

Nos. 19-1257, 19-1258

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In The  
**Supreme Court of the United States**

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MARK BRNOVICH, in his Official Capacity  
as Arizona Attorney General, et al.,

*Petitioners,*

v.

DEMOCRATIC NATIONAL COMMITTEE, et al.,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

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**BRIEF OF *AMICI CURIAE*  
ELECTION INTEGRITY PROJECT  
CALIFORNIA, INC. AND ELECTION  
INTEGRITY PROJECT ARIZONA, LLC  
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	7
A. Abusive ballot harvesting is a common vulnerability in vote-by-mail and absentee ballot systems demanding Arizona’s legislative response.....	7
B. California serves as a warning of the dangers of unchecked and unregulated vote-by-mail voting and ballot harvesting .....	10
C. The Ninth Circuit erred in ruling the ballot collection process violates § 2 of the Voting Rights Act.....	16
D. State legislatures, not unelected federal judges, set rules for voting.....	20
E. The decision below affects voter protection laws nationwide .....	21
CONCLUSION .....	22

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985) .....	17
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	18
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181 (2008) .....	10
<i>Democratic Nat’l Comm. v. Hobbs</i> , 948 F.3d 989 (9th Cir. 2020).....	17, 19
<i>Democratic Nat’l Comm. v. Reagan</i> , 329 F. Supp. 3d 824 (D. Ariz. 2018).....	19, 20
<i>Democratic Nat’l Comm. v. Wisconsin State Legis-</i> <i>lature</i> , 592 U.S. ___, No. 20-A66 2020 LEXIS 5187 (U.S. Oct. 26, 2020) .....	20, 21
<i>League of Women Voters of N.C. v. North Caro-</i> <i>lina</i> , 769 F.3d 224 (4th Cir. 2014) .....	18
<i>Navajo Nation v. U.S. Forest Service</i> , 535 F.3d 1058 (9th Cir. 2008) (en banc).....	17
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006) .....	15
<i>Smith v. Salt River Project Agric. Improvements &amp;</i> <i>Power Dist.</i> , 109 F.3d 586 (9th Cir. 1997) .....	17, 18, 20
<i>Trump v. Boockva</i> (Case No. 20-3371 (3d Cir. 2020)).....	5
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	17, 18
CONSTITUTION	
U.S. Const. Art. I, § 4 .....	2, 3, 11, 20

## TABLE OF AUTHORITIES – Continued

	Page
STATUTES AND REGULATIONS	
52 U.S.C. § 10301(a).....	6, 18
52 U.S.C. § 20507 .....	8
1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B. 1390).....	6
Ariz. Rev. Stat. § 16-1005(H)-(I) .....	6
2016 Cal. Stat. AB-1921 .....	11
2016 Cal. Stat. SB-450 .....	11
Cal. Elec. Code § 354.5 .....	13
Cal. Elec. Code § 3011 .....	12
Cal. Elec. Code § 3017 .....	11
OTHER AUTHORITIES	
Associated Press, <i>Republican David Valadao Wins Election to U.S. House in California’s 21st Congressional District, Beating Incumbent Rep. T.J. Cox</i> (Nov. 27, 2020) .....	15
John Myers, <i>Nearly 84,000 duplicate voter records found in audit of California’s ‘motor voter’ system</i> , Los Angeles Times (Aug. 9, 2019) .....	12
Michael McDonald, <i>2020 General Election Early Vote Statistics</i> , U.S. Elections Project (Nov. 23, 2020) .....	4
Michael R. Blood, <i>GOP Captures Second Democratic U.S. House Seat in California</i> , Associated Press (Nov. 13, 2020) .....	15

