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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Respondents boldly propose that the invalidation of two prevalent, commonsense state election provisions does not warrant review. Against authority and consensus, respondents also dispute the well-acknowledged split as to VRA Section 2 and whether there is a proper petitioner here.

These are mere makeweights. The divided en banc decision could hardly be more consequential. One provision here tracks the bipartisan Carter-Baker Commission's recommendation. And Arizona has one of the country's most open and accessible voting systems, providing 27 days to cast an in-person or mailed ballot. Yet the majority applied an untenably broad reading of Section 2 to reverse a post-trial judgment in the State's favor. As for the split, courts, policymakers, and academics overwhelmingly agree there is a divide (the Seventh and Eleventh Circuits each confirmed this in the past month). And this is an ideal vehicle for resolving it, especially as the State itself is a petitioner after becoming a party in the en banc proceedings over the very same protests respondents now raise.

Only this Court can clarify this growing area of law, which is vital to American democracy. And there is urgency to this opportunity given the history of these issues avoiding the Court's review even as state laws fall in the lower courts.

ARGUMENT

I. The Questions Here Are Far-Reaching And Of Exceptional Importance

As the petition well explained, the decision below presents legal questions of exceptional importance by interpreting Section 2 to upend widespread, commonsense election provisions. Pet. 14-26. "Decisions invalidating … state statutes (particularly where the statutes are representative of those in other states), are ordinarily sufficiently important to warrant Supreme Court review[.]" Supreme Court Practice § 6.31(b) (11th ed. 2019). Moreover, the Court has made plain that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as 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.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This case indisputably presents both of these concerns, as respondents do not challenge the provisions' typicality or the importance of state election regulation.

Nor can respondents avoid the consequences of the majority's expansive legal reasoning by portraying the en banc opinion as being fact-bound, with limited reach to other States' provisions. This elides the ten-day trial, the litany of findings that supported the judgment for the State, and the appellate majority's acceptance of those findings as part of its legal reasoning on appeal. It also ignores the bevy of amici that highlight the opinion's consequences and the need for the Court's guidance.

A. The Ninth Circuit Majority Invalidated Common Election Measures Despite Trial Conclusions Favoring The State

Respondents repeat that the decision here is "fact-intensive," *e.g.*, Hobbs-BIO 20, without properly acknowledging that the district court made factual findings in the State's favor in the course of rejecting all of the DNC's claims after a ten-day trial, Pet.App. 393-405. That record means that the majority's legal analysis is not fact-bound, but rather will apply to myriad other election regulations.

The factual record points in one direction—in favor of the State and its open and accessible voting system. *See, e.g.*, Pet. 4, 8-11, 17; *see also* Purcell Amicus 13. For example, the district court found that roughly 99 percent of minorities and 99.5 percent of non-minorities voted in the correct precinct in the 2016 general election; there was "no evidence" that "precincts tend to be located in areas where it would be more difficult for minority voters to find them"; and "the overall number of provisional ballots … has consistently declined," with only 0.15% of 2,661,497 total votes cast in the wrong precinct in the 2016 general election. Pet.App. 444-445, 480, 483; *see also* Pet.App. 331 n.31.

Similarly, the district court found that "even under a generous interpretation of the [nonstatistical] evidence, the vast majority of voters who choose to vote early by mail do not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions"; "even among socioeconomically disadvantaged voters, most do not use ballot collection services"; and "H.B. 2023 was not enacted with a racially discriminatory purpose" or

out of "a desire to suppress minority voters"—although some proponents may have acted out of "partisan motives" or "a misinformed belief that ballot collection fraud was occurring," "the majority … were 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." Pet.App. 419, 478, 497, 504.

