No. 19-1257

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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* MARICOPA COUNTY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, Maricopa County respectfully submits this *amicus curiae* brief in support of Petitioners Mark Brnovich, in his official capacity as Arizona Attorney General, and the State of Arizona.

Maricopa County is Arizona's largest county. Home to nearly 4.5 million people, Maricopa County is racially and ethnically diverse. It is also geographically diverse, comprised of many urban, suburban, and rural communities. The issue of Arizona's precinct-based voting system before the Court is of interest to *amicus* Maricopa County because Arizona law tasks counties with administering elections.

In 2018, Maricopa County had over 2.2 million registered voters. In the 2018 general election, nearly 1.2 million voters cast early ballots and nearly 270,000 voters cast in-person ballots in 748 precincts. In that election, voters cast ballots in nine races for federal legislative office, 47 races for state executive and legislative office, 51 state judicial retention elections, one race for county-wide office, 17 races for locally-elected county office, 11 races for municipal office, 34 races for local school boards, and 10 races for office in other local jurisdictions. Additionally, Maricopa County voters cast ballots on five state-wide and 27 local ballot measures. Altogether, Maricopa County

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[1] Consistent with Rule 37.2, *amicus* notified counsel of record for all parties of their intent to file an *amicus* brief at least ten days prior to the brief's due date. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission.

voters cast 1,454,103 ballots in the 2018 November election.[2]

SUMMARY OF ARGUMENT

In the Ninth Circuit, the results test in § 2 of the Voting Rights Act of 1965 involves a "two-step analysis." *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020) (interpreting 52 U.S.C. § 10301). In "step one," the Ninth Circuit isolates the challenged standard, practice, or procedure without considering other opportunities to vote. *See id.* at 1014–16. By viewing the challenged standard, practice, or procedure in isolation, the Ninth Circuit narrows the "baseline" for measuring statistical significance, finding disparate impact in an otherwise *de minimis* difference between minority and white voters. *See id.* at 1015.

This interpretation of the results test requires elections officials to predict with exacting precision slight statistical differences between minority and white voters before adopting or even leaving in place race-neutral elections standards, practices and procedures. But elections officials do not have *ex ante* access to that degree of precise information about racial and ethnic demographics and voter behavior patterns. As a result, the Ninth Circuit's interpretation of the results test invites constant litigation and undue judicial review of choices the United States Constitution leaves up to the States. *See*

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[2] This elections data is publicly available. Maricopa Cnty. Recorder, Maricopa Cnty. Statement of Vote (Nov. 21, 2018), https://recorder.maricopa.gov/electionarchives/2018/11-06-2018%20Final%20Statement%20of%20Vote%20Book%20NOV%202018.pdf.

Art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

That is not what Congress envisioned when it required examination of the "totality of circumstances." 52 U.S.C. § 10301(b). Congress understood that elections officials use "processes"—plural—to provide voters the "opportunity . . . to participate in the political process and to elect representatives of their choice." *See id.*

As applied in this case, the Ninth Circuit's approach effectively abolishes Arizona's precinct-based voting system. *See Hobbs*, 948 F.3d at 1031. It requires elections officials to at least "partially count[]" ballots cast in the wrong precinct. *Id.* at 999, 1031. Because the vast majority of Maricopa County voters cast ballots by mail, the decision does not meaningfully increase the opportunity to vote. The upshot is to inject further uncertainty into estimating the number of voters who may be expected to vote in particular precincts, unsettling the allocation of polling locations and potentially increasing wait times in unpredictable ways.

This Court should grant the Petition for Writ of Certiorari to reverse the Ninth Circuit's erroneous en banc decision or, if not, to direct the Ninth Circuit to provide local elections officials with guidance on how to implement it.

ARGUMENT

I. The Ninth Circuit reads the "totality of circumstances" out of § 10301(b)'s results test.

A. "Step One" of the Ninth Circuit's results test requires elections officials to predict voter behavior with near-perfect precision.

Elections officials are not alone in their confusion about § 2's results test. "[N]umerous courts and commentators have noted that applying Section 2's 'results test' to vote-denial claims is challenging, and a clear standard for its application has not been conclusively established." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636–37 (6th Cir. 2016) (collecting authorities). Yet elections officials alone face liability for failing it. And "step one" of the Ninth Circuit's results test ensures that elections officials will face liability for race-neutral standards, practices, and procedures that do not result in near-perfect outcomes.