## TABLE OF AUTHORITIES – Continued

	Page
Pew Center on the States, <i>Inaccurate, Costly and Inefficient: Evidence that America’s Voter Registration System Needs an Upgrade</i> (February 2012).....	8
Public Interest Legal Foundation, Letter to Arizona Secretary of State Katie Hobbs, May 27, 2020 .....	9
S. Rep. at 30, U.S. Code Cong. & Admin. News 1982 .....	18
Stanford University, Signature Verification, and Mail Ballots: <i>Guaranteeing Access While Preserving Integrity, A Case Study of California’s Every Vote Counts Act</i> (May 15, 2020) .....	13
<i>The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration</i> (2014).....	7, 8
<i>U.S. Elections: Report of the Commission on Federal Election Reform</i> (2005) .....	7, 10
U.S. House of Representatives Committee on House Administration Republicans, <i>Political Weaponization of Ballot Harvesting in California</i> (May 14, 2020) .....	13, 14, 15

**INTEREST OF AMICI<sup>1</sup>**

Election Integrity Project California, Inc. (EIPCa) is a non-partisan California nonprofit public benefit corporation recognized by the Internal Revenue Service as a tax-exempt Public Charity under Internal Revenue Code Section 501(c)(3). Comprised of citizen volunteers, EIPCa works to defend the integrity of California’s electoral process. EIPCa fulfills its mission by researching county and state voter rolls to test accuracy and compliance with state and federal election laws, and educating poll workers, poll observers and ballot processing observers. For several years, EIPCa team leaders have trained thousands of citizens to monitor California elections. EIPCa collects and analyzes voter registration and voting data, as well as county policies and procedures for election management and ballot processing, and presents a unique, unbiased perspective on the impact that lack of voting protections has in the state of California. Its motto is “Every Lawfully Cast Vote Accurately Counted.” Ballot harvesting flouts that principle by facilitating unlawful voting through

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<sup>1</sup> The parties have consented to the filing of this brief. Petitioners have provided blanket consent for the filing of amicus briefs and were informed of *Amici Curiae’s* intent to file on November 11, 2020. Respondents have also provided blanket consent for the filing of amicus briefs and were informed of *Amici Curiae’s* intent to file on November 6, 2020. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission

undue influence, duplicative votes from out-of-date registrations, and other tactics discussed below.

Election Integrity Project Arizona, LLC (EIPAz) is an Arizona limited liability company that is a wholly owned subsidiary of EIPCa and therefore a branch of EIPCa for federal income tax purposes. See Internal Revenue Service Notice 2012-52, Internal Revenue Bulletin 2012-35 (Aug. 27, 2012), p. 317. EIPAz operates as a non-partisan, 501(c)(3) organization of citizen volunteers who work to defend the integrity of Arizona's voting system. Formed in response to concerns about ballot harvesting in the 2014 mid-term elections, EIPAz empowers citizens to take an active role in the election process through education and training. Between 2014 and 2016, volunteers working with EIPAz identified the problem of ballot harvesting, met with state representatives and state election officials, and lobbied extensively for the enactment of Arizona's ballot-collection law.

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## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Constitution of the United States delegates the power to regulate the time, place, and manner of elections to the individual states. U.S. Const. Art. I, § 4. This design allows states to tailor election processes to local conditions and preferences; to address issues arising in a state's electoral experience; and to facilitate elections in which a state's citizens have confidence.

The Arizona legislature exercised its Art. I, Sec. 4 authority to address a problem arising in the 2016 election – improper collection and delivery of absentee and mail-in ballots. Known as “ballot harvesting,” Arizona found substantial evidence of individuals manipulating vulnerable voters to complete ballots in accordance with the collector’s preference. The ballot harvester then delivered ballots to election officials. Arizona responded by limiting who may handle ballots.

The Ninth Circuit’s decision improperly interferes with Arizona’s Article I, Section 4 power to regulate the time, place, and manner of elections. U.S. Const. Art. I, § 4. If left standing, the decision will leave states with little authority to enact safeguards in response to local circumstances and experience. Based on their extensive work in precincts throughout both Arizona and California, *Amici Curiae* respectfully submit that the Arizona provision is a needed safeguard. We urge the Court to overturn the lower court’s decision and rule that Arizona has the constitutional authority to enact reasonable and necessary voter-protection laws such as limiting those who may handle mail ballots.

