No. 18-15845

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**In the United States Court of Appeals**
**for the Ninth Circuit**

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DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

*Plaintiffs/Appellants*,

v.

MICHELE REAGAN, *et al.*,

*Defendants/Appellees*,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

*Intervenors-Defendants/Appellees*.

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On Appeal from the United States District Court
for the District of Arizona
No. CV-16-01065-PHX-DLR
Hon. Douglas Rayes

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# PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR REHEARING EN BANC

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Plaintiffs-Appellants ("Plaintiffs") respectfully move for leave to file the Reply Brief in Support of their Petition for Rehearing En Banc that is attached as Exhibit A. In support of this motion, Plaintiffs state as follows:

1. Plaintiffs timely filed their Petition for Rehearing En Banc ("Petition") on September 12, 2018—the same day the three-judge panel issued its opinion.

2. On September 25, the Court directed Defendants Michele Reagan and Mark Brnovich (together, "the State") to file a response to the Petition.

3. The State filed its Opposition ("Opp.") on October 16, 2018.

4. While the Federal Rules of Appellate Procedure and the Ninth Circuit Rules neither permit nor prohibit a reply in support of a petition for rehearing *en banc*, there are cases in which this Court granted leave for a party to do so. *See, e.g.*, *Frontline Processing Corp. v. First State Bank of Eldorado*, 399 Fed. App'x 185 (9th Cir. 2010) (unpublished) (granting appellant's motion for leave to file a reply in support of petition for rehearing); *United States v. Robertson*, 977 F.2d 593 (9th Cir. 1992) (same).

5. A reply is warranted here. As set forth in the Petition, this case raises questions of exceptional importance, conflicts with prior circuit law and law of sister circuits, and affects a rule of national application. In addition, the reply makes clear that, contrary to the State's argument that the Petition is a "request for a retrial,"

Resp. 2, Plaintiffs believe that en banc review is appropriate in light of *legal* conclusions that were made by the panel.

6. Counsel for Plaintiffs contacted opposing counsel to ascertain their position on this motion. The Republican Party Intervenors oppose. The State Defendants take no position on this motion.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order granting this Motion and accepting for filing Plaintiffs-Appellants' Reply in Support of Their Petition for Rehearing En Banc, attached as Exhibit A.

RESPECTFULLY SUBMITTED this 26th day of October, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the attached document 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 26, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

*s/ Michelle DePass*

## CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 27-1. The motion contains 319 words, excluding the portions exempted by Rule 27-1(d). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*

# Exhibit A

No. 18-15845

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DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

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# APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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# TABLE OF CONTENTS

**PAGE**

# TABLE OF AUTHORITIES

**STATUTES** **PAGE**

## INTRODUCTION

Plaintiffs seek rehearing en banc to correct a panel decision that dramatically narrows the protection for voting rights provided by the First, Fourteenth, and Fifteenth Amendments and Section 2 of the Voting Rights Act ("VRA"). In response, the State casts the Petition for Rehearing En Banc ("Petition") as a "request for a retrial," Resp. 2, and suggests that Plaintiffs inappropriately seek to revisit factual findings. Not so. Had the panel applied the correct legal analysis to the facts *as the district court found them*, it would have arrived at different legal conclusions. *See, e.g.*, Dissent 88 ("I take no issue with the district court's findings of fact. Rather, I disagree with the application of law to the facts, and the conclusions drawn from them."); *see also id.* 96-98, 100-01, 103, 119; Pet. 5-10.

More importantly, the State does not address the broader issue: at this stage, this case is about far more than two Arizona election laws. Its outcome will reverberate through voting rights law for years to come. If left to stand, the panel's flawed articulation of Section 2, the *Anderson-Burdick* legal standard, and *Arlington Heights* places insurmountable obstacles in the path of potential voting rights plaintiffs and cements the Ninth Circuit as an outlier among the courts of appeals, marking it as one of the unfriendliest circuits in the nation for plaintiffs seeking redress against violations of their voting rights. The panel majority's approach would brush aside challenges to even the most suppressive and discriminatory voting

measures, so long as plaintiffs could not establish such measures would impact sufficient numbers of voters across multiple elections. That is not the law, and the full en banc court should intervene to prevent such a diminishment of voting rights. Rehearing en banc should be granted.