As interpreted by the Ninth Circuit, to show disparate impact in "step one," plaintiffs need only demonstrate that "more than a de minimis number of minority voters [are] burdened" by the challenged standard, practice, or procedure when viewed in isolation from the full complement of laws in the state's election system. *See Hobbs*, 948 F.3d at 1014–16. By isolating the standard, practice, or procedure from other voting opportunities based on plaintiffs' framing of their claim, this approach decreases the "baseline" in the analysis and increases the likelihood of liability. *See id.*

In this case, Plaintiffs challenged a by-product of Arizona's precinct-based voting system: votes cast in the wrong precinct are not counted. *See id.* at 1014. To

determine whether this challenged practice had a disparate impact on minority voters, the Ninth Circuit set the "baseline" as "in-person ballots" cast. *Id.* at 1015. It excluded the volume of ballots cast by mail, an opportunity open to all of Arizona's citizens that accounts for the majority of ballots cast.[3] *See Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 872 (D. Ariz. 2018) (finding that analysis excluding mail-in ballots "paints an incomplete picture of the practical impact of [out-of-precinct] voting because the majority of Arizonans successfully vote by mail and, therefore, are unaffected by precinct requirements").

Establishing a narrow "baseline" based on Plaintiffs' framing of their complaint allowed an otherwise *de minimis* difference between minority and white voters to drive the results test. *Hobbs*, 948 F.3d at 1015–16. This approach is not what Congress intended when it stated that

> A violation . . . is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

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[3] Importantly, Arizona offers what is commonly referred to as "no-excuse early voting by mail," allowing any qualified elector to request and receive an early vote-by-mail ballot without having to provide a qualifying justification. *See Hobbs*, 948 F.3d at 1005.

52 U.S.C. § 10301(b) (emphasis added). As this Court has explained, "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied" in *White v. Regester*, 412 U.S. 755 (1973). *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Consistent with *White*, Congress did not intend "that any deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation." *See* 412 U.S. at 763–64. The Ninth Circuit's approach thus impermissibly encourages statistical manipulation to invalidate long-standing, race-neutral regulations.

B. Elections officials cannot predict the potential impact of adopting—or even leaving in place—elections standards, practices, or procedures with the decision's required degree of specificity.

To be clear, Maricopa County seeks to ensure that its citizens have an equal opportunity to vote regardless of race. *See* 52 U.S.C. § 10301. But Congress did not intend § 2 of the Voting Rights Act to require Maricopa County decisionmakers to control for an otherwise *de minimis* and largely unpredictable difference in outcome. *See Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) ("It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command . . . .").

That degree of control is precisely what the Ninth Circuit's decision demands. In doing so, it ignores on-the-ground challenges facing elections officials when setting standards, practices, and procedures. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring) ("Judicial review of [decisionmakers'] handiwork must apply an objective,

uniform standard that will enable them to determine, *ex ante,* whether the burden they impose is too severe."); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("We have upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.").

1. Maricopa County decisionmakers, like most (if not all) elections officers, have access to imperfect information about racial and ethnic demographics and voter behavior patterns. For starters, Arizona does not track voters and their voting behavior by race and ethnicity. Instead, when allocating polling locations for elections, Maricopa County elections officials consider the available demography of zip codes (and in some areas of the County, neighborhoods) and the general voting patterns at polling locations from past elections. But decisionmakers do not have access to refined data points by race and ethnicity, such as patterns of employment, transportation, and how voters spend their free time, that could help predict with specificity where and when voters of different races and colors will choose to vote in-person. Thus, elections officials cannot predict—with the specificity required by the Ninth Circuit—any potential impact on minority voters stemming from the change to or continuation of an in-person election standard, practice, or procedure.[4]

2. A variety of standards, practices, and procedures interact to create the "political processes leading to nomination or election in the State or

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[4] The same uncertainty applies to mail-in voting. But with vastly more voters choosing to vote by mail, this analysis provides greater room for error on standards, practices, and procedures governing mail-in ballots.

political subdivision." *See* 52 U.S.C. § 10301(b). These processes are not devised in isolation: the individual parts are designed to work together to promote the efficient administration of elections while safeguarding electoral integrity and providing voters ample opportunity to cast their ballots. *Burdick*, 504 U.S. at 441 ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."). Considering the totality of a state's voting laws when determining whether a particular subpart imposes a burden on voting rights presents a familiar analysis. *E.g. Jenness v. Fortson*, 403 U.S. 431, 438 (1971) (recognizing that the totality "of Georgia's election laws, unlike Ohio's [at issue in *Williams v. Rhodes*, 393 U.S. 23 (1968)], do not operate to freeze the political status quo," and so the challenged subpart passed constitutional muster).

