No. 19-1257

IN THE

Supreme Court of the United States

MARK BRNOVICH, 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

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

As part of its election integrity mission, Judicial Watch has a substantial interest in the proper enforcement of Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301(a) and (b). After this Court's decision in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), upholding Indiana's voter identification law, election integrity laws, like Arizona's laws here, have been increasingly subject to challenge under Section 2 of the VRA.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this amici curiae brief.

briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici have submitted several briefs before district courts, courts of appeals, and this Court, regarding the proper role of Section 2 in vote denial cases. *See* Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation, *Ohio Democratic Party v. Husted*, No. 16-3561, Dkt. Entry 43 (6th Cir.) (Section 2 challenge to Ohio's early voting policy); *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (No. 16-833) (Section 2 challenge to North Carolina election laws). Since courts of appeals have gone different ways on the issue, including the Ninth Circuit here, this Court's intervention is desperately needed.

For the foregoing reasons, amici respectfully request this Court grant petitioners' writ of certiorari.

RELEVANT FEDERAL STATUTE

Section 2 of the VRA, as amended in 1982, provides,

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in

> contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection.
>
> (b) A violation of subsection (a) 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 class of citizens protected by subsection (a) 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*: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. Section 10301 (emphasis added).

SUMMARY OF ARGUMENT

In this brief, the arguments presented are focused upon Plaintiffs' statutory claims under the Voting Rights Act (VRA) that arise under Section 2's discriminatory results standard.

In this case, Plaintiffs challenged two of Arizona's neutral regulations designed to protect the integrity of its elections: restrictions on "out-of-

precinct" (OOP) voting and the third-party collection and delivery of early ballots. Plaintiffs alleged a host of violations of federal statutory and constitutional provisions, including violations of both the discriminatory results and intent standards of Section 2 of the VRA. After a 10-day bench trial in which seven expert witnesses and thirty-three lay witnesses were heard, the district court ruled in favor of Arizona on all claims. *Democratic Nat'l Comm. v. Reagan,* 329 F. Supp. 3d 824, 833-38 (D. Ariz. 2018). The Ninth Circuit panel affirmed. *Democratic Nat'l Comm. v. Reagan,* 904 F.3d 686 (9th Cir. 2018).

But the Ninth Circuit reversed. In a sharply divided en banc decision, it found that Arizona's OOP and third-party ballot collection laws were enacted with discriminatory purpose and had discriminatory results, in violation of Section 2. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (*Hobbs*). Instead of analyzing whether Arizona's election laws *caused* less opportunity to participate in the political process, the Ninth Circuit adopted the faulty argument that disparate impact plus Senate Factor evidence is sufficient to show a Section 2 violation.

In applying Section 2's results standard in vote denial cases, courts have developed a two-step analysis. First, courts ask whether the evidence indicates that the challenged voting procedures have *caused* minority voters to have "less opportunity to participate in the political process and to elect representatives of their choice." Plaintiffs utterly failed to adduce evidence that satisfied this Step One

requirement of causation, *i.e.*, that the challenged voting procedure *caused* minorities to have less opportunity to participate in the political process and to elect representatives of their choice.

Instead, Plaintiffs showed Arizona's laws had a disparate impact upon minority voters in comparison to white voters. That is to say, the evidence showed that more minorities than whites voted OOP and whites relied less on third parties to collect and deliver their early ballots than non-whites. But in a Section 2 "results" case, disparate impact alone is *not* sufficient to show a violation. In light of this failure of proof, Plaintiffs in this case did not satisfy the Step One causation requirement, and because of this, their Section 2 discriminatory results claims must fail.

The Ninth Circuit erred when it proceeded to the next step of the Section 2 analysis, determining whether the Senate Factors provide evidence of discriminatory results. In a Section 2 "results" case, courts may only look to the Senate Factors if they first find causation. But the Ninth Circuit strayed far from this two-step process by inquiring whether there was a relationship between the challenged procedures and the social and historical conditions that are described in the Senate Factors without first finding causation. In doing so, the en banc majority determined that Senate Factors, weighed in the "totality of the circumstances," favor Plaintiffs, and then held that the evidence of disparate impact of the challenged procedures *plus* Senate Factor evidence proved that the challenged procedures violated Section 2's results standard.

