Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF SENATOR TED CRUZ AND TEN OTHER MEMBERS OF THE UNITED STATES SENATE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are United States Senators:

Ted Cruz
Marsha Blackburn
Mike Braun
John Cornyn
Tom Cotton
James M. Inhofe
James Lankford
Mike Lee
Mitch McConnell
Rick Scott
Thom Tillis

Amici are concerned about an aggressive wave of litigation aimed at further expanding Section 2 of the Voting Rights Act (VRA §2) beyond the limits imposed by its text and the enforcement power defined in the Fifteenth Amendment. The interpretation of VRA §2 adopted by the Ninth Circuit—and urged by the respondents—will jeopardize several facially neutral and entirely legitimate laws that States have adopted to deter and prevent voter fraud.

"[T]he risk of voter fraud [is] real." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008) (controlling op. of Stevens, J.). As this Court has repeatedly confirmed, States have the authority and responsibility to ensure the integrity of their elections. These measures do

1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus or its members or counsel financed the brief's preparation or submission.

not deny anyone the equal "opportunity" to vote "on account of race or color." 52 U.S.C. §10301.

Yet Respondents urge, and the Ninth Circuit below adopted, an interpretation of VRA §2 that jeopardizes legitimate voting laws across the country. The Ninth Circuit held that any neutral voting law "results" in an unequal "opportunity" to vote "on account of race or color" whenever a plaintiff identifies some minimal statistical racial disparity related to the law—and then points to completely separate, long past, invidious voting discrimination.

Not only does this novel VRA interpretation threaten legitimate election-integrity laws, it would also render VRA §2 unconstitutional—or would, at the very least, present serious constitutional questions that this Court is duty-bound to avoid so long as any plausible alternative construction of the statute remains available. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

SUMMARY OF ARGUMENT

I. The text, structure, and legislative record regarding the "results" component of Section 2 of the Voting Rights Act foreclose the Ninth Circuit's interpretation. Congress enacted an equal "opportunity" requirement—not a disparate impact statute. 52 U.S.C. §10301. Using language lifted from voting-dilution cases, §2's text provides that a violation occurs when "the political processes *** are *not equally open* to participation by members of a [racial group] 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." 52 U.S.C. §10301(b) (emphasis added).

Indeed, when amending VRA §2 in 1982, Congress sought to supplant *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and reinstitute vote-dilution claims without requiring discriminatory purpose. It adopted compromise language that codified almost verbatim this Court's previous articulation of the vote-dilution test from *White v. Regester*, 412 U.S. 755, 765–66 (1973).

Congress thus amended VRA §2 to provide for equal "opportunity" in the political process. And Congress rejected a broad "discriminatory effects" test or one requiring racially proportional outcomes.

The structure of the VRA at the time further demonstrates that §2 does not open the door to disparate-impact challenges to customary voting laws. Namely, §5 at the time required "covered jurisdictions"—the States whose blatantly discriminatory practices gave rise to the VRA—to justify any change in their voting laws by proving they did not have a retrogressive effect. It would be incongruous to hold non-covered jurisdictions to a similar, if not more demanding, standard by forcing them to defend longstanding time, place, and manner regulations with minimally disparate statistical impacts on minority voters.

Moreover, the legislative record reveals that Congress focused almost exclusively on claims that multi-member districts resulted in vote dilution. When the legislative record addressed any "practice" other than vote dilution as justification for §2, it referred only to three "episodic" instances of discriminatory acts; it cited no concern with time, place, and manner voter-participation laws.

In short, the "results" test Congress enacted to ensure that "political processes" were "equally open to participation" did not invalidate laws that impose mere disparate inconveniences on voters. *Ibid.* Otherwise, VRA §2 would "dismantle every state's voting apparatus." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

II. The Ninth Circuit, however, adopted—and Respondents urge this Court to adopt—an interpretation of VRA §2 that would do exactly that. According to this interpretation, any neutral voting law "results" in an unequal "opportunity" to vote "on account of race or color" whenever a plaintiff identifies a minimal statistical racial disparity related to the law—and then points to completely separate, long past, invidious voting discrimination. 52 U.S.C. §10301.

But VRA §2 "does not sweep away all election rules that result in a disparity in the *convenience of voting*." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (emphasis added). This Court, lower courts, and the respected bipartisan Carter–Baker Commission have recognized that "the risk of voter fraud [is] real," and "the usual burdens of voting" do not deny anyone an equal opportunity to vote. *Crawford*, 553 U.S. at 196, 198 (controlling op. of Stevens, J).

That is particularly true here regarding Arizona's ballot-collection law. As the Carter–Baker Commission found, "Absentee ballots remain the largest source of potential voter fraud." Carter–Baker Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections 46 (2005) (hereinafter Carter–Baker).

