No. 18-15845

In the United States Court of Appeals for the Ninth Circuit

DEMOCRATIC NATIONAL COMMITTEE, *ET AL.*,

Plaintiffs-Appellants,

v.

MICHELE REAGAN, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona, (Rayes, J.)
Case No. CV-16-01065

BRIEF IN OPPOSITION TO REHEARING EN BANC

Dominic E. Draye
Solicitor General
Andrew G. Pappas
Kara M. Karlson
Karen J. Hartman-Tellez
Joseph E. La Rue
Office of the Attorney General
2005 North Central Ave.
Phoenix, AZ 85004
(602) 542-3333

October 16, 2018

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. Plaintiffs' Eight Assignments of Error Are Mistaken and Prove that they Seek a Retrial. 3

II. The Panel's Holding Is Consistent with the Supreme Court and Every Other Court of Appeals. 10

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct 2305 (2018) 9

Chisom v. Roemer,
501 U.S. 380 (1991) 3, 4, 11, 12

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) ..... passim

Farrakhan v. Washington,
338 F.3d 1009 (9th Cir. 2003) 5

Gonzalez v. Arizona,
485 F.3d 1041 (9th Cir. 2007) 2

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) 4, 5, 6, 9

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 11, 12

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 15

Ne. Ohio Coal. for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016) 15, 16

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016) 14

Ohio State Conference of the NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014) 14

Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.,
28 F.3d 306 (3d Cir. 1994) 11

Pub. Integrity All., Inc. v. City of Tucson,
836 F.3d 1019 (9th Cir. 2016) 9

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 3, 9

Sandusky Cty. Democratic Party v. Blackwell,
387 F.3d 565 (6th Cir. 2004) 8

Smith v. Salt River Project Agric. Improvement & Power Dist.,
109 F.3d 586 (9th Cir. 1997) 4, 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 12

Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016) 13

Statutes

52 U.S.C. § 10301(a) 1, 5

52 U.S.C. § 10301(b) 1, 4

Rules

Fed. R. App. P. 35(a) 10

INTRODUCTION

After a 10-day trial featuring the testimony of dozens of witnesses, the district court, Judge Douglas L. Reyes, correctly concluded that Plaintiffs failed to prove any of their claims against a pair of Arizona elections regulations. In an 83-page opinion replete with factual findings, the district court rebuffed a constitutional claim under the Fourteenth Amendment because the burden imposed by these laws is minimal and the State's interest in the integrity of its elections is long-established. ER19–49. On similar findings, the court held that the same minimal burdens do not "result[] in the denial or abridgement" of voting rights. 52 U.S.C. § 10301(a); ER56–67. Alternatively, even assuming a cognizable burden exists, neither of the contested provisions under "the totality of the circumstances" makes Arizona elections "not equally open to participation" by minority voters. 52 U.S.C. § 10301(b); ER67–74. Finally, Judge Rayes found that Arizona's legislature did not enact H.B. 2023 with discriminatory intent. ER76–77, 81.[1]

[1] Plaintiffs have not alleged discriminatory intent with respect to the State's requirement that voters cast ballots in their own precincts.

On appeal, Plaintiffs sought a retrial of these "intense[ly] factual inquir[ies]." *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (first alteration in original); Op. 6. The panel majority declined the invitation to reweigh the evidence. Op. 67. In a thorough opinion, the Court held that Judge Rayes did not commit clear error in finding that Arizona's regulations impose "only a de minimis burden" that falls well below the burden upheld by the Supreme Court in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). Op. 24. The Court also affirmed the district court's finding—based on Plaintiffs' anecdotal evidence—that Arizona's laws do not "'cause a meaningful inequality in the electoral opportunities of minorities as compared to nonminorities.'" Op. 44 (quoting ER89).

Now, Plaintiffs renew their request for a retrial, this time before the en banc Court. Although the Court engaged in en banc review at the preliminary-injunction stage two years ago, the intervening trial and Judge Rayes's extensive factual findings make the current appeal unworthy of the Court's en banc consideration.

ARGUMENT

I. Plaintiffs' Eight Assignments of Error Are Mistaken and Prove that they Seek a Retrial.

In the span of a few pages, Plaintiffs allege *eight* errors by the panel. Most are factual disagreements; none warrants rehearing en banc.

Standard of Review. Plaintiffs assert that the panel applied "an overly deferential standard of review" because it "*appears* to apply clear error review to mixed questions of law and fact." Pet. 6 (emphasis added). Plaintiffs offer no example of this error. For its part, the panel correctly stated the post-trial standard of review, Op. 16–17, and only once rejected an assertion that something (discriminatory intent) was a mixed question of law and fact, Op. 49 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("It is not a question of law and not a mixed question of law and fact.")).