The Ninth Circuit's holding is in conflict with several circuits on plaintiffs' burden of proof to show a violation of Section 2's results standard, and the method of doing so. Specifically, these conflicts concern whether plaintiffs are first required to prove causation and the analysis courts must use in weighing the Senate Factors. The Court's intervention is needed.

ARGUMENT

THE NINTH CIRCUIT ERRED BECAUSE ITS FINDINGS OF DISCRIMINATORY RESULTS UNDER SECTION 2 OF THE VRA WERE NOT SUPPORTED BY EVIDENCE THAT THE CHALLENGED VOTING PROCEDURES CAUSED RACIAL MINORITIES TO HAVE LESS OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE.

I. Courts Use A Two-Step Framework In Analyzing Whether A Section 2 Results Claim Has Been Proven.

In determining whether a voting practice or procedure violates Section 2's results standard, courts have developed a two-step analysis. *Hobbs*, 948 F.3d at 1012 (collecting cases). "[T]he first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-38 (6th

Cir. 2016); *see also Chisom v. Roemer,* 501 U.S. 380, 397 (1991). Plaintiffs must show a causal connection between the challenged voting practice and a prohibited discriminatory result. *Hobbs*, 948 F.3d at 1012. Then, and only then, should the court inquire into whether the discriminatory result is linked to "social and historic conditions," set forth in the Senate Factors (S. Rep. No. 97-417) at 28-29 (1982). *Hobbs*, 948 F.3d at 1012-14. If plaintiffs do not carry their burden in showing causation, courts need *not* proceed to analyze the Senate Factors under the "totality of the circumstances." *Id. See also, Husted*, 834 F.3d at 638 ("If this first element is met, the second step comes into play.")

In this case the Ninth Circuit en banc erred in not correctly applying this two-step approach. *Hobbs*, 948 F.3d at 1012. The court correctly noted the first step is to ask whether "as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)). If it is determined that the challenged practice causes a lack of equal opportunity for minorities, courts proceed to Step Two and inquire into whether "there is a relationship between the challenged 'standard, practice, or procedure,' . . . and 'social and historical conditions'" as described in the Senate Factors. *Id.* at 1012-14; *see also* (S. Rep. No. 97-417) at 28-29 (1982).[2]

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[2] In Judge O'Scannlain's dissenting opinion he states, "[t]hese [Senate] factors—and the majority's lengthy history lesson . . . simply have no bearing on this case. Indeed, . . . [these portions] of the majority's opinion may properly be ignored as

However, if it is determined that Step One has not been satisfied, courts do not proceed to Step Two and judgment must be entered for defendants. *Hobbs,* 948 F.3d at 1012. The en banc majority acknowledged the appropriateness of using the two-step analysis here, but then failed, as described in detail below, to require in Step One specific evidence showing that minorities, as a result of the challenged procedures, had "less opportunity to participate" and "elect representatives of their choice." *Id.* at 1012-14, 1043.

II. There Are Substantial Conflicts Within and Among The Circuits Regarding The Appropriate Way To Determine Whether The Two-Step Test Has Been Satisfied.

In the seminal case of *Thornburg v. Gingles*, this Court made clear that to prevail in a discriminatory results claim under Section 2, it is necessary for plaintiffs to prove that because of the challenged voting procedure, minority voters are "experienc[ing] substantial difficulty electing representatives of their choice." 478 U.S. at 48 n.15. Various courts have interpreted the Section 2 results standard in different ways.

In the Sixth Circuit, the proper evidentiary requirement was applied in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). There, the plaintiffs challenged Ohio's rule to reduce early voting

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irrelevant" because Plaintiffs did not satisfy Step One. *Hobbs,* 948 F.3d at 1057.

days and to eliminate same day registration. *Id.* at 624. African Americans voted during the earlier voting days and used same day registration "at a rate higher than other voters." *Id.* at 627-28. The Sixth Circuit noted that Section 2 requires "proof that the challenged practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate." *Id.* at 637. Then it ruled that the challenged procedures in *Husted* did not "caus[e] racial inequality in the opportunity to vote." *Id.* at 638, citing *Gingles,* 478 U.S. at 43-47. Without there being a difference in "opportunity," the "existence of a disparate impact" in the rate at which minorities and whites vote cannot "establish the sort of injury that is cognizable and remediable under Section 2." *Id.* at 637. (citation omitted)