B. The Appellate Outcome Turned On The Legal Test, Not New Fact Finding

As the petition explained, faced with this record, the appellate majority adopted substantive legal standards, including statutory and constitutional analysis, that reach far beyond this case. Pet. 21-26. Undercutting its effort to diminish the importance of these legal standards, the DNC acknowledges that all the majority required for an actionable "burden" under Section 2 was an effect on "thousands of minority voters" out of millions of votes cast (the "more than a de minimis" standard in action). DNC-BIO 10. The DNC contends this low bar merely "served as a predicate to [the majority] proceeding to step 2 of the test." DNC-BIO 10. But as one academic recently confirmed, the outcome of the crucial "discriminatory burden" step is dispositive—it is a practically perfect predictor of ultimate Section 2 liability. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1592 (2019); *see also* Ohio Amicus 14.

The sweeping implications of the majority's reasoning are confirmed by the way the majority flipped the trial result without disputing the factual findings in the district court's careful, 83-page opinion. The majority concluded that the district court correctly

found that the percentage of out-of-precinct ballots fell from 0.47% in 2012 to 0.15% in 2016, but erred by looking at that number in comparison to the total number of ballots cast, not just those cast in-person. Pet.App. 43-44. It also concluded that the district court properly noted the limited evidence of third-party ballot collection, but erred in its legal analysis of that evidence because "[n]o better evidence was required to establish that large and disproportionate numbers of early ballots were collected from minority voters." Pet.App. 86.

In applying the Senate Factors, the majority likewise flipped the district court's conclusions based on a disagreement over whether the factors were met by the facts the district court found, without disputing the district court's factual findings themselves. *See, e.g.*, Pet.App. 70-71 (district court correctly "recognized Arizona's history" but improperly "minimiz[ed]" factor's strength); Pet.App. 76 (district court "recognized … racial disparity in elected officials but minimized its importance.").

This was also the approach to discriminatory intent, which produced a bare, 6-5 majority holding that the whole legislature acted with discriminatory intent due to a single legislator's supposed motivations. The majority's ultimate appellate conclusion turned on the adoption of the "cat's paw" theory from employment law and did not upend the subsidiary district court factual findings. For example, the majority accepted the district court's finding (Pet.App. 497) that most of the legislative proponents were sincere in their belief that the law "was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." *See, e.g.*, Pet.App. 102 (acknowledging sincere non-race-based belief).

Respondents acknowledge that the majority's decision was based on legal rather than factual disagreements with the district court. Secretary Hobbs notes that the majority held the out-of-precinct policy to violate Section 2 by "[r]elying on the district court's factual findings but disagreeing with its ultimate conclusion." Hobbs-BIO 7. The DNC likewise notes that the out-of-precinct holding was "based wholly on findings made or credited by the district court," and the ballot-collection holding was "based on the district court's fact finding." DNC-BIO 9, 15. And the DNC agrees that the discriminatory intent holding came after the majority "accepted almost every one of [the] district court's factual findings and inferences." DNC-BIO 39.

C. Amici—Including Public Officials From Over Twenty States In Eight Circuits—Confirm The Questions Are Important And Far-Reaching

Respondents ignore the fourteen amicus briefs urging review here. States, U.S. Senators, state legislative leaders, and state Secretaries of State filed briefs, as did public interest organizations.

Amici consistently confirm the importance of the questions here and the far-reaching nature of the majority's extreme holdings. For example, the U.S. Senators detail how the majority's Section 2 interpretation "threatens many legitimate time, place, and manner voting laws across the country," including absentee voting, precinct voting, early voting, straight-ticket voting, and durational residency requirements. Senators Amicus 10-15.

Amici also prominently feature pleas for the Court's guidance so the necessary task of election

regulation and administration can proceed without the current cloud of doubt stemming from sweeping decisions like the one below. For example, state legislative leaders (all from circuits with no controlling vote-denial precedent) emphasized that "[s]tate legislators need the Court's guidance concerning the scope of vote denial claims under Section 2," and emphasized the threat stemming from the discriminatory intent holding here, with its novel importation of the "cat's paw" doctrine from employment law. Haahr Amicus 5, 18-24. State Secretaries of State similarly emphasized that "election officials are unable to navigate new problems with new solutions without fear of violating the law," and so need "clarity on [Section 2] to effectively regulate elections within their States and ensure stability in the process." Adams Amicus 5.

