The Heritage Foundation

LEGAL MEMORANDUM

No. 276 | DECEMBER 14, 2020

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

Brnovich v. DNC: The Supreme Court Should Correct the Ninth Circuit's Erroneous Decision in Arizona Voting Case

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KEY TAKEAWAYS

Banning vote harvesting and requiring voters to vote in their assigned precincts are traditional, commonsense rules in numerous states that safeguard election integrity.

The Ninth Circuit misapplied Section 2 of the Voting Rights Act and the Fifteenth Amendment when it threw out these provisions in Arizona as discriminatory.

The Supreme Court should reverse the Ninth Circuit, restore these state law requirements, and reiterate the proper method of applying Section 2 and the Fifteenth Amendment.

Introduction

Vote harvesting is the collection of absentee ballots from voters by a third party who then delivers them to election officials. Allowing individuals other than the voter or his immediate family to handle absentee ballots is a recipe for mischief and wrongdoing in elections. Neither voters nor election officials have the means of verifying that the secrecy of the ballot has not been compromised or that ballots submitted by third parties—such as candidates, campaign operatives, party activists, or political consultants—have not been tampered with by the vote harvester. That is why Arizona wisely changed its law in 2016 to ban vote harvesting by certain third parties.

Arizona, as do the majority of states, also requires voters to cast their ballots in the local precinct to which they are assigned based on their residential

address. This is a standard requirement that has been in place for many decades and provides many administrative and other benefits both to election officials and voters. Ballots cast outside a voter's assigned precinct are not counted.

But the U.S. Court of Appeals for the Ninth Circuit misinterpreted Section 2 of the Voting Rights Act (VRA) in *Democratic National Committee v. Hobbs*[1] when it threw out as "discriminatory" the State of Arizona's ban on vote harvesting and its requirement that only votes cast in the resident's assigned precinct would be counted. The Ninth Circuit disregarded the basic rules of appellate review and misapplied the Supreme Court's precedents that establish the standards for finding a violation of Section 2—effectively eliminating the section's causality requirement.

The U.S. Supreme Court has decided to review the case[2] and should reverse this erroneous decision and reject this misapplication of the Voting Rights Act.

Arizona Law on Vote Harvesting and Precinct Voting

This case involves two provisions of Arizona election law that are similar to the election laws of numerous other states. Arizona has an extremely "flexible mixture of early in-person voting, early voting by mail, and traditional, in-person voting at polling places on Election Day."[3] No excuse is needed to vote early or via an absentee ballot, a rule that has been in place for over 25 years, and the voting process starts a little more than a month prior to Election Day.[4]

Vote Harvesting Ban. In 2016, the early voting law was amended to permit only certain individuals other than the voter herself to deliver that voter's completed absentee ballot (specifically, family and household members, caregivers, mail carriers, and election officials).[5] Vote harvesting is not allowed, and any third-party strangers, such as candidates, campaign staffers, party activists, or political consultants, who pick up and deliver a voter's absentee ballot are, under the law, committing a felony.

More than 20 other states have enacted similar bans on vote harvesting because they recognize the risk of giving individuals who have a stake in the outcome of an election unsupervised access to voters, who can then be pressured, intimidated, and coerced, and to their ballots—valuable commodities that can determine the outcome of an election.[6]

In-Precinct Voting. The second provision at issue is one that has been in place in Arizona for at least 50 years: a requirement that for a voter's ballot to be counted, he must cast it in the precinct to which he has been

assigned based on his registered address. Such a system is both routine and practical. According to the district court in this case, "[E]lections involve many different overlapping jurisdictions," and the precinct-based voting requirement "ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote."[7]

The Sixth Circuit explained the benefits of precinct-based voting in 2004 in *Sandusky County Democratic Party v. Blackwell* (rejecting an attack on precinct-based voting under the Help America Vote Act). To wit:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.[8]

In Arizona, if an individual goes to the wrong precinct but insists on voting, he will be issued a provisional ballot as required under both federal and state law.[9] However, that ballot will not be counted by state election officials, putting Arizona "well within the mainstream on this issue," according to the district court.[10]

The Challenge Under the Constitution and the Voting Rights Act

The Democratic National Committee (DNC), Democratic Senatorial Campaign Committee, and the Arizona Democratic Party challenged these provisions in a vote denial (*not* a vote dilution) lawsuit,[11] claiming they violated Section 2 of the Voting Rights Act and the Fifteenth Amendment[12] to the U.S. Constitution because they intentionally discriminated against Hispanic, African American, and Native American voters. They also claimed these provisions violated the First[13] and Fourteenth Amendments[14] by "severely and unjustifiably burdening voting and associational rights."[15]

Section 2 of the VRA bans any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "*results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention" of the protections given to certain language minorities.[16] To establish a violation, a plaintiff must show that

"based on the *totality of circumstances*...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...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."[17]

Vote Dilution. Most Section 2 cases have dealt with vote dilution, for example, in the context of redistricting. However, vote denial claims have increased markedly in recent years. Opponents of state election requirements such as voter identification have tried to use Section 2 to stop such reforms because they apparently believe it is easier to win such a claim under the VRA than under a claim that such requirements are unconstitutional—particularly after the Supreme Court held that Indiana's voter ID requirement did not violate the Constitution.[18]

Although the Supreme Court has dealt with numerous redistricting cases involving vote dilution in the past decade, the Court has never applied the Section 2 standards articulated in prior precedents to a vote denial claim. This makes its ultimate ruling in this case vital in establishing the appropriate legal standards and treatment of vote denial claims in a Section 2 lawsuit.