Further, in its 2016 opinion in *Husted* the Sixth Circuit made abundantly clear what is *not* required for a Section 2 results analysis. The 2016 *Husted* court was critical of the Section 2 analysis in the vacated 2014 *Husted* decision relied on by the Ninth Circuit's en banc majority.[3] *Husted,* 834 F.3d at 638-

[3] To be clear, the en banc majority relied on the decision reported at *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014). The injunction obtained there was stayed by this Court. *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014). It was then vacated in *Ohio State Conference of NAACP v. Husted,* 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014). This vacated case was cited numerous times in the en banc majority opinion as precedent for how to determine whether the Section 2 results test has been satisfied. *See Hobbs*, 948 F.3d at 1012, 1013-14, 1017, 1033. However, the controlling law in the Sixth Circuit, as now set out in *Ohio Democratic Party*

40. More specifically, it noted that the 2014 *Husted* opinion's use of the Senate Factors

> could be erroneously misunderstood to mean that an alleged disparate impact that is linked to social and historical conditions make out a Section 2 violation . . . [I]f the second step is divorced from the first step requirement of causal contribution by the challenged standard or practice itself, it is incompatible with the text of Section 2 and incongruous with Supreme Court precedent.

Id. at 638. In light of this warning by the 2016 *Husted* court, it is particularly troubling that the en banc majority in *Hobbs* relied exclusively upon the 2014 *Husted* opinion while neglecting to mention the 2016 *Husted* opinion at all.

The Seventh Circuit applied the same causation requirement in *Frank v. Walker,* 768 F.3d 744 (7th Cir. 2014). The court there found that plaintiffs failed to prove their claim that Wisconsin's voter ID law had a discriminatory result on minority voters. *Id.* at 752. In doing so *Frank* reasoned that the fact that minorities "do not get photo IDs at the same frequency as whites" does not show unequal voter *opportunity,* only unequal outcomes. *Id.* at 753. The court noted that the Section 2 results standard

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v. Husted, 834 F.3d 620 (6th Cir. 2016), is not referenced at all in the majority opinion, and it is the case upon which amici curiae rely.

"does not condemn a voting practice just because it has a disparate effect." *Id.*

The Fourth Circuit, like *Hobbs,* has moved away from requiring causation to prove a Section 2 results claim and appears to be in intra-circuit conflict on this central point. In *League of Women Voters (LWV) of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), plaintiffs challenged North Carolina's prohibition against counting OOP ballots on the grounds that it violated the Section 2 results standard. *Id.* at 245. In reversing the district court's denial of plaintiffs' motion for preliminary injunction, the Fourth Circuit did *not* require proof that North Carolina's OOP policy caused minorities to have "less opportunity to participate" and "to elect representatives of their choice." *Id.* at 245, 248-49. Instead, the court applied a disparate impact analysis in conjunction with the Senate Factor evidence to support a Section 2 results claim. *Id.* at 243, 245.[4] This approach is the same analysis used by the en banc majority here (*i.e.*, disparate impact plus proof of Senate Factors equals discriminatory results). *Hobbs*, 948 F.3d at 1012-14, 1043. The text of Section

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[4] Importantly, the en banc majority in this case understood *LWV* to strike "down a state statute that would have prevented the counting of OOP ballots . . . *without inquiring into whether the number of affected ballots was likely to affect election outcomes*." *Hobbs*, 948 F.3d at 1043 (emphasis added). By referring to this language in *LWV* as the standard in Section 2 "results" cases, the en banc majority clearly showed that, in its reliance upon *LWV*, it *did not require* Plaintiffs in this case to show that the challenged procedures, including the OOP rule, caused minority voters not to be able to participate equally and elect representatives of choice. *Id.* at 1043.

