second step is toothless in theory and in practice.

2. The State Petitioners contend (at 20-22) that §2 guarantees what it says—equality of "opportunity … to participate in the political process." §10301(b); *see also* Ohio, et al., Amicus 11-15; Pacific Legal Amicus 11. Respondents do not quibble with those statutory

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[1] The United States similarly argues (at 29) that "[a] single polling-place clerk violates Section 2 by turning away only minority voters whether or not their votes would swing the election." No doubt that conduct would violate §2—and the Fifteenth Amendment—as *intentional* discrimination. But it would not support a claim under §2's *results* test absent proof of actual impact to "opportunity … to elect representatives of their choice." §10301(b).

words, but they interpret them to require States to adopt processes guaranteeing voters of all races equal *outcomes*. Put differently, Respondents argue that a §2 claim arises when minority voters *use* equal opportunities at differential rates than non-minority voters.

That argument does not state a cognizable §2 claim under the tests recognized by the Fourth, Sixth, Seventh, and Eleventh Circuits. *See Greater Birmingham Ministries*, 966 F.3d at 1232-1235; *Lee*, 843 F.3d at 600-601; *Frank*, 768 F.3d at 753-755; *Luft*, 963 F.3d at 672; *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-638 (6th Cir. 2016). Respondents have no response to any of these cases, largely or entirely ignoring them.

3. By omitting any substantiality requirement and permitting violations based on disparate use, Respondents' step one would cripple States' ability to manage their election codes. *See, e.g.*, Haahr, et al., Amicus; Wis. Legislators Amicus. Respondents' step-one standard invites §2 liability for the most minute disparity; it "would mean that every polling place would need to be precisely located such that no group had to spend more time traveling to vote than did any other." *Lee*, 843 F.3d at 601.

Plaintiffs do not answer this concern. Indeed, they do not even acknowledge *Lee*'s reasoning. And this danger is particularly acute as both Respondents would forbid courts resolving §2 challenges to consider other existing ways voters can participate in the process, contending that "a state cannot wave away a closed door by pointing to an open window." DNC Br. 29 n.6; *accord* Hobbs Br. 22-23. So much

for the "totality of circumstances" inquiry Congress mandates. §10301(b).

It is not hard to envision how Respondents' only-some-of-the-circumstances standard will hamstring State election officials. Suppose a law shifting polling hours by one hour increased Hispanic voter turnout by 2%, decreased African-American voter turnout by 2%, and left white voter turnout flat. That result would violate step one of Respondents' test because of the disparate (though not substantial) burden on African-American voters relative to white voters. But reverting to the prior law would (under Respondents' theory) raise a separate §2 claim because of the now-known corresponding disparate impact on Hispanic voters. A State would potentially face inescapable §2 liability whenever a law benefits one minority group but hinders another—a scenario that will be far more common if non-significant disparities sufficed.

Even policies *increasing* opportunity for all would potentially violate §2. Suppose, for example, a legislature adopts no-excuse voting by mail, which increases African-American, Hispanic, and white voter turnout by 6% and Native American voter turnout by 3%. That too would violate §2 under Respondents' theory because of the disparate results for Native American voters.

4. No party disagrees with the State Petitioners' view (at 23-24)—consistent with every circuit decision addressing the question—that §2 plaintiffs must prove causation. But Respondents' approaches to proving causation do violence to §2's text.

Start with Secretary Hobbs. She admits (at 18-19) that §2 "requires … but-for causation." But Secre-

tary Hobbs never shows how the en banc Ninth Circuit applied any but-for causation test. That's because it did not: The en banc majority allowed plaintiffs to prove that the disparate impact was *either* "caused by *or* linked to 'social and historical conditions[.]'" JA 659, 671 (emphasis added) (citation omitted). The Ninth Circuit thus allowed an impact's alleged link to "social and historical conditions" to substitute for the but-for causation that Secretary Hobbs admits §2's text demands.