Vote-by-mail or “absentee” voting, while becoming fashionable nationally as a method of voting, is particularly vulnerable to corruption such as vote manipulation, voter intimidation, and fraudulent ballot harvesting. What began decades ago as an ad hoc exemption for individual voters who would be absent from their locale on election day, has ballooned into common practice or even the legal standard. In the 2020 general election and in response to the COVID-19 crisis,

around 65 million individuals cast their vote by mail. Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. Elections Project (Nov. 23, 2020).<sup>2</sup> And states vary in how they regulate this type of voting. Ballots are mailed to voters (sometimes without their request or knowledge) and are left in unsecured mailboxes. Once completed, these ballots can sit in mailboxes for hours before collection. In some states, these ballots require a witness to verify the identity of the voter by signing the vote-by-mail identification ballot. Some states require vote-by-mail ballots to contain prepaid postage and do not obtain a postmark date stamp. In other instances, voters are required to pay for postage. Certain jurisdictions limit who can vote-by-mail to certain classes of persons while others have moved to almost 100% mail vote. Other states require a voter to submit in writing a request for a mail vote while others allow electronic requests to suffice. Some states permit outside, third-party organizations to canvass and harvest mail ballots and others, like Arizona, prohibit such activity.

Overturing the decision of the Ninth Circuit ensures that states may continue to implement commonsense protections for a method of voting that is outside the security of the election booth and inherently vulnerable. Removing protections such as limitations on the handling and delivery of vote-by-mail ballots will deny states a method to protect their electoral system from unscrupulous third parties who engage in

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<sup>2</sup> Available at <https://electproject.github.io/Early-Vote-2020G/index.html> (last visited Nov. 25, 2020).

ballot harvesting. Voter chaos ensues when protections are removed. Consider the upheaval in certain states during the 2020 presidential election. As of November 24, 2020, President Trump continues to challenge the accuracy and legitimacy of the vote count in Pennsylvania. *Trump v. Boockvar* (Case No. 20-3371 (3d Cir. 2020)). Strong and clear voting protections, in place well before the onset of elections, are necessary to ensure integrity in the system.

The Court need look no further than the state of California as the model for what occurs when most protections are removed. In 2018, lax voting protections, a failure to properly implement a new voter registration system and systematic failures to ensure accurate voter rolls led to widespread voter confusion and possible disenfranchisement.

The vote-by-mail process contains opportunities for fraud that are not present in traditional voting. Again, ballots are sometimes delivered and left unsecured in mailboxes in high population density locales. Opportunities to illicitly collect and complete these ballots abound. Further, sophisticated entities can train and deploy operatives to visit these communities and collect ballots – and in the process – exert undue influence on vulnerable voters. The issue here is whether states will continue to be permitted to enact and enforce the most minor and obvious protections for this system or whether all controls will be removed.

Arizona law permits vote-by-mail and has increasingly moved to make this form of voting the norm. Most

Arizona voters do not vote in person on election day – they vote by mail-in ballot. App. 106. In recognizing the dangers of vote-by-mail, Arizona prohibits anyone but the voter from possessing the “elector’s unvoted absentee ballot.” 1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B. 1390). It also limits who can handle the collection of early ballots. Under this policy, only a “family member,” “household member,” “caregiver,” “United States postal service worker” or other person authorized to transmit mail, or “election official” may return the voter’s completed ballot. Ariz. Rev. Stat. § 16-1005(H)-(I).

Now, this minimal ballot protection – used as a necessary tool by Arizona to ensure its otherwise vulnerable voting system remains secure – is prohibited because of the Ninth Circuit’s ruling. Unless the Court overturns the lower court’s ruling, commonsense voting protections in dozens of other states will be at risk. Professional vote-by-mail activists need only clear the most minor of hurdles to successfully argue that minor burdens placed on the voter violate § 2 of the Voting Rights Act. 52 U.S.C. § 10301(a).