2 and *Gingles* does not authorize disparate impact plus proof of Senate Factors as being sufficient to prove discriminatory results when plaintiffs cannot show that the challenged law causes minorities to have less opportunity to participate in the political process. Quite simply, this approach does not comply with the Step One inquiry used in Section 2 "results" cases.[5]

But two years after *LWV*, the Fourth Circuit went the other way, creating a split within its own circuit. In *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), the court upheld Virginia's voter ID law on the grounds that all Virginia voters were "afforded an equal opportunity to obtain a free voter ID." *Id*. at 600. The fact that "a lower percentage of minorities ha[d] qualifying photo IDs" (*i.e.*, disparate impact) was not deemed by the Fourth Circuit to be sufficient to establish a discriminatory result under Section 2. *Id*. *Lee* held the plaintiffs "simply failed" to prove that the challenged voter ID law caused minorities "less opportunity than others to" vote (*id.* at 598, 600) falling in line with precedents in the Sixth and Seventh Circuits. *See also, Irby v. Va. State Bd. of Elections*, 889 F. 2d 1352, 1358-59 (4th Cir. 1989) (upholding the challenged procedure where the evidence "cast considerable doubt on . . . a causal link between the appointive system and Black underrepresentation").

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[5] Of course, under the two-step analysis, Senate Factor evidence is not relevant in this case because Plaintiffs failed to adduce evidence of causation. *Hobbs*, 948 F.3d at 1057 (O'Scannlain, J. dissenting).

Unlike *Lee* in the Fourth Circuit, *Husted* in 2016 in the Sixth Circuit, and *Frank* in the Seventh Circuit, the Fifth Circuit adopted a different method of analyzing Section 2 violations. In *Veasey v. Abbott,* 830 F.3d 216 (5th Cir. 2016) (en banc), the Fifth Circuit found that the challenged Texas voter ID law "disparately impact[ed]" minority voters. *Id.* at 251, 252. But instead of asking whether the challenged practice *caused* plaintiffs less opportunity to participate, the *Veasey* court analyzed the burden in relation to the "social and historical conditions" of minorities, which is, of course, Senate Factor evidence. *Id.* at 245; *see id.* at 313 (Jones, J. dissenting) ("The majority's opinion fundamentally turns on a statistical disparity in ID possession among different races, but instead of showing that this disparity was *caused* by SB 14 [the voter ID law], the majority relies on socioeconomic and historical conditions as the causes of this disparity.")

In *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), the Ninth Circuit addressed whether Arizona's Proposition 200 that required proof of U.S. citizenship in order to register to vote violated Section 2's results standard. *Id.* at 388. In ruling against plaintiffs in *Gonzalez*, the Ninth Circuit stated, "[A] § 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Id.* at 405, citing *Smith v. Salt River Project Agricultural Improvemen*t *& Power District*, 109 F.3d

586, 595 (9th Cir. 1997) (emphasis added); *see also, Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998) (per curiam); *Gonzalez*, 677 F.3d at 405 ("proof of 'causal connection between the challenged voting procedure and a prohibited discriminatory result' is crucial.") (citation omitted).

The Ninth Circuit's decision in *Hobbs* squarely conflicts with its decisions in *Salt River Project, Ruiz* and *Gonzalez*. One would have thought that, after these three cases, it was clear in the Ninth Circuit that plaintiffs in a Section 2 "results" case had to prove that the challenged voting procedures caused racial minorities to have "less opportunity to participate" and "to elect representatives of their choice." However, the en banc majority in *Hobbs*, while paying lip service to Section 2's statutory language and its own circuit precedents, chose *not* to follow the existing framework for Section 2 vote denial cases. Instead, it followed the reasoning of *Veasey* and *LWV* in holding that disparate impact plus Senate Factor evidence is sufficient to prove discriminatory results for Section 2 claims. 948 F.3d at 1043. To enforce Section 2 in this manner is, in effect, to read the statutory language "less opportunity . . . to participate in the political process and to elect representatives of their choice" out of Section 2.

Clearly, the law regarding a Section 2 results claim in vote denial cases is in a considerable state of confusion.

III. Plaintiffs Failed To Prove That Arizona's Out-of-Precinct (OOP) Rule Caused Minority Voters To Have Less Opportunity To Participate In The Political Process And To Elect Representatives Of Their Choice.

The Arizona law restricting OOP voting is the majority rule in this country. Thirty states have rules that wholly disregard OOP ballots, and twenty states partially count the votes in OOP ballots if the voter was entitled to vote in specific elections on the ballot. *Hobbs*, 948 F.3d at 1031.