Unlike Secretary Hobbs, who embraces but-for causation, the DNC ignores it by refusing even to address whether §2 requires but-for causation. Instead, the DNC follows the en banc majority's lead and latches onto the *Gingles* factors as the sole method to determine causation. That approach accurately describes what happened below, but has little else to recommend it. Consider two problems it raises. First, the DNC's approach does not answer whether §2's text itself requires but-for causation—what Secretary Hobbs calls (at 18) "the 'default' or 'background' rule[.]" Second, the DNC contends (at 26 n.5) that some aspects of *Gingles* should be "limited to multimember district vote dilution cases," but never explains why the Court should import *Gingles*'s apparent presumption of causation into the vote-denial context. There is a straightforward answer why it should not: In vote-dilution cases, the government itself draws district lines, so causation will rarely be contestable. But a disparate-impact analysis for vote-denial claims must account for a host of voter- and group-specific factors—the "totality of circumstances," §10301(b)—untethered to State action. That makes proof that the challenged law

itself caused the disparate impact an indispensable textual requirement of vote-denial claims.

5. Two brief responses to the United States. First, the United States contends (at 21-24) that §2 requires proof of proximate causation. In the State Petitioners' view, this Court need not decide whether §2 requires proximate causation or but-for causation because Plaintiffs did not prove, and the Ninth Circuit did not require, even the lower of those two showings. This Court thus could reserve that question for a future case and reverse the judgment for Plaintiffs' failure to prove even but-for causation. If the Court decides to reach this question, however, the State Petitioners agree with the United States that §2 requires a showing of proximate causation and urge the Court to adopt that standard for the reasons the United States explains. *See* U.S. Br. 21-24.

Second, the State Petitioners agree with the United States (at 24-25) that States must retain the ability to present their governmental interests when defending against vote-denial claims. But whether that occurs as part of a "totality of circumstances" inquiry or (as the United States proposes) as a separate third step is a distinction without a difference. In either event, plaintiffs must bear the burden at all phases of §2 litigation, since §2 cannot be read to impose a burden-shifting framework. Nor does "tenuous[ness]," *Gingles*, 478 U.S. at 36-37, do any real work if a state chooses to present its interests supporting a challenged law; that factor has become merely an invitation for courts to substitute their judgment for the judgments of legislatures. *Supra* at 6 (discussing toothlessness of step two when based on *Gingles* Factors).

B. Respondents' view of §2 raises serious constitutional concerns.

The State Petitioners explained (at 24-28) how the en banc court's §2 standard raises two serious constitutional concerns—it (1) makes §2 exceed Congress's powers to enforce the Reconstruction Amendments, and (2) violates the Fourteenth Amendment by making race the predominant factor in fashioning election laws. *See also* Ohio, et al., Amicus 27-31. Respondents' briefs do nothing to dispel those severe concerns.

1. Respondents answer principally by fighting the existence of meaningful constitutional constraints. In their telling, Congress's powers under §2 of the Fifteenth Amendment—unlike under §5 of the Fourteenth Amendment—authorize any law that can be deemed a rational use of that power. DNC Br. 23, 47; Hobbs Br. 34-35. The DNC further appears to contend (at 49-50) that "religious-liberty" rights occupy a lower tier than voting rights.

Respondents' premises fail. The text, history, and context of the two enforcement sections are virtually identical. Given those shared characteristics, Respondents offer no valid reason not to give "both Amendments" the same readings. *Shelby Cty. v. Holder*, 570 U.S. 529, 542 n.1 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009). And the Court already recognized in the context of §2 that race-based inquiries and decision-making "raise[] serious constitutional questions." *Bartlett v. Strickland*, 556 U.S. 1, 18, 21 (2009) (plurality op.). Respondents neither acknowledge nor answer *Strickland*'s concerns. Nor does the DNC ex-

plain how the Constitution places religious-liberty rights on a lower tier than voting rights.

Respondents also suggest that Congress has power under the Elections Clause to give §2 the reach they propose. Hobbs Br. 35-36; DNC Br. 53. But the Elections Clause allows Congress to prescribe procedures only for *federal* elections, and §2 applies to State procedures for *all* elections. So §2 cannot be justified as an exercise of Congress's Election Clause powers. Nor is the Elections Clause a license for Congress to require State voting processes that violate the equal treatment guaranteed by the first sections of the Fourteenth and Fifteenth Amendments.