*Amici’s* brief focuses only on the propriety of Arizona’s ballot-collection policy, Ariz. Rev. Stat. § 16-1005(H)-(I), and the adverse effects that abolition of such a policy would have on elections. Though the out of precinct policy (OOP) is as an important protection and should survive judicial scrutiny, *amici* here offer a unique perspective on the probable effects of allowing the Ninth Circuit’s decision to stand.



## ARGUMENT

### **A. Abusive ballot harvesting is a common vulnerability in vote-by-mail and absentee ballot systems demanding Arizona’s legislative response.**

Opportunities for fraud abound when individuals vote by mail ballot. *U.S. Elections: Report of the Commission on Federal Election Reform* 46 (2005) (“Carter – Baker Report”).<sup>3</sup> Voting occurs outside the strictly regulated confines of the precinct, where election officials guard against undue influence and electioneering, ensure compliance with voting laws and maintain chain of custody of ballots. For these reasons, the absentee ballot process “remains the largest source of potential voter fraud.” *Id.* Fraud occurs in several ways. First, blank ballots mailed to wrong addresses or apartment buildings can be intercepted. *Id.* Second, voters are particularly susceptible to pressure or intimidation when voting at home or nursing home. *Id.* Finally, third-party organizations can operate illicit “vote buying schemes” that are “far more difficult to detect when citizens vote by mail.” *Id.*

Even a study skeptical of the incidence of voter fraud generally acknowledges the dangers in vote-by-mail. It notes that, when fraud does occur, “absentee ballots are the method of choice.” *The American Voting Experience: Report and Recommendations of the*

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<sup>3</sup> Available at <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf> (last visited Nov. 24, 2020).

*Presidential Commission on Election Administration* 56 (2014).<sup>4</sup>

Other factors contribute to vulnerabilities in electoral processes. Millions of voters' names appear on multiple state voter registration lists because states do not routinely share registration data. *Id.* at 28. In 2012, Pew research foundation found that about 24 million (one in eight) voter registrations were no longer valid or contained significant inaccuracies with 1.8 million deceased individuals listed on voter rolls and 2.75 million names on registrations in more than one state. Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (February 2012).<sup>5</sup>

These inaccuracies can, in part, be traced to states' failures to enforce the provisions of the National Voter Registration Act (NVRA), which require state election officials to ensure the accuracy of registration lists by confirming residency and periodically removing the names of dead or out of state residents from voter rolls. 52 U.S.C. § 20507.

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<sup>4</sup> Available at [https://elections.delaware.gov/pdfs/PCEA\\_rpt.pdf](https://elections.delaware.gov/pdfs/PCEA_rpt.pdf) (last visited Nov. 24, 2020).

<sup>5</sup> Available at [https://www.pewtrusts.org/~media/legacy/uploaded\\_files/pes\\_assets/2012/pewupgradingvoterregistrationpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploaded_files/pes_assets/2012/pewupgradingvoterregistrationpdf.pdf) (last visited Nov. 24, 2020).

Data analysis of Arizona's voter rolls found, as of October 2019:

- 2289 deceased voters on the voter rolls.
- 315 double votes cast in 2018 across state lines.
- 85 double votes cast in 2018 across county lines.
- 3277 double votes cast in 2016 by individuals with two active registrations at the same address.
- 3077 double votes cast in 2018 by individuals with two active registrations at the same address.
- 884 voters using commercial addresses as their residence.

Public Interest Legal Foundation, Letter to Arizona Secretary of State, Katie Hobbs, May 27, 2020.