***Gingles* Test.** In *Thornburg v. Gingles*, the seminal Supreme Court decision outlining how Section 2 should be applied, the Court approved the use of certain factors that must be present to meet the "totality of circumstances" test before a violation of Section 2 can be found.[19] Taken from the Senate Judiciary Committee's majority report on the 1982 amendments to Section 2, the non-exclusive list of "typical factors" for a court to consider when evaluating whether the test has been met includes:

- The extent of any history of official discrimination in the jurisdiction that touched the right of minorities to register, vote, or otherwise participate in the electoral process;

- The extent to which voting in elections is racially polarized;

- The extent to which the jurisdiction has used unusually large election districts, majority vote requirements, anti-single-shot provisions,[20] or other voting practices that may enhance the opportunity for discrimination;

- Whether minority candidates have been denied access to any candidate-slating process;[21]

- The extent to which minorities in the jurisdiction bear the effects of discrimination in education, employment, and health that hinder their ability to participate effectively in the political process;

- Whether political campaigns have been characterized by overt or subtle racial appeals;

- The extent to which minorities have been elected to public office;

- Whether there is a significant lack of responsiveness by elected officials to minorities; and

- Whether the policy behind the use of the voting practice in question is tenuous.[22]

Pursuant to the Court's opinion in *Gingles*, to prove a violation of Section 2, a plaintiff must do more than show that the implementation of a law or practice had a disparate impact on a protected minority group. Rather, the plaintiff must establish that, based on the totality of the circumstances, the disparate impact was generated by one or more of the Senate factors set forth above or other indicia of discrimination that then results in *unequal access* to the political process. The key to this standard is equality of *opportunity*, not equality of *results*.

***Anderson/Burdick* Test.** When it comes to determining whether there has been a violation of the First or Fourteenth Amendments in the voting context, the Supreme Court has established a framework called the *Anderson/Burdick* test, named after the two Supreme Court decisions from which the test is derived, *Burdick v. Takushi*[23] and *Anderson v. Celebrezze*.[24] As the district court in the Arizona case that the High Court will now review correctly noted, under this balancing test:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[25]

District Court Findings

After a 10-day bench trial and after hearing the testimony of dozens of witnesses, the federal district court rejected all claims made by the political challengers, concluding that under the *Anderson/Burdick* test, the ban on vote harvesting and out-of-precinct voting served important regulatory interests and only minimally burdened voters' voting and associational rights. The court also determined that these provisions did not violate Section 2 of the VRA because neither provision was discriminatory.[26]

Precinct Voting. Among other things, the court noted that "at no point has the [U.S. Department of Justice] objected" to Arizona's precinct-voting requirement as discriminatory.[27] Arizona was one of the states covered under Section 5 of the VRA, which required pre-clearance of all voting laws and procedures from certain states and jurisdictions until the coverage formula was struck down by the Supreme Court in 2013 in *Shelby County v. Holder*.[28] Furthermore, despite this being the law in Arizona for 50 years, the plaintiffs "object to it for the first time in this case."[29]

Arizona's refusal to count provisional ballots cast outside a voter's assigned precinct "has no impact on the vast majority of Arizona voters," the court concluded.[30] In the 2008 general election, such ballots constituted only 0.64 percent of all votes cast. In 2012 and 2016, they constituted only 0.47 percent and 0.15 percent of all votes cast, respectively.[31]

The challengers' claim that this refusal "severely burdens" a "small" subset of minority voters was also "unavailing," according to the district court, for "two independent reasons." First, the challengers did not dispute the fact that the biggest reason for out-of-precinct voting was due to the "high rate of residential mobility"—voters moving to another address without updating their registered address—which has nothing to do with race or discriminatory practices by election officials.[32]

Second, the burdens imposed by precinct-based voting that the "[p]laintiffs do not directly challenge" are not "severe" and "merely require[] voters to locate and travel to their assigned precinct, which are ordinary burdens traditionally associated with voting."[33] The court cited surveys showing that no survey respondents reported any difficulty in finding their Arizona precincts; in fact, 94 percent said it was "very easy or somewhat easy to find their polling places." Voters are assigned to polling places "near where they live, and county officials consider access to public transportation when assigning polling places."[34]

Thus, to the extent that the claims are "considered as an indirect challenge to Arizona's strictly enforced precinct-based system, the burden

imposed on voters to find and travel to their assigned precincts is minimal and does not represent a significant increase in the ordinary burdens traditionally associated with voting." Moreover, there are important state regulatory interests since precinct-based voting "serves an important planning function for Arizona counties by helping them estimate the number of voters who may be expected at any particular precinct, which allow for better allocation of resources and personnel," which further helps provide for the "orderly administration of elections" and reductions in "wait times" for voters.[35]

Allowing out-of-precinct voting would also undermine "Arizona's goal of promoting voting for local candidates" since only the votes cast for state and countywide offices would be counted. As the district court said, voters would have "far less incentive to vote in their assigned precincts," and other voters "might incorrectly believe that they can vote in any location and receive the correct ballot." Moreover, requiring election officials to review all out-of-precinct ballots would "impose a significant financial and administrative burden" on election officials.[36] In fact, precinct-based voting "is a quintessential time, place, and manner election regulation" that is well within the constitutional authority of the state and only imposes "minimal burdens" on voters.[37]