* * *

At bottom, respondents present all Section 2 vote denial cases as fact-specific and unworthy of the Court's review. That is a deeply unsettling (and wrong) proposition, especially given the scope of the majority's substantive legal analysis here. As the State has demonstrated (and the amici confirm), the majority's decision reaches far beyond the facts here—it invalidated multiple provisions of state law based on an extreme reading of Section 2 notwithstanding favorable factual findings in favor of the State that came after a ten-day trial (and a State win on all claims). This is precisely the type of case that warrants the Court's review.

II. Respondents Cannot Paper Over The Well-Acknowledged Split

As the petition detailed, there is a strong consensus that (1) "the circuits are intractably divided over the core question highlighted by the United States: how to determine whether a provision produces an unlawful 'discriminatory burden' as opposed to a mere disparate inconvenience," and (2) "only this Court can resolve that split." Pet. 27-33.

In an unsuccessful attempt to paper over this split, respondents note that courts have generally adopted a two-part framework for Section 2 vote denial cases, and most courts quote Section 2's operative language in setting forth this framework. *See, e.g.*, Hobbs-BIO 17. Respondents also attempt to downplay the majority's aggressive approach to "discriminatory burden" by emphasizing that the "totality of the circumstances" is eventually taken into account as part of the Senate Factor analysis (though this fails to acknowledge that the "discriminatory burden" question is dispositive in practice (*supra* 4)). *See, e.g.*, DNC-BIO 28.

But courts and commentators agree that there is a fundamental divide over how to adjudicate these Section 2 vote denial claims. *See*, *e.g.*, Pet. 26-27. As one academic recently put it in the Yale Law Journal: "the emerging consensus about the test's form masks a number of fierce disagreements about its application"; "section 2 vote denial law is much more unsettled than its placid surface suggests." Stephanopoulos, *supra* at 1580.

Amici reinforce this. For example, Ohio, leading seventeen States, explains that while "all courts require litigants to show that the challenged laws dis-

parately impact minority voters," "they disagree regarding what this showing entails." Ohio Amicus 3; *see also id.* 14-16 (detailing split, including "key disagreement" concerning "what it takes to prove a discriminatory burden"). So too state legislative leaders from across the country, who highlight the same core divide over what showing is required as to voting opportunity. *See* Haahr Amicus 11-15. And also state Secretaries of State. *See* Adams Amicus 1 ("The Courts of Appeals have split over the standard for proving a discriminatory burden under the Act.").

And respondents' core claim of circuit consensus on the framework is belied by reality, as recent cases illustrate. In *Greater Birmingham Ministries*, the Eleventh Circuit rejected application of *Gingles* and the Senate Factors for vote denial claims. *See* --- F.3d ---, 2020 WL 4185801, *24-26 (11th Cir. July 21, 2020). And in *Luft v. Evers*, the Seventh Circuit confirmed again that it has not adopted the "two-part test … adopted by the Fourth and Sixth Circuits." 963 F.3d 665, 672 (7th Cir. 2020). Instead, as the Petition explained, the Seventh Circuit remains committed to looking at equality of opportunity rather than being satisfied by a mere disparate outcome alongside historical analysis. Pet. 27-28; *Luft*, 963 F.3d at 672; *Frank v. Walker*, 768 F.3d 744, 752-754 (7th Cir. 2014).

III. This Is An Exemplary Vehicle

As the petition noted, this is a clear opportunity to address crucial voting questions for the first time. Pet. 3, 34-35. The record is exhaustively developed, including through the United States' participation. The State itself is a petitioner, having become a party before the en banc Ninth Circuit. And the challenged provisions have not been materially altered.