2. Respondents also fight the premise that overtly race-conscious decisions by the government raise constitutional concerns. Secretary Hobbs (at 35) even accuses "Petitioners" of "invent[ing]" those concerns. So much for this Court's extensive precedents also raising them. *See* State Br. 24-28. Secretary Hobbs simply refuses to explain why her interpretation would not raise the very concerns this Court has repeatedly identified but she ignores.

Similarly, the DNC seems to see the race-conscious consequences of its interpretation as a feature rather than a constitutional bug. It suggests (at 54, 56) that "the Fourteenth Amendment does not command race *blindness* in government decision-making" and "that government need not be race-blind." To be sure, the Fourteenth Amendment sometimes permits race-based decision-making in extraordinary circumstances when the government satisfies strict scrutiny. But this Court's precedents make clear that race-based policies must be a last resort, not a first choice. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900,

904, 916 (1995). The ubiquitous governmental consideration of race resulting from the DNC's arguments turns those principles on their heads.

3. Respondents end by invoking step two of their test to assuage potential constitutional concerns. Hobbs Br. 34; DNC Br. 58. But Respondents' diluted step-two causation analysis cannot bear the weight they place on it. Instead, as explained, empirical evidence shows that—in all but a single case—step two rubber stamps whatever the court found at step one. *Supra* at 6. Respondents' causation analysis thus performs no meaningful screening function.

Because the supposed protections of Respondents' second step are illusory, they cannot dispel the constitutional doubts here.

II. Arizona's out-of-precinct policy and ballot-collection law do not violate §2.

A. Arizona's out-of-precinct policy does not violate §2.

Plaintiffs' claims fail both parts of the §2 inquiry.

1. Plaintiffs' §2 challenge to the out-of-precinct policy fails at step one for three reasons. *First*, the out-of-precinct policy is race neutral; it gives all voters an equal *opportunity* to vote in their correct precinct on Election Day, or otherwise to choose from Arizona's robust set of early voting options, and it requires discarding the votes of all out-of-precinct voters, irrespective of race. State Br. 16-17, 33-40; U.S. Br. 25-26. Although Respondents point to differential outcomes in minority-group usage of in-person precincts, they offer no evidence demonstrating unequal *opportunity*.

Second, Plaintiffs failed to prove a substantial disparity, particularly when reviewing Arizona's elections system as a whole. In the 2016 general election, the out-of-precinct policy affected about 0.15% of Arizona voters. State Br. 9, 17, 34-37. Though Plaintiffs proved "minorities are over-represented among the small number of voters casting [out-of-precinct] ballots," JA 332, the district court found that "such a small and ever-decreasing fraction of the overall votes cast" meant that Arizona's policy "has no meaningfully disparate impact." JA 334. And as the United States correctly contends, the Ninth Circuit erroneously fixated only on in-person, election-day votes to increase the disparity to 99% vs. 99.5% (U.S. Br. 20-21, 25-27), which is still not substantial for purposes of §2 in any event.

Beyond that, Respondents' continued insistence (DNC Br. 9; Hobbs Br. 39) that the out-of-precinct policy affected *twice* as many minorities as non-minorities would be a statistically accurate description if the rates were 99.99% of non-minorities vs. 99.98% of minorities, or even 99.999% of non-minorities vs. 99.998% of minorities—"a misuse of data" that confirms why comparing percentages alone without considering absolute magnitudes cannot establish a substantial disparity. *Frank*, 768 F.3d at 752 n.3.

Third, the DNC's repeated reliance (at 21, 31) on Florida's 537-vote margin in the 2000 presidential race does nothing to satisfy their burden. For one thing, the 2000 election could not have informed what Congress meant when it passed a statute eighteen years earlier in 1982. Even so, close elections existed before 2000, yet Congress still chose language mandating impacts on electoral outcomes—

which even the DNC acknowledges requires "substantial" impacts for vote-dilution claims to be cognizable. *Supra* at 5-6. So too for vote-denial claims.

2. At step two, Plaintiffs failed to prove even but-for causation. Indeed, the DNC does not allege that it did. *Supra* at 9. In any event, Plaintiffs never proved that the out-of-precinct policy actually caused voters of any race to vote in the wrong precinct. State Br. 17, 37-38; *see also* JA 708 (O'Scannlain, J., dissenting); U.S. Br. 6, 26.