When it came to the claims by the challengers under Section 2 of the VRA, the district court noted that "not every disparity between minority and non-minority voters is cognizable under the VRA." No state has "exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." Perfect parity is "unlikely to exist in every aspect of a state's election system," and "unless the VRA is to be interpreted to sweep away all elections regulations, some degree of disproportionality must be tolerable."[38]

The district court cited with approval the Seventh Circuit's 2014 opinion in *Frank v. Walker*, in which the court rejected the notion that:

> If whites are 2 [percent] more likely to register than blacks, then the registration system top to bottom violates §2; and if white turnout on election day is 2 [percent] higher, then the requirement of in-person voting violates §2. Motor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses.... Yet it would be implausible to read §2 as sweeping away almost all registration and voting rules. It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command.[39]

The district court found that because out-of-precinct ballots "represent such a small and ever-decreasing fraction of the overall votes cast in any given election," their "rejection has no meaningfully disparate impact on the opportunities of minority voters to elect their preferred representatives."[40] Moreover, the challengers' own expert admitted that out-of-precinct voting "is concentrated in relatively dense precincts that are disproportionally populated with renters and those who move frequently." While these groups are disproportionally composed of minorities, the challengers were unable to show that Arizona's policy "causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts."[41]

After applying the factors outlined in the *Gingles* decision and evaluating the totality of the circumstances, the district court found that no Section 2 violation had occurred. It noted that while Arizona was covered under the pre-clearance requirements of Section 5 of the VRA, from 1975 to 2013, the U.S. Department of Justice "did not issue any objections to any of its statewide procedures for registration or voting."

While some of the *Gingles* factors were present in Arizona, others were not. But the causation theory advanced by the challengers was "too tenuous to support their VRA claims because, taken to its logical conclusion, virtually any aspect of a state's election regime would be suspect as nearly all costs of voting fall heavier on socioeconomically disadvantaged voters." Such a "loose approach to causation, which potentially would sweep away any aspect of a state's election regime in which there is not perfect racial parity, is inconsistent with the Ninth Circuit's repeated emphasis on the importance of a 'causal connection between the challenged voting practice and a prohibited discriminatory result,'"[42] a causal connection that the Ninth Circuit all but abandoned in its controversial *en banc* decision.

Vote Harvesting. On the issue of banning vote harvesting, the district court concluded that "in fact, the vast majority of Arizona voters are unaffected" by the ban.[43] Even "under a generous interpretation of the 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" the recognized exceptions in the law.[44] Furthermore:

> H.B. 2023 is generally applicable and does not increase the ordinary burdens traditionally associated with voting. The law merely limits who may possess, and therefore return, a voter's early mail ballots. Early voters may return their own ballots, either in-person or by mail, or they may entrust family members, household members, or a caregiver to do the same. Thus, the burden H.B. 2023 imposes is the burden of traveling to a mail box, post office, early ballot

> drop box, any polling or vote center (without waiting in line), or an authorized election official's office, either personally or with the assistance of a statutorily authorized proxy, during a 27-day early voting period.[45]

Thus, "the burden on early voters to return their early mail ballots is less severe than the burden on in-person voters, who must travel to a designated polling place or vote center on Election Day, often necessitating taking time off work and waiting in line." Moreover, the challengers were not claiming that "the more onerous travel required of in-person voters is unconstitutionally burdensome, nor would the law support such an argument."[46]

The fact that the state had eliminated "a preferred or convenient way of returning an early mail ballot" did not constitute a burden on voters. The Constitution does not demand "recognition and accommodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public."[47]

The court also held that there was no violation of associational rights since the ban on vote harvesting does nothing to prevent the challengers from "encouraging, urging, or reminding people to vote, informing and reminding them of relevant election deadlines, helping them fill out early ballots or request special election boards or arranging transportation to on-site early voting locations, post offices, county recorder's offices, or polling places."[48]

Such a law, the court concluded, advances important state regulatory interests. The court adopted Arizona's argument that such a law acts as a "prophylactic measure intended to prevent absentee voter fraud by creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction," while also improving and maintaining "public confidence in election integrity."[49] Even if there is no "direct evidence of ballot collection fraud or widespread public perception that ballot collection undermines election integrity," the state legislature "is not limited to reacting to problems as they occur, nor is it required to base the laws it passes on evidence that would be admissible in court."[50]

Arizona's law, which "closely follows the recommendation of the bipartisan Commission on Federal Election Reform," is "one reasonable way to advance what are otherwise important state regulatory interests"—and thus violates neither the First nor the Fourteenth Amendments.[51]

No Violation of Section 2. The district court also found that banning vote harvesting does not violate Section 2 of the VRA. The Arizona law, the court stated, is facially neutral since it "applies to all Arizonians regardless

of race or color." The challengers were also unable to prove that it disproportionately burdens minority voters because "there are no records of the numbers of people who in past elections, have relied on now-prohibited third parties to collect and return their early mail ballots" and "no quantitative or statistical evidence comparing the proportion that is minority versus nonminority."[52]

The challengers tried to make up for this lack of actual evidence by presenting anecdotal testimony that ballot collection tends to be used more by "communities that lack easy access to secure, outgoing mail services; the elderly, homebound, and disabled; the poor; those who lack reliable transportation; those who work multiple jobs or lack childcare; and less educated voters who are unfamiliar with or more intimidated by the voting process."[53]