Number of Voters. Plaintiffs allege that the panel erred in requiring that a "'substantial' number of minority voters must be burdened" before a law will be stricken under Section 2 of the Voting Rights Act. Pet. 7 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)). They never say *where* the panel committed this alleged error, and their ar-

gument to the panel relied extensively on "the *dissent* in *Chisom*." Op. 47 n.22 (emphasis added). But the panel was "bound by the majority, which rejected this argument." *Id.* The panel's discussion of *Chisom* thus focuses on the Supreme Court's majority holding that Section 2 does not split into separate claims for (a) denial/abridgment of voting rights and (b) inability to elect preferred candidates. Op. 37–39; *Chisom*, 501 U.S. at 396–97. Following *Chisom* and the text of Section 2, plaintiffs must establish an abridgment of voting rights that results in "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). This Court already has held that the alternative—"a bare statistical showing of disproportionate impact on a racial minority"—does not suffice for a claim under Section 2. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997); *see also Gonzalez v. Arizona* (*Gonzalez II*), 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (same).

Here, the district court found, and the panel affirmed, that Plaintiffs failed to show that Arizona's electoral process was not equally open to minority voters as defined in Section 2. ER63, 89; Op. 44, 75.

Causation. Section 2 asks whether the "standard, practice, or procedure . . . results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). One of the reasons that Judge Rayes found Plaintiffs' evidence unconvincing under Section 2 is that it revealed that other variables (*e.g.,* residential mobility, changes in polling places, and other unchallenged election practices) were the actual causes of out-of-precinct voting. ER42–45. The panel affirmed based on precedent interpreting the "results in" language to require more than "a bare statistical showing of disproportionate impact," *Salt River*, 109 F.3d at 595, or a mere "statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity," *Gonzalez II*, 677 F.3d at 405.

Plaintiffs ignore the Court's en banc decision in *Gonzalez* and instead cite the earlier decision in *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003). *Farrakhan* concerned the applicability of the "totality of the circumstances" test, which is a legal point that no one disputes and indeed illustrates the intensely factual nature of a Section 2 analysis.

Senate Factors. Next, Plaintiffs fault Judge Rayes's alleged "mischaracterization of the evidence regarding the Senate Factors." Pet. 7. Again, it is unclear what they have in mind because Plaintiffs never explain the alleged error. But this kind of evidence-weighing is a quintessential factual determination that appellate courts review for clear error. As this Court has explained, "the district court's findings of fact [include] its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2." *Gonzalez*, 677 F.3d at 406. That is precisely the inquiry that the Senate Factors address, and Plaintiffs provide no reason to think that Judge Rayes clearly erred.

In any event, the panel had no need to address the Senate Factor evidence to affirm; those factors are relevant only at the *second* step of the Section 2 framework. Op. 42, 45. The panel thus recognized that "because the district court correctly determined that H.B. 2023 does not satisfy step one of the § 2 analysis, we need not evaluate the district court's analysis of these factors in detail." Op. 45 n.20 (finding no clear error and declining to reweigh Senate Factor evidence).

Subgroups. Plaintiffs further assert that the panel "failed to consider the impact of the challenged practices on subgroups of voters."

Pet. 7. On the contrary, both the panel and the district court expressly considered subgroups, when the evidence allowed, and followed the Supreme Court's analysis in *Crawford* for doing so. Op. 62–64. Judge Rayes, for example, focused on the small fraction of Arizona voters who (a) vote in person and (b) live in a county that has not adopted the vote-center model. ER45. For that subgroup, he found that the "the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens traditionally associated with voting." ER45–46; Op. 63. Judge Rayes's factual finding was not clearly erroneous, and the panel was correct to affirm it. In fact, even Plaintiffs do not assert that this analysis was incorrect; they simply deny that it occurred. Pet. 7.

Precinct-Based Voting. Again without citation, Plaintiffs accuse the panel of "recast[ing]" their allegation that Arizona cannot constitutionally require in-person voters to vote in their geographic precincts as "a challenge to precinct-based voting as a whole." Pet. 8. The gist of this objection appears to be that Judge Rayes somehow erred in finding a minimal burden on voters and an important government interest in voters casting ballots in their own precincts. *Id.* Neither of these was

clear error. Op. 64–67. Judge Rayes found that "the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens." ER 45.

On the other side of the scale are the State's interests in encouraging voters to cast ballots in down-ballot races, avoiding misdirection from persons seeking to manipulate down-ballot races, and managing administrative costs. ER 45–46; Op. 67–70 (citing *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004)). Judge Rayes also explained, and the panel agreed, that the State cannot fully capture these benefits without enforcing precinct-based voting. ER 48; Op. 68–70. The district court's assessment of how burdensome it is to vote in one's own precinct and the State's interest in maintaining and enforcing that requirement is not clearly erroneous, and the panel was correct to affirm it.