## ARGUMENT[1]

### I. Rehearing en banc is needed to address the panel's incorrect imposition of a "frequent election outcomes" standard for Section 2 claims.

Rehearing en banc is needed to correct the panel's flawed conclusion that establishing a violation of Section 2 requires a showing that a challenged law would deprive sufficient minority votes to change the outcome not "mere[ly]" in "an occasional election," but rather that it would have altered multiple election "outcomes." Op. at 39-40, 42, 72-74; Pet. 7. Any "outcomes" requirement—much less a "frequent election outcomes" requirement—is incompatible with the plain language and broad purposes of Section 2, Supreme Court precedent and the decisions of every Circuit, including this one, that has decided the issue.

The panel's "outcomes" requirement is inconsistent with the framework that this Court sitting en banc and other courts of appeals have applied to Section 2 vote-

[1] Plaintiffs reiterate that rehearing en banc is merited to correct all errors detailed in the Petition and discussed at length in the Dissent. Given the word limit for this brief, however, Plaintiffs focus here on the three errors most likely to impede future voting-rights litigants' ability to protect their right to vote.

denial claims. The Fourth, Fifth, Sixth, and Seventh Circuits have uniformly held that the first step of the two-part Section 2 test requires the court to evaluate the discriminatory burden a law places on members of a protected class—not its impact on election outcomes.[2] *See Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 37 (6th Cir. 2016); *Frank v. Walker*, 768 F.3d 744, 754-755 (7th Cir. 2014); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367, 400-01 (9th Cir. 2016) (en banc), *stay granted*, 137 S. Ct. 446 (2016); Amicus Br. 5-12.

The State argues that the "outcomes" requirement is justified under *Chisom v. Roemer*, 501 U.S. 380 (1991), and the text of Section 2, but neither authority supports that proposition. As the panel dissent explains, the *Chisom* Court "clearly understood that the VRA does not demand a showing that the challenged provision may be outcome-determinative: 'Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.'" Dissent 82 n.1 (quoting *Chisom*, 501 U.S. at 396-97). Under *Chisom*, a court that has determined that a law imposes a

[2] This interpretation is consistent with the causation requirement in *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), and *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997). But the panel's requirement that causation must be shown by demonstrating frequent loss of elections is novel, unwarranted, and impractical.

discriminatory burden should *inevitably* conclude that members of the protected class are less able to elect the representative of their choice. *See id.*; *see also* Amicus Br. 13-15 (discussing *Chisom*). This reading of *Chisom* is reinforced by the Supreme Court's direction that the VRA must be interpreted to "provide[] the broadest possible scope in combating racial discrimination." 501 U.S. at 403 (quotation marks omitted).

To read *Chisom* and Section 2 otherwise, as the panel did here, would eliminate pre-enforcement challenges, inoculate discriminatory laws from review under Section 2,[3] and require that discriminatory burdens be imposed on voters before a violation of Section 2 can be established.[4] *See* Amicus Br. 16-19. That view cannot be squared with the VRA's "broad remedial purpose of ridding the country of racial discrimination in voting," and warrants en banc review by this Court. *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003) (quotation marks

[3] There is no reason to believe that the Supreme Court intended *Chisom* to have that result; to the contrary, in eliminating the pre-clearance regime in *Shelby County v. Holder*, the Supreme Court noted that "[Section 2] relief is available in appropriate cases to block voting laws from going into effect." 570 U.S. 529, 537 (2013).

[4] The significant difficulty of meeting this evidentiary burden is evident here. Arizona has a history of close elections and at least one election *during the pendency of this case* was decided by a margin that was smaller than the number of out-of-precinct voters. Dissent 84 n.2. And yet the panel found that the "outcomes" requirement had not been met.

omitted); *see also League of Women Voters of N. Carolina*, 769 F.3d at 244 ("even one disenfranchised voter—let alone several thousand—is too many").

## II. The panel's flawed *Anderson-Burdick* analysis confirms the need for rehearing en banc.

In applying the *Anderson-Burdick* test, the panel held that neither of the challenged laws imposes significant burdens on voters—in large part because either a small portion of the electorate was impacted by the policy (out-of-precinct voting) or because the precise number of individuals who were impacted (ballot collection) could not be determined. *See* Op. at 20-21 (discussing imprecision in numbers of voters burdened and noting that "the vast majority of Arizona voters were unaffected by [the ballot collection ban]"); Op. at 64 (burden minimal because "number of out-of-precinct votes is 'small and ever dwindling'"); Pet. 7-8. It then concluded that Arizona's interests justified both practices.