Data from the U.S. Election Assistance Commission (EAC) for the November 2018 election show Arizona had 642,210 unaccounted-for vote-by-mail ballots, or 24% of all domestic absentee ballots mailed in the November 2018 election.<sup>6</sup>

These registration errors make an already vulnerable electoral process even more susceptible to fraud. Should ineligible individuals receive vote-by-mail ballots,

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<sup>6</sup> Data obtained from Election Assistance Commission and tabulated by EIPCa. Data available at <https://www.eac.gov/research-and-data/studies-and-reports> (last visited Nov. 24, 2020).

harvesting groups can easily exploit the situation and commit wholesale voter fraud. Such exploitation has occurred in the past. In 2004, for example, 1,700 voters registered in both New York and California requested vote-by-mail ballots to be mailed to their home in the other state with no investigation. Carter-Baker Report at 12.

Vote-by-mail ballots mailed to addresses of those who have moved or died are vulnerable to ballot harvesting. Unaccounted-for ballots are currency to harvesters. Arizona's limitations on who handles ballots, however, are a useful tool to ensure that ballots sent to ineligible registrants are not collected and submitted by unscrupulous individuals or organizations. Removal of this protection exposes this system to persons who seek to affect unlawfully the outcome of elections. The Court itself has recognized the effect ballot harvesting can have on elections. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-196 (2008) (noting that fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – “perpetuated using absentee ballots” – demonstrated “that not only is the risk of voter fraud real but that it could affect the outcome of a close election.”).

**B. California serves as a warning of the dangers of unchecked and unregulated vote-by-mail voting and ballot harvesting.**

Vote-by-mail voting can serve as a useful tool to ensure that certain voters with specified limitations

have a chance to participate in the political process. States, however, must be allowed to exercise their Article I authority to enact and enforce certain reasonable protective measures to ensure their election process is not exploited. The Ninth Circuit's decision eviscerates Arizona's reasonable efforts to protect the integrity of its elections. If the Court fails to correct this decision, similar protections in other states will be challenged and possibly overturned. Removal of voting protections such as limiting who handles vote-by-mail ballots can lead to election irregularities and fraud. It can also delay the outcome of the election in that ballots can be collected and returned after the election.

Consider the problems as extensively documented in California. In 2016, California amended its election laws to permit any individual to return the mail ballot of another with no limitation as to the relationship to the voter or number of ballots collected. 2016 Cal. Stat. AB-1921. Ballot collectors can be paid by any source so long as compensation is not based on the number of ballots collected. Cal. Elec. Code § 3017(e)(1). Next, California's Voter's Choice Act (VCA) encouraged counties to shift to automatic mailing of vote-by-mail ballots to all active registrants. 2016 Ca. Stat. S.B-450. Under the VCA, voters return their ballot by mail, take the ballot to a drop-off location, or cast it in-person at a designated county vote center. *Id.*

California's liberal ballot-collection laws, its failure to maintain accurate voter registration records, and its flawed implementation of the VCA combined to create the perfect storm on election day 2018. *Amici*

documented over 1,000 incidents of voters – mainly in southern California counties – forced to arrive at the polls in person on election day in 2018 because they had not received their vote-by-mail ballots. San Bernardino county admitted to *Amici* that it failed to send 1,129 ballots to its voters. California has never accounted for these missing vote-by-mail ballots and has since implemented a “Where’s My Ballot?” app to allow voters to track their vote-by-mail ballots.<sup>7</sup>

Election officials in California acknowledged widespread registration errors leading to frustration, confusion, and possible disenfranchisement in the 2018 election. An independent audit of voting registration practices, commissioned by the state, concluded that California’s efforts to automate voter registration resulted in close to 84,000 duplicate registrations with more than double the number of faulty political party designations. John Myers, *Nearly 84,000 duplicate voter records found in audit of California’s ‘motor voter’ system*, Los Angeles Times (Aug. 9, 2019).