State Interest. The final two assignments of error are particularly bald attempts to reverse factual findings. The first involves the State's interest in its election regulations, which Plaintiffs call "'unsupported by the facts.'" Pet. 8 (quoting Dissent 104). There is little to say on this point, except that Judge Rayes did not clearly err. The interests

he found are settled by a pair of en banc decisions already on the books. *Gonzalez II* recognized a State's interest in "deterring and detecting voter fraud . . . and safeguarding voter confidence." 677 F.3d at 410. Likewise, the Court has "repeatedly upheld as 'not severe' restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016); *see also Crawford*, 553 U.S. at 197 (noting the same state interests).

Discriminatory Intent. Plaintiffs conclude their eight assignments of error by asserting that the district court's "factual findings are irreconcilable with its ultimate conclusion" regarding discriminatory intent. Pet. 9. Try as they might to call this a legal question, the Supreme Court has held that discriminatory intent "is not a question of law and not a mixed question of law and fact." *Pullman-Standard*, 456 U.S. at 288. Instead, intent "is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Id.*; *see also Abbott v. Perez*, 138 S.Ct. 2305, 2326 (2018) ("[A] district court's finding of fact on the question of discriminatory intent is reviewed for clear error."). Plaintiffs offer nothing to meet that exacting standard.

* * *

Plaintiffs' litany of alleged errors is long, but none of them comes anywhere close to reaching the high threshold for rehearing en banc. Fed. R. App. P. 35(a). Plaintiffs are dissatisfied with their losses at trial and on appeal. That frustration and attempt to have a redo trial on appeal do not imbue their scattershot petition with the legal significance required for rehearing en banc.

II. The Panel's Holding Is Consistent with the Supreme Court and Every Other Court of Appeals.

Plaintiffs assert that the majority opinion "conflict[s] with decisions of other courts of appeals regarding applicable standards for evaluating voting rights claims under § 2 and the Constitution." Pet. 9. In support, Plaintiffs string-cite four decisions from the Fourth, Fifth, and Sixth Circuits—*all* of which the majority opinion addressed. *See* Op. 19, 26, 30 n.12, 42–43 n.19, 53, 55. Plaintiffs never actually identify a conflict with those sister court decisions. None exists.

First, Plaintiffs cite *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) ("*LWV*"), which analyzed a Section 2 claim at the preliminary-injunction stage. Plaintiffs never explain how the Fourth Circuit's approach allegedly conflicts with the majority opin-

ion here. And they ignore that the panel specifically explained how its "two-step analysis" to evaluate Plaintiffs' Section 2 claim was "consistent with the two-step framework adopted" in *LWV* and other circuits. Op. 42–43 n.19.

Indeed, just like the panel here, *LWV* correctly stated that a Section 2 plaintiff must show that "members of the protected class have less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice.'" *LWV*, 769 F.3d at 240 (emphasis added); *see also* Op. 38; *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994) ("Section 2 plaintiffs must demonstrate that they had less opportunity *both* (1) to participate in the political process, *and* (2) to elect representatives of their choice.") (citing *Chisom*, 501 U.S. at 397 n.24) (emphasis added). Here, Plaintiffs could not make the necessary factual showing at trial on (at least) the latter part of this conjunctive standard—*i.e.*, a diminished opportunity to elect representatives of their choice. *See* Op. 45–46, 71–73.

Plaintiffs further ignore that *LWV* was decided at the preliminary-injunction phase, before the appellate court had the benefit of a full tri-

al record. Consequently, and unlike this case, the Fourth Circuit did not have before it factual findings that the challenged practices did not meet Section 2's standard because they were "not burdensome" and were offset by "easily accessible alternative means of voting." Op. 41 (citing *Chisom*, 501 U.S. at 397 n.24); *see also* Op. 46 ("[N]ot a single voter testified at trial that H.B. 2023 made it significantly more difficult to vote."); *id.* at 73 (explaining that "a common electoral practice" like precinct-based voting "is a minimum requirement, like the practice of registration, that does not impose anything beyond 'the usual burdens of voting'") (quoting *Crawford*, 553 U.S. at 198); *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986) ("It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'").[2]

---

[2] The amicus brief supporting rehearing en banc provides slightly more specificity than Plaintiffs regarding *LWV*, arguing that "the Fourth Circuit expressly rejected the notion that the number of minority voters affected is always dispositive of a Section 2 vote denial claim." Amicus at 17 (citing *LWV*, 769 F.3d at 244). This argument mischaracterizes the panel opinion, which nowhere creates such an automatic mechanism. To the contrary, it explains that whether a practice "has some material effect on elections and their outcomes," as Section 2 requires, does *not*