But here, for example, by excluding mail-in voting from its "baseline," the Ninth Circuit's analysis impermissibly left out the largest process in Arizona's voting system. *See Hobbs*, 948 F.3d at 1015. Indeed, approximately eighty percent of votes cast in Arizona are by early ballot. *See id.* at 1005; Maricopa Cnty. Statement of Vote, *supra* note 2, at 49–50 (reporting nearly 1.2 million voters cast early ballots and nearly 270,000 voters cast in-person ballots). The Ninth Circuit's artificial narrowing of the "baseline" ignores the totality of the circumstances: elections officials deliberating in-person elections standards, practices, and procedures necessarily consider the existence and popularity of mail-in voting. A baseline that disregards 4 out of 5 ballots cast is no baseline at all. *Cf. Crawford*, 553 U.S. at 208 (Scalia, J., concurring) ("This is an area where the dos and don'ts need to be known in advance of the election . . . .").

3. Compounding these challenges, Maricopa County elections officials typically are locked into decisions to procure technology, print ballots, locate adequate polling places, and train sufficient poll workers far in advance of election day. Altering these decisions to adapt to changed circumstances is an enormous undertaking, and "step one" of the Ninth Circuit's analysis ensures that changed circumstances are more likely to impact the not-much-more than *de minimis* burden requirement.

The Ninth Circuit's decision also does not account for circumstances that are outside of elections officials' control. For example, it criticized Maricopa County's "frequent changes in polling locations" and "confusing placement of polling locations" as "key factors" leading voters to cast out-of-precinct ballots. *See Hobbs*, 948 F.3d at 1001–02. The Ninth Circuit failed to consider that Maricopa County's selection of polling locations is frequently based on factors outside of its control, such as the willingness of property owners to permit polling locations in their buildings year over year and the suitability of available buildings when considering accessibility for individuals with disabilities.

Other circumstances outside of elections officials' control are more difficult to anticipate, such as the unexpected popularity of a particular candidate, election contest, or issue, which will have an outsized impact on the Ninth Circuit's narrowed "baseline." In the 2018 general election, for instance, Maricopa County elections officials could not predict with the specificity required by "step one" which of the 139 local (i.e., non-statewide) election contests or ballot measures might propel voter turnout. *See generally* Maricopa Cnty. Statement of Vote, *supra* note 2.

Simply put, as with any human activity, establishing elections standards, practices, and procedures is an imperfect endeavor. Yet "step one" of the Ninth Circuit's results test imposes an unrealistic expectation of near perfection to avoid liability.

C. In practice, the unpredictable nature of the Ninth Circuit's standard invites constant litigation.

"[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ."). But the Ninth Circuit's decision invites "constant litigation" to second-guess common-place, race-neutral regulations. *Cf. Crawford*, 553 U.S. at 208 (Scalia, J., concurring) ("[V]oter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation.").

The present pandemic presents a timely exploration of these issues. Many voters, poll workers, and property owners are understandably concerned about the spread of COVID-19 through in-person voting. More voters are expected to vote by mail; fewer poll workers and property owners are volunteering their services or buildings for in-person voting.

As a result, Maricopa County is contemplating shifting resources toward "vote centers" rather than

strict precincts for the 2020 primary election.[5] Vote centers would be equipped to print ballots on-demand, alleviating concerns about casting ballots out-of-precinct in this election. This potential shift necessarily means that Maricopa County would have fewer voting locations for the 2020 primary election: the technology necessary to print ballots on-demand is exceedingly expensive, and COVID-19 has further reduced building and poll worker availability.

Maricopa County elections officials have no reason to believe that a shift to vote centers would substantially burden any voter. They recognize that because voters can cast a ballot at any vote center, the distribution of voters (and thus wait times) may be uneven across locations. But they cannot predict with specificity the popularity—particularly popularity by race—of any particular location in advance. If a particular vote center sees an unpredicted surge in use and wait times with minority voters unpredictably facing a slight disparate impact by that surge, then Maricopa County faces liability under the Ninth Circuit's analysis through no fault of its elections officials.[6]

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[5] Arizona law allows each county to choose whether to use polling places requiring in-precinct voting, vote centers allowing voters to cast their ballot at any voting location in the county, or a hybrid utilizing both models. A.R.S. § 16-411.