Furthermore, the OOP rule affects a very small group of Arizona voters. For example, in 2016 "of those casting ballots in-person on election day, approximately 99% of minority voters and 99.5% of non-minority voters cast their ballots in their assigned precincts." *Hobbs*, 948 F.3d at 1051 (O'Scannlain, J. dissenting). As noted by the en banc majority, one in one hundred minority voters vote OOP, while one in two hundred white voters vote OOP. *Id*. at 1004-05, 1014. Of the very small number of OOP voters, minority voters "were twice as likely as white voters to vote out-of-precinct and not have their votes counted." *Id.* at 1014. (citation omitted).

The fundamental flaw in the en banc majority's conclusion that the OOP rule had a racial result is that the record here contains no statistical or non-statistical evidence showing: (1) which candidates in local and state races in Arizona elections were

preferred by minority voters;[6] (2) the vote margins by which those minority preferred candidates were defeated; and (3) whether the number of minority-cast OOP votes, if counted, was sufficient to have caused the election to go in favor of the minority preferred candidates. Without this type of specific evidence, Plaintiffs utterly failed to carry their burden of showing that minority preferred candidates were defeated because of the rejection of minority cast OOP ballots.

The en banc majority unsuccessfully attempted to fill this vacuum in Plaintiffs' evidence by pointing to numerous other types of evidence, all irrelevant to showing causation. *Hobbs*, 948 F.3d at 1013-16, 1017-31. None of this evidence is a substitute for the non-existent evidence showing that the OOP rule caused minority voters "to have less opportunity to participate" and "to elect representatives of their choice." First, the en banc majority pointed to the fact that "[v]oting in Arizona is racially polarized." *Id.* at 1026.[7] Although admissible in Step Two as Senate

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[6] In *Gingles*, this Court stated that in identifying the minority preferred candidates, it was "crucial to that inquiry" to consider "the correlation between race of voter and the selection of certain candidates." 478 U.S. at 63. Moreover, according to this Court, use of bivariate statistical analysis is appropriate in Section 2 "results" cases to identify candidates preferred by minority voters. *Id.* at 61, 63.

[7] In support thereof, the en banc majority pointed to the district court's finding of polarized voting, *Reagan*, 329 F. Supp. 3d at 876, and to twelve elections in 2008 and 2010 found by an unidentified entity to have been racially polarized. *Id.* at 1027. Furthermore, the majority also noted that election polls taken at the time of the 2016 general election indicated racial

Factor evidence, evidence of racially polarized voting does not prove that the enforcement of the OOP ballot-rejection rule caused minority voters' preferred candidates to be defeated. Those two issues—racially polarized voting and causation—are separate and distinct issues. The majority incorrectly believed that the existence of polarized voting helped answer the causation question, which it does not.

Second, the en banc majority "assumed" the number of OOP ballots that were cast but not counted in the 2016 election [3,709 statewide] were not de minimus, reasoning that minority voters cast twice the number of OOP ballots as white voters. *Hobbs,* 948 F.3d at 1015. If the majority's assumptions are correct, that would mean that in the 2016 election 2,475 minority OOP ballots and 1,234 white OOP ballots were rejected in an election in which 2,661,497 total ballots were cast. *See Reagan,* 329 F. Supp. 3d. at 856. But whether the minority-cast portion of the discarded ballots is deemed de minimus or not misses the point. Even if the minority-cast portion of the 3,709 OOP ballots is more than de minimis, such evidence does not suggest, much less prove, that enforcement of the OOP policy caused minorities not to be able to elect candidates of their choice. Quite simply, even if the adverse impact of the challenged procedure were more than de minimus, this would not be a substitute for the missing causation evidence.

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polarization and that the Arizona Independent Redistricting Commission had found racially polarized voting in one of nine of Arizona's congressional districts and in five of its thirty legislative districts. *Id.*

Third, instead of analyzing how OOP ballot rejections affected Arizona's elections, the en banc majority referred to the 2000 presidential election in Florida. *Hobbs*, 948 F.3d at 1016. This election was the only close election (537 votes) referenced by the majority. *Id.* Clearly, what happened in Florida almost two decades ago has no bearing on Arizona's elections or the two voting procedures challenged in this case. Nothing in this Florida election in any way addresses whether the use of the OOP rule in Arizona elections causes minority voters to have "less opportunity to participate" and "to elect representatives of their choice."