Based on this evidence, the court concluded that prior to the enactment of the ban on vote harvesting, "minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." But the terms "more" or "less" are not specific or precise terms and are "an imprecise proxy for disparities in ballot collection use." Considering that the "vast majority of Arizonians, minority and non-minority alike, vote without the assistance of third-parties who would not fall within H.B. 2023's exceptions, it is unlikely that H.B. 2023's limitations on who may collect an early ballot causes a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities."[54]

This ban "does not impose burdens beyond those traditionally associated with voting," and while some voters might prefer ballot collection by a third party, there is no violation of Section 2 because minority voters are not being denied "meaningful access to the political process simply because the law makes it slightly more difficult or inconvenient for a small, yet unquantified subset of voters to return their early ballots."[55]

Finally, after an intense factual review of the legislative history, the district court also denied the challengers' claim under the Fifteenth Amendment that the ban on vote harvesting by unrelated third parties was passed in order to intentionally discriminate against minority voters. In fact, the proponents "repeatedly voiced concerns that mail-in ballots were less secure than in-person voting, and that ballot collection created opportunities for fraud."[56]

Some individual legislators may have been "motivated in part by partisan interests," but "partisan motives are not necessarily racial in nature." Both the Fifteenth Amendment and Section 2 "address racial discrimination, not partisan discrimination."[57] Besides, the court found that "partisan motives did not permeate the entire legislative process. Instead, many proponents

acted to advance facially important interests in bringing early mail ballot security in line with in-person voting security." The legislature was not "motivated by a desire to suppress minority voters."[58]

Ninth Circuit Panel

The district court's opinion was affirmed in 2018 by a three-judge panel of the Ninth Circuit in a two-to-one decision.[59] The majority pointed out that evaluating constitutional and VRA challenges is an "intense[ly] factual inquiry," which is exactly what the district court did in a "thorough and evenhanded [manner], with findings well-supported by the record."[60] It refused to engage in what it called the Democratic National Committee's request that the appellate panel "reweigh and reevaluate the evidence in the record" and "duplicate the role of the lower court." The majority on the panel concluded that the district court's findings were not "clearly erroneous," and it did not "err in identifying and applying the correct legal standards to each of the DNC's claims."[61]

Vote Harvesting. On vote harvesting, the panel majority said that the "DNC's evidence falls far short of the necessary 'quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of [H.B. 2023].'"[62] It also criticized the dissenting judge whose opinion was, according to the majority, based on "throwing out the district court's factual findings, reweighing the evidence, and reaching its own factual conclusions," which is "not only contrary to the most basic principles of appellate review, but is an approach that the Supreme Court has frequently warned us to avoid."[63]

Evidence of Voter Fraud Unnecessary. The dissent also made the basic error of contending that the legislature could not pass such a law without first showing "direct evidence of voter fraud." But that reasoning runs afoul of the Supreme Court's precedent in *Crawford v. Marion County*,[64] in which the Court upheld Indiana's voter ID law despite the lack of evidence of in-person voter fraud. As the panel majority pointed out, "the controlling opinion concluded that the law served Indiana's interest in preventing fraud," and the DNC could not dispute that Arizona's law was similarly a "prophylactic measure intended to prevent absentee voter fraud."[65]

The district court's finding that there was no Section 2 violation was also clearly correct given that the "burden on a protected class of voters is so minimal that it would not give them less opportunity to elect representatives of their choice."[66] The dissent's claim that the "total number of votes affected is not the relevant inquiry" but instead "the proper test is whether

any minority votes are burdened" is a "meritless" argument. A "bare statistical showing" that an "election practice" has a "disproportionate impact on a racial minority does not satisfy the §2 'results' inquiry."[67]

Instead, in order to "determine whether a challenged law will result in members of a class having less opportunity to elect representatives of her choice, a court must necessarily consider the severity and breadth of the law's impacts on the protected class."[68] Here, the majority concluded, the DNC utterly failed to establish that banning vote harvesting would satisfy this requirement.

Precinct-Based Voting. The appellate panel came to the same conclusion on Arizona's refusal to count provisional ballots cast outside a voter's assigned precinct. The panel majority agreed with the district court that the challengers were attacking Arizona's precinct-based voting system. And upon review, it found no error in the findings of the district court that precinct voting is both constitutional and not a violation of Section 2 of the VRA. In fact, Arizona "easily carried its burden" under applicable law "to show that its election practices were reasonably tailored to achieve the State's important regulatory interests" and placed "only the most minimal burden on voters."[69]

En Banc Ninth Circuit

Unfortunately, the reasonable, rational, and entirely justified findings of the district court and the three-judge appellate panel were all tossed out by a closely divided *en banc* Ninth Circuit decision.[70] That opinion misinterpreted and misapplied Section 2, the Fifteenth Amendment, and prior precedents to invalidate both provisions of Arizona law—provisions that are, as Arizona correctly said in its *Petition for a Writ of Certiorari*, "commonplace election administration provisions used by Arizona and dozens of other States to prevent multiple voting, protect against voter intimidation, preserve the secrecy of the ballot, and safeguard election integrity."[71]

In an opinion by Judge William Fletcher, the *en banc* court ruled that not counting out-of-precinct ballots and banning third parties from returning ballots would have a discriminatory impact on minorities in violation of Section 2, and, in addition, that the vote harvesting provision was enacted with discriminatory intent in violation of Section 2 and the Fifteenth Amendment.