As one amicus emphasized, the Court should not pass over this opportunity given the way these important issues have previously evaded the Court. *See* Honest-Elections Amicus 4-9. Respondents' untethered vehicle arguments certainly offer no compelling basis to do so.

A. Respondents Cannot Reasonably Dispute Standing When The Ninth Circuit Made The State Itself A Party To The Appeal

Standing is simple—the State is a petitioner after becoming a party in the Ninth Circuit. Pet.App. 638-639. The State is represented by its Attorney General, who is empowered under Arizona law to represent the State in federal court. *See* A.R.S. § 41-193(A)(3); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 51 n.4 (1997) ("Under Arizona law, the State Attorney General represents the State in federal court." (citing 41-193(A)(3)).

Respondents ignore that the Ninth Circuit already adjudicated who speaks for the State in this case. Respondents pressed the same points in opposing the State's motion to intervene. No. 18-15845, Dkts. 132, 133 (9th Cir. Mar. 10, 2020). But the points failed, the State's motion was granted (Pet.App. 638-639), and the State's presence eviscerates any standing

points respondents recycle now in a last-ditch effort to muddy the waters.[1]

In addition to the State's dispositive presence, General Brnovich independently has adequate standing to seek review of the decision as to *both* provisions. Neither respondent challenges his standing to defend the ballot-collection law. And as to the out-of-precinct policy, respondents critically fail to recognize that Secretary Hobbs does not have complete control over the policy and General Brnovich is pursuing his own independent interests here as an elected state official. *See* No. 18-15845, Dkt. 134 (9th Cir. March 19, 2020) (out-of-precinct policy derives from statute; further, AG is tasked with enforcing EPM provisions like out-of-precinct policy and plays dispositive role in EPM's issuance). Moreover, the Arizona case respondents rely on (rejected by the Ninth Circuit below) speaks at most to the AG's powers to file a state-court appeal on behalf of the Secretary over her objection, which is far afield from the present federal proceedings under an amended statutory scheme with each elected official proceeding with their own counsel. *See id.*

B. The Discriminatory Intent Holding Is No Hurdle To Review

The bare, 6-5 en banc majority's discriminatory intent holding departed so far from the accepted and usual course of judicial proceedings that it warrants certiorari on its own. Pet. 20, 24-26. Indeed, under-

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[1] The intervention decision tracks other recent instances when the State, through General Brnovich, has been granted federal court intervention to defend election measures when Secretary Hobbs demurred. *See, e.g.*, *Miracle v. Hobbs*, No. 19-17513, Dkt. 45 (9th Cir. Feb. 25, 2020).

signed found only one other voting case in which a circuit reversed a district court's finding of no discriminatory intent: *North Carolina NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

There are multiple independent failings in the majority's discriminatory intent analysis: the majority contravened the appropriate standard of review in reversing the district court, improperly relied on the lack of direct evidence of ballot collection fraud as an indicator of racial animus (contra *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008)), failed to distinguish racial from partisan motivations, and imported novel liability theories from other legal contexts in order to cover for the paucity of intent evidence. Pet. 24-26.

For present purposes, however, it is most pertinent that the 6-5 majority committed the precise type of error that led the Court to grant and reverse in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). As *Anderson* explains, a reviewing court is not in position to reverse the district court's factual findings as to discriminatory intent "simply because it is convinced that it would have decided the case differently"; "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it." 470 U.S. at 573-574. Yet, as the dissenters explain, "[t]he majority … fails to offer any basis—let alone a convincing one—for the conclusion that it must reach in order to reverse the decision of the district court: that the district court committed clear error in its factual findings." Pet.App. 142.

Here, as to discriminatory intent, the Court need only follow *Anderson* and hold that: "When the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous." 470 U.S. at 577.

CONCLUSION

The Court should grant the State's petition.

July 28, 2020

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