Depending on changing circumstances, including the experience of the 2020 primary and the extent of COVID-19 concerns, Maricopa County might also consider using the vote center model for the 2020 general election.

[6] Regardless of whether Maricopa County adopts the "vote center" model or continues the precinct-based system, the increased use of mail-in voting in response to COVID-19 will further narrow the "baseline" of in-person ballots, skewing the analysis and increasing the likelihood of liability under the Ninth Circuit's "step one."

This example underscores the context missing from "step one" of the Ninth Circuit's results test. In contrast to the text of § 10301(b), "step one" encourages artificially isolating elections standards, practices, and procedures. This analysis predicates disparate impact on a narrow baseline and small numbers of affected voters, driving outcomes that are unpredictable to well-informed and well-meaning elections officials. "That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States." *See Crawford*, 553 U.S. at 208 (Scalia, J., concurring) (citing Art. I, § 4).

That is not what Congress intended when it instructed courts to examine the "totality of circumstances." 52 U.S.C. § 10301(b). Congress recognized that various "processes" comprise the "opportunity" to vote. *See id.* The decisions establishing those processes represent a give-and-take with resources and on-the-ground circumstances, decisions the United States Constitution leaves up to the States. *See* Art. I, § 4; *Burdick*, 504 U.S. at 433; *Storer*, 415 U.S. at 730. The Ninth Circuit's interpretation of the results test runs counter to Congressional intent and the United States Constitution. This Court should grant the Petition for Writ of Certiorari to correct the Ninth Circuit's interpretation.

II. The Ninth Circuit disregards the impact its decision will have on Arizona's precinct-based voting system.

The Ninth Circuit's decision requires Maricopa County elections officials to "count[] or partially count[]" ballots cast out-of-precinct. *See Hobbs*, 948 F.3d at 999. It states that "[t]here is no finding that

counting or partially counting" ballots cast out-of-precinct "would threaten the integrity of Arizona's precinct-based system." *Id.* at 1031.

This statement is incongruent with the district court's explanation of the benefits promoted by precinct-based voting—an explanation block-quoted by the decision. *See id*. at 1030. As explained by the district court:

> Precinct-based voting helps Arizona counties estimate the number of voters who may be expected at any particular precinct, allows for better allocation of resources and personnel, improves orderly administration of elections, and reduces wait times. The precinct-based system also ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote, thereby promoting voting for local candidates and issues and making ballots less confusing. Arizona's policy to not count [out-of-precinct] ballots is one mechanism by which it strictly enforces this system to ensure that precinct-based counties maximize the system's benefits. This justification is not tenuous.

Reagan, 329 F. Supp. 3d at 878. Importantly, the Ninth Circuit did not disagree with the district court's conclusion that a precinct-based voting model affords many benefits, it simply found that justification inapt based on Plaintiffs' framing of their claim. *Hobbs*, 948 F.3d at 1030.

An "unbroken practice" followed "openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *See Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970); *see also Hobbs*, 948 F.3d at 1062–64

(Bybee, J., dissenting) (describing widespread use of precinct-based voting systems). Taken at face value, the Ninth Circuit's decision disregards the effect that "partially counting" out-of-precinct ballots will have on these benefits—it eliminates them. No longer will Maricopa County elections officials be able to predict how many voters will use a particular voting location based on geography, because voters who are most interested in voting for top-of-the-ticket races (like president) will be able to vote anywhere. This anticipated voter behavior will lead to unpredictable increased wait times in some—perhaps many—locations.[7]

Worse, voters casting their ballots out-of-precinct will not receive ballots for the legislative and local election contests for which they are eligible to vote. Voters already have a vote-from-anywhere option—vote-by-mail. The decision thus complicates in-person voting and effectively abolishes precinct-based voting without meaningfully increasing the opportunity to cast a ballot in the location of the voter's choice.

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[7] Maricopa County's explanation of the "vote center" model in Section I.C. of this Brief illustrates the trade-off between on-demand ballot printing and the predictability of geographically-defined precinct-based voting.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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