Second, Plaintiffs cite *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016), apparently to suggest that the Fifth Circuit has applied different legal standards under Section 2. Not true. The majority opinion here explained that its analysis involved the same two-part framework adopted by the Fifth Circuit (as well as the Fourth Circuit in *LWV*). *See* Op. 42–43 n.19. Where *Veasey* and the present case part ways is on the facts. Specifically, the Fifth Circuit discussed the trial court's factual findings that Texas's voter-identification law imposed "substantial" and "significant" obstacles to in-person voting, and that "mail-in voting is not an acceptable substitute for in-person voting *in the circumstances presented by this case*." *Veasey*, 830 F.3d at 254–56 (emphasis added).[3] Here, Plaintiffs failed to make a similar showing with respect to either H.B. 2023 or precinct-based voting. Op. 45–46, 72–73 (discussing de minimis burdens and consistency with *Crawford*). If anything, *Veasey*'s

---

necessarily turn on the number of impacted voters, but can also hinge on the severity of the challenged practice and the availability of voting alternatives. *See* Op. 39, 41.

[3] Applying the principle of constitutional avoidance, *Veasey* declined to consider whether the challenged voter identification law imposed an unconstitutional burden on voting. *Veasey*, 830 F.3d at 265.

fact-dependency illustrates why the panel here was correct and why Plaintiffs' many assignments of error are mistaken.

Third, Plaintiffs cite the Sixth Circuit's vacated decision in *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Plaintiffs' citation lacks even a pin cite, but in their previous arguments to the panel, Plaintiffs contended that Arizona needed to provide specific instances of fraud in order to justify H.B. 2023. Responding to that argument, the panel majority explained why Plaintiffs' "reliance on [this] vacated Sixth Circuit opinion is unpersuasive": "The Sixth Circuit has explained that any persuasive value in *Ohio State Conference* . . . is limited to cases involving 'significant' . . . burdens," not "'minimal'" ones. Op. 30 n.12 (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016)). If there were any question about where the Sixth Circuit stands, the later *Ohio Democratic Party* case eliminates any doubt. In both this Court and the Sixth Circuit, minimal burdens on voting are insufficient to offend the Fourteenth Amendment. *See* Op. at 24; 63–64.

Moreover, all federal courts are bound by the Supreme Court's decisions. The Supreme Court closed the door on Plaintiffs' demand for evidence of actual fraud before the State can enact prophylactic measures like H.B. 2023. In *Crawford*, "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194. The Supreme Court nonetheless affirmed that States may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The federal courts of appeals are not divided on this issue, and *could not be* without ignoring the Supreme Court.

Fourth, Plaintiffs cite another Sixth Circuit decision, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016) ("*NEOCH*"). Based on the page they cite, Plaintiffs apparently contend that the panel failed to assess properly the impact of H.B. 2023 and precinct-based voting on "subgroups" in applying the *Anderson-Burdick* test. The panel specifically addressed *NEOCH*, however, explaining that "it is an error to consider 'the burden that the challenged provisions uniquely place' on a subgroup of voters in the absence of 'quantifi-

able 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 [those provisions].'" Op. 19 (quoting *NEOCH*, 837 F.3d at 631) (alteration in original).[4] The panel's approach to subgroups is entirely consistent with the Sixth Circuit's decision in *NEOCH*. Any objection Plaintiffs might have to the subgroup standard is aimed at both circuits, not this Court alone.

On the merits of the subgroup question, the district court addressed subgroups where possible, *see supra* 6–7, but declined to speculate where Plaintiffs presented failed to present "sufficient evidence," ER25. Citing *Crawford*, Judge Rayes held that "there is insufficient 'concrete evidence' for the Court to gauge the magnitude of that burden or the portion of it that is justified." ER26 (citing 553 U.S. at 201). The panel affirmed. *See* Op. 24, 26, 27-28 (H.B. 2023), 66 (precinct-based voting). These evidentiary deficiencies are particular to the present case and do not merit *en banc* review.

---

[4] Defendants continue to believe that Supreme Court precedent bars consideration of subgroups. Answering Br. 21; *see also NEOCH*, 837 F.3d at 631 ("Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.").

CONCLUSION

The Court should deny the petition for rehearing en banc.

October 16, 2018

Respectfully Submitted,

/s/ Dominic E. Draye

Dominic E. Draye
Solicitor General
Andrew G. Pappas
Kara M. Karlson
Karen J. Hartman-Tellez
Joseph E. La Rue
OFFICE OF THE ATTORNEY GENERAL
2005 North Central Ave.
Phoenix, AZ 85004
(602) 542-3333

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 40-1(a) because this brief contains 3,260 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type.

/s/ Dominic E. Draye
Dominic E. Draye
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
2005 North Central Ave.
Phoenix, AZ 85004
(602) 542-3333

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 16, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Dominic E. Draye
Dominic E. Draye
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
2005 North Central Ave.
Phoenix, AZ 85004
(602) 542-3333