California does not limit who may handle ballots and places very few restrictions on ballot collection. While ballot harvesters in California are required to write their name, signature, and relationship to the voter on the vote-by-mail envelope, a failure to provide this information will not cause a disqualification of the ballot. Cal. Elec. Code § 3011(a)-(c). In general, laws requiring signature verification on vote-by-mail ballots

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<sup>7</sup> Available at <https://www.sos.ca.gov/elections/ballot-status/wheres-my-ballot/> (last visited Nov. 24, 2020).

are not enough to prevent fraud, as California has “limited statewide uniform criteria or standards for signature verification, and what ‘counts’ as a matching signature varies enormously from county to county.” Stanford University, *Signature Verification, and Mail Ballots: Guaranteeing Access While Preserving Integrity, A Case Study of California’s Every Vote Counts Act 2* (May 15, 2020).<sup>8</sup>

Compounding the problems associated with lack of uniform standards for signature verification, states like California permit voters who are unable to sign a vote-by-mail ballot to mark their ballot with an “X.” Cal. Elec. Code § 354.5(a). A witness must sign near the mark but does not have to provide his/her name, relationship to the voter or other identifying information. *Id.*

As expected, the lack of any significant regulation on the vote-by-mail process led to widespread “ballot harvesting” in California in 2018. Political operatives, “known as ‘ballot brokers’ identify specific locations, such as large apartment complexes or nursing homes” to exploit the voting process. U.S. House of Representatives Committee on House Administration Republicans, *Political Weaponization of Ballot Harvesting in California* (May 14, 2020) (“Committee Report”).<sup>9</sup> After

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<sup>8</sup> Available at [https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/SLS\\_Signature\\_Verification\\_Report-5-15-20-FINAL.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/SLS_Signature_Verification_Report-5-15-20-FINAL.pdf) (last visited Nov. 24, 2020).

<sup>9</sup> Available at [https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL\\_0.pdf](https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL_0.pdf) (last visited Nov. 24, 2020).

establishing relationships with individuals in these locations, ballot brokers would “encourage, and even assist, these unsuspecting voters in requesting a mail-in ballot; weeks later when the ballot arrives in the mail the same ballot brokers are there to assist the voter in filling out and delivering the ballot.” *Id.* As noted in the Committee Report, “[t]his behavior can result in undue influence in the voting process and destroys the secret ballot, a long-held essential principle of American elections intended to protect voters.” It continued, “These very scenarios are what anti-electioneering laws at polling locations are meant to protect against. A voter cannot wear a campaign button to a polling location, but a political operative can collect your ballot in your living room?” *Id.*

Ballot harvesting appeared to affect the outcome of several races for the U.S. House of Representatives in California in 2018. For example, in the 39th Congressional district, Young Kim, the Republican candidate led the vote count on election night and in the week following election day. Ms. Kim even traveled to Washington D.C. for orientation as a new member of the House. “Two weeks later, the Democrat challenger was declared the winner after 11,000 mail ballots were counted, many of which were harvested.” *Id.* at 3. In the 21st Congressional district, Republican David Valadao led by almost 5,000 votes on election night. The final tally of votes led to Mr. Valadao’s Democratic challenger winning by 862 votes – a swing of 5,701 votes. *Id.* These votes “heavily favored the Democrat candidate at a much higher rate than previously

counted ballots.” *Id.* The swing in counted votes was largely because of high numbers of vote-by-mail ballots that had been dropped off at the polls and were processed and counted in the days following the election. “In Orange County alone, 250,000 mail ballots were turned in on Election Day.” *Id.* at 4. Such last-minute actions can overwhelm election officials’ ability to properly validate every ballot before the certification deadline. California’s insufficient signature verification standards only add to this post-election chaos.<sup>10</sup>

Such uncertainty and after-the-fact results undermine the public’s confidence in the integrity of the election process. And “[c]onfidence in the election process is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Court continued, “Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.” *Id.*

Limiting who handles vote-by-mail ballots to the voter, an acknowledged family member, the U.S. Postal

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<sup>10</sup> Young Kim succeeded in her 2020 bid to unseat Congressman Cisneros. Michael R. Blood, *GOP Captures Second Democratic U.S. House Seat in California*, Associated Press (Nov. 13, 2020). Available at <https://apnews.com/article/election-2020-donald-trump-california-house-elections-us-news-9fdd024be55643ed868c6f7c24bae4ad> (last visited Nov. 25, 2020). Mr. Valadao also succeeded in his bid to unseat Democrat incumbent T.J. Cox. Associated Press, *Republican David Valadao Wins Election to U.S. House in California’s 21st Congressional District, Beating Incumbent Rep. T.J. Cox* (Nov. 27, 2020). Available at <https://www.usnews.com/news/politics/articles/2020-11-27/republican-david-valadao-wins-election-to-us-house-in-californias-21st-congressional-district-beating-incumbent-rep-tj-cox> (last visited Nov. 30, 2020).