As a result, Plaintiffs' challenge is really to the precinct system itself or to county-level officials' actions regarding polling places. But Plaintiffs did not bring those challenges, which would focus on county defendants, involve different evidence, and require different remedies. Indeed, the DNC's proposal to count some number of races at the top of the ballot suggests that the DNC seeks not to cure an alleged §2 violation but only to benefit itself politically in top-of-the-ticket races. In any event, that remedy—counting an arbitrary number of races at the top of the ballot—is not a cure for any violation based on the location or movement of polling places. Secretary Hobbs, in turn, suggests (at 44) ballot centers as the remedy. But counties have the option of choosing ballot centers under current statutory law. Ariz. Rev. Stat. ("A.R.S.") §16-411(B)(4).

Even if the DNC were correct that it could sidestep ordinary causation by relying on the *Gingles* factors, its arguments still fail. While the DNC hints (at 40 n.8) that the Ninth Circuit "recognized recent examples of discrimination," it identifies no errors in the State Petitioners' demonstration (at 39) that those recent examples were "scant and equivocal," and ex-

clusively involved actions by non-parties. That the en banc majority allowed that type of evidence to establish causation exemplifies how readily the *Gingles* factors "lend themselves to manipulation." *Veasey*, 830 F.3d at 327 (Elrod, J., concurring in part and dissenting in part).[2]

3. If the State's justification bears on the challenged law's validity, there is a strong justification here. The United States (at 4, 27, 29-30) well summarizes the important state interests that a precinct-based system serves, including allowing ballots to list the correct races and facilitating state efforts to monitor votes and prevent election fraud. In fact, Secretary Hobbs defended the out-of-precinct policy below largely on those grounds and does not rebut them here. Hobbs Br. 43 (discussing instead the administrative feasibility of partially counting very low numbers of out-of-precinct ballots). And while she now (at 43-44) makes conclusory assertions about extra-record conversations she had with unnamed county officials, none of that was evidence before the district court.

[2] The DNC's characterizations of the record are misleading in any case. As an example, the DNC contends (at 9) that "Arizona is heavily rural." But with more than 80% of its population in just the Phoenix and Tucson metropolitan areas alone, *see Arizona Population and Vital Statistics*, Arizona's Economy, https://www.azeconomy.org/arizona-population/ (last visited Feb. 11, 2021), Arizona is actually among the ten *least* rural states in the country, *see Urban Percentage of the Population for States, Historical,* Iowa Community Indicators Program, https://www.icip.iastate.edu/tables/population/urban-pct-states (last visited Feb. 11, 2021).

B. The ballot-collection law does not violate §2.

1. The en banc majority erred in reversing the district court's finding that Plaintiffs had not satisfied step one by showing any "meaningful inequality in the electoral opportunities of minorities as compared to nonminorities." JA 331; *see* U.S. Br. 27. As the district court correctly found—and Respondents fail to contest with anything but conclusory assertions—Plaintiffs presented "no quantitative or statistical evidence comparing the proportion that is minority versus nonminority." JA 321. Even so, the district court thoroughly considered the limited circumstantial and anecdotal evidence Plaintiffs introduced at trial, JA 324, and still found insufficient evidence to show a substantial disparate impact. JA 331.

Both Secretary Hobbs and the DNC admit that a "bare statistical showing" is not sufficient. DNC Br. 27; Hobbs Br. 33. A case-in-chief lacking that bare showing necessarily fails. And out of the sparse anecdotal evidence Plaintiffs offered, much of it pointed to *partisan*, not racial, motivations. *See* JA 329-330 ("Within the last decade, ballot collection has become a larger part of the Democratic Party's [get-out-the-vote] strategy … [while] the Republican Party has not significantly engaged in ballot collection as a [get-out-the-vote] strategy.").

2. Plaintiffs also failed to show causation. Respondents do not even try to show that but-for causation was proven here. Instead, like the en banc majority, they rely (DNC Br. 32-34) only on a linkage to "social and historical" conditions—their only option, since "no individual voter testified that H.B. 2023's

limitations on who may collect an early ballot would make it significantly more difficult to vote." JA 331.