Fourth, the en banc majority pointed to the fact that "minorities make up 44% of Arizona's total population, but they hold 25% of Arizona's elected offices," noting that "it is undisputed that American Indian, Hispanic, and African American citizens are underrepresented in public office in Arizona." *Hobbs* 948 F.3d at 1029. The fact that racial minorities are "underrepresented" in holding Arizona public offices does not aid Plaintiffs in carrying their burden of proving causation, and certainly does not show whether the OOP rule has caused minority-preferred candidates to lose. Accordingly, it would be strange indeed if a statute, such as Section 2, with a specific anti-proportional representation proviso, were construed to mean that underrepresentation of minorities in elected positions could serve as a substitute for the critical causation evidence required to show a Section 2 violation.

The en banc majority erred in finding otherwise.

IV. Plaintiffs Failed To Prove That Arizona's H.B. 2023 Procedure That Restricts Ballot Collection and Delivery By Third Parties Caused Minority Voters To Have Less Opportunity To Participate In The Political Process And To Elect Representatives Of Their Choice.

Prior to 2016, an unknown number of minority voters used the assistance of third parties to collect their early ballots and deliver them to election officials more than white voters did. *Hobbs*, 948 F.3d at 1005, 1006. In 2016, Arizona enacted legislation known as H.B. 2023, which limited third party collection and delivery of early ballots to a "family member, house member, caregiver, United States postal service worker" or other authorized officials. *Id.* at 1048. (O'Scannlain, J. dissenting).

Plaintiffs' attempts to prove that this Arizona procedure restricting collection and delivery of early ballots caused minority-preferred candidates to lose were even less persuasive than their showing regarding the OOP policy. Plaintiffs' evidence on this point consisted almost entirely of testimony that, prior to the enactment of H.B. 2023, "third parties collected a large and disproportionate number of early ballots from minority voters." *Hobbs,* 948 F.3d at 1032. Witnesses "testified . . . to having personally collected, or to having personally witnessed the collection of, thousands of early ballots from minority

voters." *Id.* at 1032. But Plaintiffs provided no evidence of specific numbers of ballots cast with assistance. *Id.* at 1005-06. Importantly, *no* individual voter testified that these ballot-collection and delivery restrictions made it "significantly more difficult to vote." *Id.* at 1055 (O'Scannlain, J. dissenting). "[A]necdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in other ways or would be burdened by having to do so." *Id.*

The en banc majority pointed to no testimonial or documentary evidence comparing the number of early ballots delivered to election officials by third parties before and after enactment of H.B. 2023. The majority, citing only testimonial evidence of a "large and disproportionate number of" assisted early ballots from minority voters, then "found that "[n]o better evidence was required." *Hobbs*, 948 F.3d at 1033. The majority then went on to hold that "H.B. 2023 results in a disparate burden on minority voters," and "that Plaintiffs [had] succeeded at step one of the results test." *Id.* at 1033.

In addition, Plaintiffs made no showing concerning whether the enforcement of the challenged H.B. 2023 restrictions caused minority-preferred candidates to lose elections, an error fatal to Plaintiffs' Section 2 results claim. As Judge O'Scannlain stated in his dissent, quoting *Gingles*, at 48 n.15,[8] "It is obvious that unless minority group

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[8] The en banc majority attempts to diminish the impact of this language in *Gingles* by pointing out that *Gingles* was a vote

members experience *substantial difficulty* electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Hobbs*, 948 F.3d at 1051. Clearly, Plaintiffs in this case did not prove the causation element. They did not show that the ballot-collection policy caused the defeat of any minority-preferred candidates.

By way of example, a persuasive showing that the restrictions of H.B. 2023 were causing minority voters "substantial difficulty" electing their preferred candidates might have included evidence: (1) identifying minority preferred candidates who ran and lost in Arizona elections since the 2016 enactment of H.B. 2023; (2) showing how many minority voters who were entitled to vote in those elections did not vote because of restrictions on third-party assistance; and (3) showing that, if this number of minority voters had cast a ballots for the minority-preferred candidates, those votes would have caused those preferred candidates to win. Without a showing of this kind, plaintiffs in Section 2 results claims cannot carry their burden of proof in Step One.