Service, caregivers, or election officials is reasonable and provides a necessary protection to guard against voter manipulation and voter fraud. As voter rolls are not accurate (either because of states' unwillingness to share registration data or its failure to follow the mandates of the NVRA) and as voting by mail is the method of choice for those who seek to commit fraud, reasonable protections are essential. The benefits of preventing fraud, intimidation, and undue influence on voters by limiting who can handle vote-by-mail ballots far outweighs the minimal burden imposed by Arizona's law.

If the Ninth Circuit's decision stands, and limitations on who can handle vote-by-mail ballots are found in violation of the Voting Rights Act, the harm will be severe. Ballot collection groups will be able to exert undue pressure on voters, collect unused or discarded ballots and mobilize unlawful voter collection efforts if their preferred candidate appears to be losing. Arizona and other states that have similar laws overturned as a result will become subject to the same loss of voter confidence and process integrity as California.

**C. The Ninth Circuit erred in ruling the ballot collection process violates § 2 of the Voting Rights Act.**

Both the district court and a three-judge panel at the appellate stage determined Arizona's ballot collection process did not violate Section 2 of the Voting Rights Act ("Act"). It took an en banc panel of the

circuit court – engaging in an incorrect analysis – to rule that the process caused a disparate impact and thus violated the Act. As stated in the robust dissent, the Ninth Circuit erred in using a *de novo* standard of review of the district court’s findings of facts rather than applying a “clearly erroneous” standard. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1048-1049 (9th Cir. 2020) (citing *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1066 (9th Cir. 2008) (en banc)). The panel disregarded precedent and reversed the factual findings of the district court. The “clearly erroneous” standard does not entitle the “reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Instead, when “the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Id.* at 574.

Applying the proper standard of review, “clearly erroneous,” does not support a claim that the ballot collection process violates Section 2.

And because a determination of whether a challenged practice violates Section 2 is “intensely fact-based,” the task of assessing the “totality of the circumstances and” evaluating the “past and present reality” is left to the district court. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). On review, courts should defer to findings made at the trial court level. *Smith v. Salt*

*River Project Agric. Improvements & Power Dist.* (“Salt River”), 109 F.3d 586, 591 (9th Cir. 1997).

A Section 2 analysis determines whether a given practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Gingles*, 478 U.S. at 47. Courts use a two-step process: first, whether the practice provides members of the protected class “less ‘opportunity’ than others ‘to participate in the political process and to elect representatives of their choice.’” *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (quoting 52 U.S.C. § 10301). The regulation must therefore “impose a discriminatory burden on members of the protected class.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). Plaintiffs must “show a causal connection between the challenged voting practice and prohibited discriminatory result.” *Salt River*, 109 F.3d at 595.

Once Plaintiffs have established the causal connection, courts then look to whether the particular burden is “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.” *League of Women Voters*, 769 F.3d at 240 (quoting *Gingles*, 478 U.S. at 47). Courts, in sum, undertake “a searching practical evaluation of the ‘past and present reality’ with a ‘functional view of the political process.’” *Gingles*, 478 U.S. at 45 (quoting S. Rep. at 30, U.S. Code Cong. & Admin. News 1982, p. 208).

Arizona’s ballot-collection policy does not violate Section 2. At trial, Plaintiffs failed to show that the policy restricts members of a protected class by providing less opportunity to participate in the political process. The Ninth Circuit finds, erroneously, that the policy violates Section 2 because there is “extensive evidence showing minority voters are more likely to use ballot collection services. Restrictions on these services, would, therefore disproportionately burden these voters.” *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d at 1054.