Judge Diarmuid O'Scannlain wrote a scathing dissent, joined by Judges Richard Clifton, Jay Bybee, and Consuelo Callahan, charging that the majority drew "factual inferences that the evidence cannot support and misreads

precedent along the way. In so doing, it impermissibly strikes down Arizona's duly enacted policies designed to enforce its precinct-based election system and to regulate third-party collection of early ballots."[72]

Majority Mistakes. The majority's first mistake was "disregarding the critical standard of review."[73] Although it pays lip service to the proper appellate standard, which is to review the district court's conclusions of law *de novo* but to review its findings of fact only for clear error, the majority "does not actually" follow the standard.[74] Its "disregard of such standard and, thus, our appellate role, infects its analysis of each of DNC's claims."[75]

The majority proceeds to do exactly what the Supreme Court has said it cannot do; the "clear error" standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."[76] The majority wrongly overrode the district court's factual finding that neither the precinct voting requirement nor the vote harvesting ban provided less opportunity for minority voters to participate in the political process and elect their candidates of choice, as well as the district court's conclusion that neither of these provisions was related to past social or historical discriminatory practices in Arizona. As the dissent said, under the "appropriately deferential standard" that an appellate court is obligated to provide to a district court, the "DNC cannot prevail even at step one: it has simply failed to show that either policy erects a discriminatory burden."[77]

It seems obvious that the majority did not like either of these provisions from a policy point of view and simply ignored the factual findings they did not like and that did not support their view of how elections should be conducted. How else to explain their conclusion that the precinct-based voting requirement is discriminatory when, as the dissent points out, the district court found that "the overwhelming majority of all voters complied with the precinct-based voting systems during the 2016 election."[78]

Given that fact, "it is difficult to see how the district court's finding could be considered clearly erroneous," particularly when the DNC provided no evidence whatsoever "to suggest that the burden of voting in one's assigned precinct is more significant for minority voters than for non-minority voters."[79] It "cannot be true, as the majority suggests, that simply showing that some number of minority voters' ballots were not counted as a result of an individual policy satisfies step one of the §2 analysis for a facially neutral policy."[80]

In fact, what is "implicit in the majority opinion [is] that *any* facially neutral policy which may result in some statistical disparity is necessarily discriminatory under step one of the §2 inquiry."[81] But that view is

completely inconsistent with the standards established by the Supreme Court in the *Gingles* decision, which requires application of the Senate factors and a showing, based on the totality of the circumstances, that as a result, protected voters have *less of an opportunity to participate* in the electoral process and elect their candidates of choice.

An End Run Around *Gingles*. Thus, what seems to really be going on in this opinion is that the majority is trying to get around the stricter standard of Section 2 as interpreted and applied by the Supreme Court in *Gingles* and to change the stricter standard in Section 2 into the laxer standard in Section 5, which is no longer in operation due to the *Shelby County* decision. Section 5 was an easier standard to establish because a plaintiff challenging a practice or law under that section did not have to prove causality or intentional discrimination against minority voters. Instead, under Section 5, one applied a simple disparate impact standard called "retrogression." The retrogression standard only required a challenger to demonstrate that the status of minority voters affected by a voting change had "retrogressed" when compared to the *status quo* before the change.[82]

This Section 5 approach eliminates the requirement of Section 2 and the "totality of the circumstances" test, as applied by the Supreme Court in *Gingles*, that there must be some causal connection to vote denial or vote dilution on account of race such that the election and voting process is not equally open to minority voters. In other words, under Section 2, you have to show not only that a voting change affected minority voters, but also that, based on the totality of the circumstances, the change resulted in discriminatory treatment of minority voters when compared to other voters.

Vote Harvesting. With regard to the ban on vote harvesting by unrelated third parties, the majority also overrode the district court's extensive factual finding that the "DNC failed to establish at step one that the ballot-collection policy imposed a discriminatory burden on minority voters."[83] This finding was clearly not erroneous given that the DNC could not provide *any* actual numbers or quantitative evidence on how many minority voters might be affected by the policy; instead, it could provide only anecdotal claims that ballot collection disproportionately occurred in minority communities.

Indeed, the DNC did not produce a single witness who claimed that the ballot collection ban "would make it significantly more difficult to vote."[84] Given the inability of the DNC to produce evidence that this ban would in any way prevent minority voters from electing their candidates of choice, the DNC could not even satisfy "its burden at step one of the §2 Voting Rights Act inquiry."[85]

Ignoring Facts. As to the majority's opinion that this provision was passed with discriminatory intent and thus violated the Fifteenth Amendment, it once again had to entirely ignore the detailed factual findings of the district court that the legislature was not motivated "by a desire to suppress minority voters."[86] As Judge O'Scannlain pointed out, the majority failed "to offer any basis—let alone a convincing one" for reversing the decision of the district court."[87]

Two Crucial Errors. As the dissenters noted, the majority made two "crucial errors" in ignoring the district court's "determinations that while some legislators were motivated by partisan concerns, the legislature as a body was motivated by a desire to enact prophylactic measures to prevent voter fraud."[88]