In the clear language of Section 2, Plaintiffs were required to prove that the restrictions on third-

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dilution case under Section 2, and not a vote denial case as this one is. *Hobbs*, 948 F.3d at 1043-44. However, legal precedents in the Ninth Circuit stand for the proposition that the standards for proving a discriminatory result claim under Section 2 are very similar, if not the same, regardless of whether the case involves a vote denial or a vote dilution claim. *See e.g.*, *Salt River Project*, 109 F.3d at 596 n. 8; and *Gonzalez*, 677 F.3d at 405 n. 32.

party assistance resulted in denying minority voters an "opportunity to participate" and "to elect representatives of their choice." However, in explaining why it found that Plaintiff had satisfied its burden of proof, the en banc majority did not point to any elections in which minority preferred candidates were defeated because of the restrictions in the ballot-collection policy. *Hobbs,* 948 F.3d at 1032-33. *See also, id.* at 1056 ("Thus, from the record, we do not know either the extent to which voters may be burdened by the ballot-collection policy or how many minority voters may be so burdened.") (O'Scannlain. J dissenting).

Importantly, the en banc majority stated that a, "particular connection to statewide office does not exist between H.B. 2023 and election of minorities."[9] *Hobbs,* 948 F.3d at 1035. However, the majority here went on to opine that H.B. 2023 is "likely to have a pronounced effect in rural counties with significant" racial minority populations. *Id.* The majority in *Hobbs* further opined that discriminatory results under Section 2 would more likely occur in counties that "lack reliable" mail and transportation services, "and where a smaller number of votes can have a significant impact on election outcomes." *Id.* Such observations by the en banc majority are not

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[9] The en banc majority's conclusion that H.B. 2023's restrictions do not have a discriminatory result in Arizona's statewide elections has important ramifications for this case. It would mean that, even though the ballot-collection and delivery restrictions are not violative of the Section 2 results standard in statewide elections, Arizona would nevertheless be enjoined from enforcing the restrictions in such elections as well as in local elections.

supported by evidence in the record. Plaintiffs' failures of proof concerning the alleged discriminatory results of H.B. 2023's restrictions cannot be corrected by appellate court conjecture. Accordingly, the majority's speculation about what may occur in smaller counties does not cure Plaintiffs' failure of proof.

Moreover, in its inquiry concerning the legality of H.B. 2023, the en banc majority gave great weight to the fact that "no one has ever found a case of voter fraud connected to third-party ballot collection in Arizona." *Hobbs,* 948 F.3d at 1035. But this misses the mark. In *Crawford,* 553 U.S. at 195-96, this Court rejected a challenge to an Indiana law that required voters to provide a photo ID if voting at the polls. *Id.* In doing so it also rejected the argument that actual evidence of voter fraud was needed to justify a state's decision to enact prophylactic laws aimed at preventing voter fraud:

> The record contains no evidence of any such [in-person voter] fraud actually occurring in Indiana at any time in its history. . . . It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, . . . demonstrate[ing] that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Id. at 194-96. (footnotes omitted)

Crawford went on to recognize that while protecting public confidence in the "legitimacy of representative government" is "closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance." *Id.* at 197. Unregulated collection of third-party ballots can undermine public confidence in the integrity of elections. This is demonstrated by the ballot collection fraud that recently occurred in North Carolina in 2018.[10]

Arizona's interest in preventing voter fraud and protecting public confidence in the electoral process provided two legitimate bases for enacting anti-fraud election regulations, such as H.B. 2023, without any direct evidence that ballot-collection fraud had been committed in the State. The en banc majority's failure to "even mention *Crawford*" in its opinion may indicate that it overlooked *Crawford* and did not "grapple with its consequences on this case." *Hobbs,* 948 F.3d at 1059. (O'Scannlain, J. dissenting). The majority failed to recognize that *Crawford* clearly indicated that states do not have to have evidence of voter fraud to enact prophylactic statutes against fraud. That failure caused the majority to place undue importance on the lack of such evidence in this case. The majority erred in believing that the lack of voter fraud evidence weighed in favor of Plaintiffs'

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[10] *See* "Election Fraud in North Carolina Leads to New Charges for Republican Operative," *The New York Times*, available at https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html.

Section 2 results claims. Certainly, a lack of voter fraud evidence does not replace the evidence that is missing—proof of causation.

The en banc Ninth Circuit erred in finding otherwise.

CONCLUSION

Amici curiae respectfully request that this Court grant Petitioners' writ of certiorari.

Respectfully submitted,

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