This conclusion overruled the factual finding of the district court who concluded that the ballot-collection policy did not provide “less opportunity to elect representatives of their choice.” *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 871 (D. Ariz. 2018). The district court also noted that “no individual voter testified that [the ballot collection policy’s] limitations on who may collect an early ballot would make it significantly more difficult to vote.” *Id.*

Thus, the Ninth Circuit “offers no record-factual support for its conclusion that the anecdotal evidence presented demonstrates that compliance with the ballot-collection policy imposes a disparate burden on minority voters.” *DNC v. Hobbs*, 948 F.3d at 1055. Even the circumstantial evidence presented showed that “the vast majority of Arizonans, minority and non-minority alike, vote without assistance of third-parties who would not fall within the [ballot-collection policy’s] exceptions.” *Id.* at 1056 (quoting *DNC v. Reagan*, 329 F. Supp. 3d at 871). The district court’s conclusion “that

the limitation of third-party ballot collection would impact only a ‘relatively small number of voters,’” *id.* (quoting *DNC v. Reagan*, 329 F. Supp. at 870) therefore, should be entitled to deference.

The “bare statistical showing” offered by Plaintiffs at the district court does not alone satisfy step one of a Section 2 inquiry. *Salt River*, 109 F.3d at 595.

**D. State legislatures, not unelected federal judges, set rules for voting.**

This year, when addressing COVID-19 related voting cases, the Court has consistently held that the Constitution “not federal judges, not state judges, not state governors, not other state officials – bear primary responsibility for setting election rules.” *Democratic Nat’l v. Wisconsin State Legislature*, 592 U.S. \_\_\_, No. 20-A66 2020 LEXIS 5187, \*2 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring) (citing Art. I, § 4, cl. 1). Legislators, unlike judges, “can be held accountable for the rules they write or fail to write . . .” Legislatures “make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful.” *Id.* at \*5. Further, “legislators must compromise to achieve the broad social consensus necessary to enact new laws, something not easily replicated in courtrooms where typically one side must win and the other lose.” *Id.*

Changes to election protections therefore should be made by accountable branches of government. While legislatures “are often slow to respond” to perceived

problems, courts should be reluctant to interfere – particularly when a legislature has identified a problem and enacted measures to combat it. “[C]hanges to the status quo will not be made hastily, without careful deliberation, extensive consultation, and social consensus.” *Id.* at \*6.

Finally, changing duly enacted voting protections “does damage to the faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures.” *Id.*

Arizona determined that the legitimate threat posed by ballot harvesting necessitates a limitation on who can handle vote-by-mail ballots. Courts must defer to the legitimate interests of states in these matters. Cases such as this – when the Court has ruled that voting by mail is not a fundamental right – demand deference to state law. Without a clear violation of the Voting Rights Act, the will of the people of the state, as expressed through their duly elected state legislature, prevails.

#### **E. The decision below affects voter protection laws nationwide.**

If the Ninth Circuit’s decision stands, voter protections throughout the country will be challenged and overturned. Activist groups will challenge similar laws in other states and courts will have to declare such laws illegal. Other measures such as those requiring witness signatures on vote-by-mail ballots or those requiring written requests for vote by mail ballots will

be removed. States will be left with little protections against voter fraud and ballot harvesting. Elections will not be decided on election night, but weeks later and after ballot harvesters have seized the opportunity to collect more votes for their preferred candidate. In short, the integrity and confidence in the entire election system will be compromised.

It is, therefore, imperative the Court overturn the lower court's decision. Bringing continuity and certainty to this important issue will ensure citizens do not lose confidence in the integrity of the election system.



## CONCLUSION

For these reasons EIPCa and EIPAz respectfully urge the Court to overturn the lower court's decision.

Respectfully submitted,

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