The panel's suggestion that a voting law is not burdensome as long as most voters are unaffected is incorrect. The relevant burdens are the burdens on the voters who are most affected by the law. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling opinion) ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements."); *Pub. Integrity All. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) ("[C]ourts may consider not only a given law's impact on the electorate in general, but also its

impact on subgroups, for whom the burden, when considered in context, may be more severe."); *Feldman*, 843 F.3d at 396; *see also* Dissent 121.[5] Here, the panel held that subgroup analysis should be conducted "*only if* the plaintiff adduces evidence sufficient to show the size of the subgroup and quantify how the subgroup's special characteristics makes the election law more burdensome." Op. at 19 (emphasis added). But neither *Crawford* nor *Public Integrity Alliance* created such a requirement, and it makes no sense. For instance, Plaintiffs put on significant evidence, that the district court credited, that HB2023 made it more difficult to vote for Native Americans living on tribal lands. Dissent 117-18, 121-22. The precise number of Native Americans impacted is not relevant to determining the extent of the burden HB2023 places on that subgroup; indeed, its only conceivable relevance would be potential impact on electoral outcomes.

The standard applied by the panel also imposes practical barriers to establishing an *Anderson-Burdick* claim. The precise number requirement means that potential plaintiffs may have to spend years collecting comprehensive statistical evidence and expend resources over a period of time. In addition, a single actor may not have access to comprehensive data, and the data that is available may not be sufficient to determine precisely the size of the subgroup that is disparately

[5] The State points out that the district court considered subgroups "where the evidence allowed," Resp. at 7, but, as discussed above, this is simply incorrect.

burdened. Dissent 117 (discussing ballot collection). Further, even if a plaintiff is able to introduce evidence regarding the precise size of a disparately burdened subgroup—as Plaintiffs did here by specifying the numbers of disenfranchised out-of-precinct voters, Op. 64—under the panel's decision, courts could conclude that not enough voters were affected to raise constitutional concerns. Of course, there is no minimum number of voters who must be burdened before a law implicates rights protected by the First and Fourteenth Amendments. Holding otherwise was legal error, and merits correction by the en banc Court.[6]

## III. The panel erred in upholding the district court's *Arlington Heights* analysis.

The panel's intentional discrimination determination is inconsistent with *Arlington Heights* and the Fourth Circuit's opinion in *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). After concluding that Plaintiffs had presented evidence demonstrating the existence of the four factors set forth in *Arlington Heights*, the district court failed to draw the inevitable conclusion: that the Republican-controlled Arizona legislature passed the

[6] Although Respondents argue otherwise, "*Crawford* is not a blank check for legislators seeking to restrict voting rights with baseless cries of 'voter fraud,'" Dissent 123, and the application of it as such here is at odds with that decision and prior decisions of this Court. *Id.* 123-25; *see also Pub. Integrity All. Inc.*, 836 F.3d at 1025 (explaining that *Anderson-Burdick* does not permit rational basis or burden shifting); *Feldman*, 843 F.3d at 396 n.2 ("A court may not avoid application of a means-end fit framework in favor of rational basis review simply by concluding that the state's regulatory interests justify the voting burden imposed.").

ballot collection ban to inhibit voting among Arizona's minority citizens, who typically vote for Democrats. *See* Dissent 106-14 (based on facts as district court found them, all four *Arlington Heights* factors present). In refusing to draw the inevitable conclusion, the district court and the panel flouted the Supreme Court's direction in *Arlington Heights* and committed the same mistake that the Fourth Circuit held clearly erroneous in *McCrory*: "miss[ing] the forest in carefully surveying the many trees." 831 F.3d at 214. Contrary to the State's assertions, drawing the wrong legal conclusions from findings of fact constitutes legal error. Errors of law "include[e] those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Salt River*, 109 F.3d at 591. Moreover, this error will impact this Court's future discriminatory intent decisions. Dissent 106-114. En banc review is needed to correct these legal errors.

## CONCLUSION

For these reasons, the petition for rehearing en banc should be granted.

RESPECTFULLY SUBMITTED this 26th day of October, 2018.

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*s/ Michelle DePass*

## CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) and Rule 32-2(b). The brief contains 1,996 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*