The recent ballot-collection fraud that upended an election in North Carolina only confirms the wisdom of Arizona's choice to adopt the ballot-collection law as a prophylactic measure against fraud. *See* State Br. 44. The DNC apparently views the State Petitioners' desire to avoid a similar fate as unanswerable, since it offers no answer; it merely persists in claiming that the State's fraud concerns are invented. DNC Br. 23-24.

Secretary Hobbs, in contrast, contends (at 50) that North Carolina evidence is irrelevant because such fraud "would have been illegal under Arizona laws independent of H.B. 2023." But Secretary Hobbs's contention ignores the very purpose of prophylactic measures. Consider another real-life example: The Food and Drug Administration and the States limit purchases of cold medicine containing pseudoephedrine not because they believe the medicines themselves will be abused, but instead because buyers can use those medicines to produce methamphetamine. And it is no answer to say that States and the Federal Government can outlaw manufacture and possession of methamphetamine (as they do). That is hard to detect and enforce, so governments prophylactically regulate sales of cold medication. Arizona's approach to ballot collection is no different, adopting both a prophylactic ban on conduct that heightens the risk of fraud and a ban on the underlying fraud itself.

On that score, Arizona's ballot-collection law is virtually identical to the Carter-Baker Commission's recommendations. State Br. 8. The very purpose of

the Carter-Baker Commission's recommendation was prophylactically to ban practices that *risk* such fraud. Secretary Hobbs does not acknowledge that the State's law is virtually identical to what Carter-Baker actually recommended, instead focusing (at 46-47) on what Secretary Hobbs thought the Commission "meant to" do. The DNC, in turn, reaches outside the record (at 61 & n.19) to suggest that President Carter effectively recanted his recommendations. Not so. President Carter actually said that voting by mail works "where safeguards for ballot integrity are in place."[3] That is exactly what Arizona's ballot-collection law is designed to accomplish.

This is not a hypothetical concern for Arizona. Less than a year before the legislature passed the ballot-collection law, the City of Phoenix had to issue a warning following reports that "individuals have come to [voters'] doors stating that they work for city elections and that they are there to pick up the voter's early ballot to return it."[4] The ballot-collection law is an appropriate way to help prevent that type of actual misconduct from recurring and preserve the integrity of the State's elections.

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[3] The statement further elaborated that the "main recommendations on vote-by-mail and absentee voting" included "eliminat[ing] the practice of allowing candidates or party workers to pick up and deliver absentee ballots." *See Carter Center Statement On Voting By Mail For 2020 U.S. Elections*, Carter Center (May 6, 2020), https://www.cartercenter.org/news/pr/2020/united-states-050620.html.

[4] *City Reminds Voters that City Elections Staff Do Not Pick Up Ballots at Residences or Ask How Residents Voted*, City of Phoenix (Aug. 12, 2015), https://www.phoenix.gov/news/cityclerk/900.

III. The Ninth Circuit's intentional-discrimination holding is untenable.

1. The Ninth Circuit's intentional-discrimination holding cannot fairly be read to rest on anything but the "cat's paw" theory. The en banc majority called "the majority" of legislators "sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." JA 350; *see also* JA 357. Those concededly sincere beliefs preclude any finding of intentional discrimination without some way to impute improper intent to those legislators. The Ninth Circuit's way to do so was the cat's-paw theory, so its holding rises or falls on that theory's applicability.

The cat's-paw theory does not—and cannot—apply here. Some type of "agency" relationship must exist for the "cat's paw" doctrine to do any work—and no agency relationship exists among co-equal, independent legislators. State Br. 45-47; U.S. Br. 33-34.

Neither Respondent seriously disputes that view of the cat's-paw theory. Nor do they try to supply a doctrinal or factual basis to apply the theory to co-equal, independent legislators. Instead, Secretary Hobbs posits (at 48) that the "roots" of the theory "are irrelevant" because "legislative history was just one of *many* reasons the en banc court deemed the law racially motivated." But the en banc majority specifically said that a majority of legislators were acting on "sincere … belief[s]," requiring the court instead to rely almost entirely on then-Senator Shooter's legislative efforts under the cat's-paw theory. JA 674-679. In any case, it is not the historical

"roots" of the cat's-paw theory that are at issue but rather its doctrinal coherence in this context—which simply does not exist absent an agency relationship.