First, the majority failed "to distinguish between *racial* motives and *partisan* motives."[89] The majority "suggests that a legislator motivated by partisan interest to enact a law that disproportionately impacts minorities must necessarily have acted with racially discriminatory intent as well."[90] For a court to hold that partisan interests are synonymous with racial discrimination is a perversion and total misuse of Section 2, yet it has become an increasing problem in Section 2 litigation as more courts refuse to distinguish between the two and equate partisanship with race.[91]

Second, in a mistake that other courts have made[92] and in "defiance of Supreme Court precedent to the contrary," the majority "assumes that a legislature's stated desire to prevent voter fraud must be pretextual when there is no direct evidence of voter fraud in the legislative record."[93] But the Supreme Court specifically *rejected* that argument in the *Crawford* case and held that preventing voter fraud is a "legitimate and important interest" of state government.[94] Yet, as the dissent pointed out, the majority "does not even mention *Crawford*, let alone grapple with its consequences on this case."[95]

In reaching this unsound conclusion, which the majority uses to justify a finding of intentional discrimination under the Fifteenth Amendment, "it provides no support for its inference of pretext where there is a sincere and legitimate interest in addressing a valid concern" over voter fraud. The "majority is unable to locate any discriminatory purpose," but simply "attributes one" to the legislators.[96] It is hard to view this "extraordinary leap in logic" as anything other than the Ninth Circuit refusing to follow and expressing its contempt for Supreme Court precedent with which it disagrees, yet another reason for the Supreme Court to overturn the Ninth Circuit's flawed, defiant decision.

A second dissent was authored by Judge Bybee, and joined by Judges O'Scannlain, Clifton, and Callahan. Bybee emphasized that both Arizona

provisions at issue are the epitome of the "Times, Places and Manner" rules governing federal elections that the Constitution entrusts to state legislatures.[97] Both are "rules of general applicability" that "apply to all voters" regardless of their race or color. Yet rather than "simply recognizing that Arizona has enacted neutral, color-blind rules, the majority has embraced the premise that §2 of the VRA is violated when any minority voter appears to be adversely affected by Arizona's election laws."[98] That view not only violates Supreme Court precedent, but it also "has no limiting principle for identifying a de minimis effect in a facially neutral time, place, or manner rule."[99]

Both rules that the majority throws out, according to Bybee, "have widely-held, well-recognized—even distinguished—pedigrees."[100] The out-of-precinct rule "is a standard feature of American democracy" that is followed by "twenty-six states, the District of Columbia, and three U.S. territories."[101] The ban on vote harvesting by unrelated third parties is "substantially similar to the laws in effect in many other states" and "follows precisely the recommendation of the bi-partisan Carter-Baker Commission on Federal Election Reform."[102]

As Bybee says in the conclusion of his dissent,

> As citizens of a democratic republic, we understand intuitively that we have a legal right and a moral duty to cast a ballot in free elections. The states have long had the power to fashion the rules by which its citizens vote for their national, state, and local officials. Once we consider that "totality of the circumstances" must take account of long-held, widely adopted measures, we must conclude that Arizona's time, place, and manner rules are well within our American democratic-republican tradition. Nothing in the Voting Rights Act make "evenhanded restrictions that protect the integrity and reliability of the electoral process" invidious.[103]

Supreme Court Review

The Supreme Court ought to overturn the Ninth Circuit's *en banc* decision and clarify that any violation of Section 2 of the VRA cannot be based simply on disparate impact or partisan motivations unrelated to race. The Ninth Circuit cannot be allowed to ignore the requirements outlined in the statute and the *Gingles* decision that require a causal connection between a state election procedure and the denial or dilution of an individual's vote on account of race or color.

In contrast to the Ninth Circuit, the Fourth, Fifth, Sixth, and Seventh Circuits have all followed this binding precedent, as well as the statute,

and have held that an election law that may have a disparate impact on a particular group is not discriminatory under Section 2 unless members of the group have less opportunity than other voters to participate in the political process.[104]

Furthermore, courts should not be abusing and misapplying Section 2 to interfere in the common, traditional election rules and procedures that states have the authority under the Constitution to implement to protect both the ability of eligible individuals to vote and the integrity of the election process. As the Supreme Court said in the *Shelby County* decision, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."[105]

Furthermore, under our federalist structure, "States retain broad autonomy in structuring their governments and pursuing legislative objections."[106] This includes structuring the rules for precinct-based voting and banning vote harvesting by third parties (who may have a stake in the outcome of the election), both reasonable rules that have been followed by a large number of states for decades.

As just one example, a book on election administration *published 86 years ago* noted that it is "the well-established practice in nearly every state to divide the county or city into a number of geographical districts for the purpose of holding elections. Each elector is required to vote at the polling place of his own precinct, which by custom is ordinarily located within the precinct, and in cities, within a few blocks of his residence."[107] To suddenly rule that such a requirement is discriminatory and that ballots cast outside a voter's precinct must be counted is quite a stretch.

Disparate Impact and Constitutionality. Furthermore, by ignoring precedent and converting Section 2 into a disparate impact standard, the Ninth Circuit is raising issues over the constitutionality of Section 2. Congress passed the Voting Rights Act pursuant to its authority under the Fifteenth Amendment, which provides that the right of citizens to vote shall not be "denied or abridged" by a state "on *account* of race, color, or previous condition of servitude."[108] As the Supreme Court said just five years after the amendment was ratified, the right it confers is the "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."[109]

Thus, the Fifteenth Amendment bans state election laws that intentionally or purposefully discriminate on the basis of race. It does not prohibit racially neutral, non-discriminatory election practices that may have a disparate impact. That is why the language and text of Section 2, as well as the Supreme Court's application of it in *Gingles*, requires causality between

an election practice and actual denial or dilution of a vote on account of race, i.e., disparate treatment.

A Dubious Legal Standard. The Ninth Circuit is creating a dubious legal standard that jeopardizes almost all presumptively valid state election laws, since every election rule and procedure will burden—impact—someone. Such an approach would convert the VRA into a one-way federal ratchet in which no state could ever change any of its election laws for fear of negatively impacting an individual voter or subset of voters, which liberal advocates in today's toxic political environment would no doubt label as "voter suppression." It would, in essence, establish a one-minority-voter-veto rule.

Under this twisted version of Section 2, many routine election law practices such as requiring pre-registration of voters, standard list maintenance procedures, witness requirements on absentee ballots, verification of citizenship of registered voters, and voter identification requirements could be targeted as discriminatory based simply on statistical disparities that have no causal connection to any actual discriminatory intent, treatment, or application.

Standards of Appellate Review. Finally, the Ninth Circuit defied the Supreme Court's standards on appellate review—as well as its precedents on the authority of state legislatures to pass prophylactic measures—when it ignored the factual findings of the district court and created out of whole cloth the false claim that the ban on vote harvesting was passed with discriminatory intent in violation of the Fifteenth Amendment. The Supreme Court should not let such open defiance by an appellate court stand.

As 17 states said in their amicus brief filed with the Supreme Court, this case gives the Court the "opportunity to clarify that a voting law violates Section 2 only if the law when viewed in the light of the State's entire voting system, causes minority voters to have less opportunity to participate in the political process and elect representatives of their choice" than other voters.[110]

The Ninth Circuit's misinterpretation of Section 2 that would permit claims resting on "little more than a disparate impact"[111]not only throws into question almost every traditional election rule used by states to administer an orderly election process, but also jeopardizes Section 2's status as an appropriate and constitutional implementation of the Fifteenth Amendment.[112]

Conclusion

It is vital that the Supreme Court reverse the Ninth Circuit's misinterpretation and misapplication of Section 2 of the Voting Rights Act and the

Fifteenth Amendment, particularly the Ninth Circuit's misuse of a disparate impact standard. A failure to do so would put at risk not only the constitutionality of Section 2, but the continued viability of the traditional laws and procedures that states have had in effect for decades that govern the voter registration and voting process in the local, state, and federal elections that they administer.

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Endnotes

1. Democratic National Committee v. Hobbs, 948 F.3d 989 (9th Cir. 2020).
2. Arizona Republican Party v. Democratic National Committee, No. 19-1258 (consolidated with Brnovich v. Democratic National Committee).
3. Democratic National Committee v. Reagan, 329 F.Supp.3d 824, 838 (D. Arizona 2018).
4. *Id*. at 839.
5. *Id.* The bill amending the law was H.B. 2023.
6. *See* Hans von Spakovsky, "Vote Harvesting: A Recipe for Intimidation, Coercion, and Election Fraud," Heritage Foundation Legal Memorandum No. 253 (Oct. 8, 2019), https://www.heritage.org/sites/default/files/2019-10/LM253_0.pdf.
7. Reagan, 329 F.Supp.3d at 840.
8. Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir. 2004) (per curiam).
9. 52 U.S.C. § 21082 and A.R.S. §§ 16-122, -135, -584.
10. 329 F.Supp. 3d at 840. The court cited 21 other states that do not count ballots cast outside the voter's assigned precinct: Alabama, Arkansas, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, Ohio, South Carolina, South Dakota, Tennessee, and Texas. *Id*. at footnote 5.
11. Vote denial claims are based on individuals being prevented from actually casting ballots by a state's laws or procedures. In vote dilution claims, voters are not prevented from casting their ballots but are asserting that the value of their votes are being diluted by certain practices of state officials. This can be seen most often in redistricting lawsuits, in which minority voters claim that the boundary lines of a legislative or other political district have been drawn in such a way as to dilute or reduce the value of their vote in order to prevent them from being able to elect their candidates of choice.
12. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1.
13. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.
14. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, § 1.
15. Reagan, 329 F.Supp.3d at 832.
16. 52 U.S.C. § 10301(a) (emphasis added).
17. *Id.* § 10301(b) (emphasis added).
18. Crawford v. Marion County Election Board, 553 U.S. 181 (2008).
19. Thornburg v. Gingles, 478 U.S. 30 (1986).
20. Having an unusually large election district can dilute the political power of minority voters by reducing their percentage of the voting population within a district, i.e., black voters who represent 45 percent of a district will potentially have much more influence over election results than if they are only 10 percent of a district. On majority vote requirements, making all of the city council districts within a city at-large districts that require the majority votes of all of the residents of a city to win can also dilute the political power of minority voters within the city. Single-shot voting is a tactic used by minority voters to try to get their candidates of choice elected where they only vote for a single candidate in an election, such as a town council election, where there are several open seats. Laws outlawing single-shot voting were used in the segregationist South to try to stop black voters from casting their ballots only for black candidates to get them elected.
21. A candidate slating process is when a political party nominates a group of candidates to run together as a slate; a key question in Section 2 claims is whether minority candidates were denied the ability to be included in such a party slate.
22. Thornburg, 478 U.S. at 36–37.
23. Burdick v. Takushi, 504 U.S. 428 (1992).
24. Anderson v. Celebrezze, 460 U.S. 780 (1983).
25. Democratic National Committee v. Reagan, 329 F.Supp.3d at 844 (citing Burdick, 504 U.S. at 434).
26. Reagan, 329 F.Supp.3d 824.
27. *Id.* at 840.
28. Shelby County v. Holder, 570 U.S. 529 (2013).
29. Reagan, 329 F.Supp.3d at 840.