The DNC's arguments are no more persuasive. The DNC asserts (at 59) that applying the cat's-paw theory "was apt" because "racially-motivated allegations [were] peddled by influential actors [that] *tainted the whole process*." But Plaintiffs offered no proof that those actors were influential; that is the inquiry the Ninth Circuit used the cat's-paw theory to short-circuit. And Shooter's lack of influence with his colleagues is confirmed by the later overwhelming vote to expel him, State Br. 47, which neither Respondent mentions.

2. Any non-cat's-paw-theory reasoning the Ninth Circuit employed to support this holding is untenable. As the State Petitioners explained (at 49-51), the en banc majority "overstep[ped] the bounds" of clear-error review for pure factual findings, and this Court can reverse on that basis alone. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

The en banc majority also erred by conflating the district court's findings of *partisan* motives with *racial* motives. JA 717-718 (O'Scannlain, J., dissenting) ("The majority simply concludes that such finding shows racially discriminatory intent as a motivating factor."). Respondents argue that this was permissible because "'racial identification is highly correlated with political affiliation.'" Hobbs Br. 50 (citation omitted); *accord* DNC Br. 60. But this Court has expressly rejected such conflation. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017); *Hunt v. Cromartie*, 526 U.S. 541, 551-552 (1999).

3. The en banc majority further erred by concluding that Arizona legislators must have acted with racially tainted motives when enacting prophylactic measures because those legislators lacked evidence of fraud *in Arizona*. *See* JA 718 (O'Scannlain, J., dissenting). But *Crawford v. Marion County Election Board* recognized the legitimacy of preventive legislative enactments to protect election integrity. *See* 533 U.S. 181, 194-196 (2008). Nothing in *Crawford*'s reasoning is inapplicable to §2.

IV. The State has standing to seek review of the out-of-precinct policy.

Secretary Hobbs's contention that the State Petitioners lack standing to seek review of the out-of-precinct policy does not accurately state Arizona law. Her argument ignores that the State of Arizona was granted intervention in the Ninth Circuit—a decision she did not challenge by cross-petition here. And unlike the single house in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019), the Arizona Attorney General has explicit statutory authority under Arizona law to "[r]epresent the state in any action in a federal court." A.R.S. §41-193(A)(3). This Court has previously recognized as much: "Under Arizona law, the State Attorney General represents the State in federal court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 51 n.4 (1997). Secretary Hobbs does not acknowledge that decision or A.R.S. §41-193(A)(3), much less distinguish them or explain why they do not apply here.

Instead, Secretary Hobbs relies almost entirely on *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360 (Ariz. 1975). *Santa Rita*, however, involved a prior attorney general's attempt

to appeal in state court in the name of a state agency over the agency's objection. Here, the Attorney General is not attempting to seek review in the Secretary's name, but rather in his own name and, under A.R.S. §41-193(A)(3), the State of Arizona's name.[5] *Santa Rita* is thus inapposite.

V. The Court should reverse the judgment without remanding for further proceedings.

To give Arizona's legislature the certainty it deserves, this Court should direct entry of judgment for Defendants. This case has already gone through a full trial generating extensive factual findings—and Plaintiffs failed to introduce evidence proving their §2 claims. *See* Section II, *supra*.

The district court already performed the "intensely local" inquiry that the DNC and Secretary Hobbs acknowledge §2 requires. The results of that inquiry after a full trial are not close: The district court found (1) that the out-of-precinct policy did not affect 99.9% of non-minority voters vs. 99.8% of minority voters, and (2) a total absence of quantitative proof on the ballot-collection law's impact. Because this post-trial factual record supports only a single outcome if §2 is properly applied, a remand would serve no purpose. Similarly, the bare en banc majority's discriminatory-intent holding is premised on obvious legal error that can and should be corrected now.

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[5] Secretary Hobbs's reliance on the election procedure manual ("EPM") is both irrelevant and incorrect. The out-of-precinct policy arises from statute, not merely the EPM. State Br. 7. Nor does Secretary Hobbs have authority to amend the EPM unilaterally; instead, she needs the concurrence of both the Attorney General and the Governor. A.R.S. §16-452(B).

CONCLUSION

This Court should reverse the Ninth Circuit's judgment and direct entry of judgment for Defendants.

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Respectfully submitted,

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