30. *Id.* at 856.
31. *Id.*
32. *Id.* at 858.
33. *Id.*
34. *Id.* at 859.
35. *Id.* at 860.
36. *Id.* at 861.
37. *Id.* at 862.
38. Reagan, 329 F.Supp.3d at 865.
39. *Id.* at 865 (citing Frank v. Walker, 768 F.3d 744, 754 (7th Cir. 2014)).
40. *Id.* at 872.
41. *Id.* at 873.
42. *Id.* at 878 (citations omitted).
43. Reagan, 329 F.Supp.3d at 844.
44. *Id.* at 845.
45. *Id.* at 845.
46. *Id.* at 846.
47. *Id.* at 850 (citing Ohio Democratic Party v. Husted, 834 F.3d 620, 630 (6th Cir. 2016)).
48. *Id.* at 852.
49. *Id.* at 852.
50. Reagan, 329 F.Supp.3d at 853.
51. *Id.* 855–856.
52. Reagan, 329 F.Supp.3d at 866.
53. *Id.* at 868.
54. *Id.* at 871.
55. *Id.*
56. *Id.* at 880.
57. *Id.* at 882.
58. *Id.*
59. Democratic National Committee v. Reagan, 904 F.3d 686 (9th Cir. 2018).
60. *Id.* at 697.
61. *Id.*
62. *Id.* at 706 (citations omitted).
63. *Id.*
64. Crawford v. Marion County Election Board, 553 U.S. 181 (2008).
65. Democratic National Committee, 904 F.3d at 708.
66. *Id.* at 716.
67. *Id.* at 717 (citations omitted).
68. *Id.*
69. *Id.* at 731.
70. Democratic National Committee v. Hobbs, 948 F.3d 989 (9th Cir. 2020).
71. Brnovich v. Democratic National Committee, Petition for a Writ of Certiorari (U.S. April 27, 2020), p. 2.
72. Hobbs, 948 F.3d at 1047.
73. *Id.* at 1048.

74. *Id.*
75. *Id.* at 1049.
76. Hobbs, 948 F.3d at 1049 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).
77. *Id.* at 1050.
78. *Id.* at 1051.
79. *Id.*
80. *Id.* at 1052.
81. *Id.* at 1054.
82. Shelby, 133 S.Ct. at 2627.
83. Hobbs, 948 F.3rd at 1055.
84. *Id.*
85. *Id*. at 1057.
86. *Id.* at 1058.
87. *Id.*
88. *Id.*
89. *Id.* (emphasis in original).
90. *Id.*
91. *See, e.g.*, League of Women Voters v. North Carolina, 769 F.3d 224 (4th Cir. 2014); Michigan State A. Philip Randolph Institute v. Johnson, 833 F.3d 656 (6th Cir. 2016).
92. *See* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S.Ct. 612 (2017), in which the Fifth Circuit reversed a finding by the district court that the passage by the Texas legislature of a voter ID was intentional discrimination. The Fifth Circuit said that "[n]o one questions the legitimacy" of the concerns of the state legislature in passing such a law that "centered on protection of the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting process." *Id.* at 231.
93. Hobbs, 948 F.3rd at 1058.
94. *Id.*
95. *Id.* at 1058–1059.
96. Hobbs, 948 F.3d at 1059.
97. *Id.* at 1061 (citing U.S. Const. Art. I, §4, Cl. 1).
98. *Id.*
99. *Id.* The Fourth Circuit has unfortunately followed this mistaken view of Section 2 in League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014).
100. *Id.* at 1062.
101. *Id*. at 1064.
102. *Id.* at 1069.
103. Hobbs, 948 F.3d at 1072.
104. Lee v. Virginia State Board of Elections, 843 F.3d 592 (4th Cir. 2014); Veasey v. Abbot, 830 F.3d 216 (5th Cir. 2016) (*en banc*); Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016); Frank v. Walker, 768 F.3d 744 (7th Cir. 2014).
105. Shelby, 570 U.S. at 543 (internal quotation marks omitted).
106. *Id.*
107. Hobbs, 948 F.3d at 1063 (citing Joseph P. Harris, *Election Administration in the United States* 206-07 (1934)).
108. U.S. Const. Amend. XV, § 1 (emphasis added).
109. U.S. v. Reese, 92 U.S. 214, 218 (1875).
110. Brnovich v. Democratic National Committee, No. 19-1257, *Brief of Ohio, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia in Support of Petitioners* (U.S. May 2020).
111. Nicholas O. Stephanopoulos, *Disparate Impact*, 128 Yale L. J. 1566, 1590 (2019).
112. Roger Clegg and Hans A. von Spakovsky, "'Disparate Impact' and Section 2 of the Voting Rights Act," Heritage Foundation Legal Memorandum No. 119 (March 17, 2014), https://www.heritage.org/election-integrity/report/disparate-impact-and-section-2-the-voting-rights-act.