Nevertheless, the Ninth Circuit's VRA §2 interpretation would eviscerate scores of legitimate time, place, and manner voting laws that prevent and deter fraud. In the past decade, plaintiffs have pushed an aggressive VRA §2 theory seeking to invalidate voting laws regulating absentee voting, precinct voting, early voting, voter identification, election observer zones, voter registration, durational residency, and straight-ticket voting. These election-integrity provisions are entirely unlike the draconian, invidious voting restrictions the original VRA was designed to address. And they do not deny anyone an equal "opportunity" to vote. 52 U.S.C. §10301.

III. The Ninth Circuit's sweeping interpretation of VRA §2 would also render the statute unconstitutional.

Congress's Enforcement Clause powers extend only to laws that are "congruen[t] and proportional[]" to remedying *constitutional* violations. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Here, constitutional violations require a showing of discriminatory *purpose*. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997). But the VRA §2 interpretation advanced by Respondents and adopted below by the Ninth Circuit would sweep far more broadly, prohibiting scores of neutral time, place, and manner voting laws that are entirely constitutional and were enacted for legitimate election-integrity purposes.

Moreover, Congress's "legislative record" from amending VRA §2 in 1982 did not "identify a pattern" of constitutional violations from neutral time, place, and manner voting laws. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001). In the vast legislative record, Congress identified only three cases holding that

States abridged voter participation—and none of those cases found a discriminatory purpose.

Congress's compromise VRA §2 amendment in 1982 sought to avoid imposing racial proportionality. But that is required by the Ninth Circuit's interpretation, which would mandate that States consider racial proportionality every time they enact new voting laws. This would unconstitutionally "subordinate[] traditional race-neutral * * * principles" to "racial considerations." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995).

ARGUMENT

I. VRA §2'S TEXT, STRUCTURE, AND LEGISLATIVE RECORD CONFIRM THAT CONGRESS ENACTED AN EQUAL "OPPORTUNITY" REQUIREMENT, NOT A DISPARATE-IMPACT STATUTE AIMED AT INVALIDATING NEUTRAL TIME, PLACE, AND MANNER VOTING LAWS

A. The text of VRA §2 confirms that the "results" component of VRA §2 guarantees equal "opportunity"—not racial proportionality. 52 U.S.C. §10301.

Since 1982, §2(a) has prohibited any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right *** to vote on account of race or color." 52 U.S.C. §10301(a). Congress dictated that such a violation is shown if, as a result of the voting practice and "based on the totality of circumstances," "the political processes *** are *not equally open* to participation by members of a [racial group] 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." *Id.* §10301(b) (emphases added). And §2(b) goes on to emphasize "that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

In this case, it is simply wrong for the Ninth Circuit to conclude that Arizona's "political processes" were "not equally open to participation" by minority voters, and that they had less "opportunity * * * to participate in the political process" merely because they are marginally more likely to try to vote outside their political precinct and because they are marginally more apt to be solicited to have their ballots harvested by activists.

1. Before 1982, VRA §2 was "a little-used provision that tracked the language of the Fifteenth Amendment." Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1352 (1983).

In contrast, Congress enacted separate VRA provisions targeting particular voting laws where "Congress had before it a long history of the discriminatory use of [these laws] to disenfranchise voters on account of their race." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (op. of Black, J.); *see South Carolina v. Katzenbach*, 383 U.S. 301, 333–334 (1966) (banned tests "have been administered in a discriminatory fashion for many years"); 52 U.S.C. §10101(a)(2)(C) (ban on literacy tests); *id.* §10306(b) (authorizing Attorney General to challenge poll taxes under the Constitution); *id.* §10307 (prohibiting refusal to count

duly cast votes and intimidating or threatening voters under color of state law).

In addition to general literacy tests, *Katzenbach* also refers to general educational requirements, moral-character restrictions, and registered-voter vouchers, 383 U.S. at 312, which are all specifically proscribed at 52 U.S.C. §10501 (Section 201 of the VRA): "No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State," with "test or device" defined to include "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." This provision remains in force today.

The disparities these pernicious laws created for minority voting participation were so expansive that they could be explained only as discrimination on the basis of race, and thus were treated as such. *See*, *e.g.*, *Katzenbach*, 383 U.S. at 313 (before the original VRA, black voter registration was 4.2% in Alabama and 4.4% in Mississippi—each more than "50 percentage points" lower than white registration).

2. Separately, throughout the 1970s, this Court addressed whether multi-member or at-large districts unconstitutionally diluted minority votes. *White v. Regester*

recognized that such districts "are not *per se* unconstitutional," while fashioning a test for determining if they could be unconstitutional under certain circumstances:

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings *that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*

412 U.S. at 765–66 (emphasis added).[2]

After *Regester*, the Fifth Circuit summarized a list of factors that could show "the existence of dilution." *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc). But this Court in *City of Mobile v. Bolden* overturned *Zimmer*, reasoning it "was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." 446 U.S. at 71 (plurality op.).

Bolden held that the pre-1982 VRA §2 "no more than elaborate[d] upon that of the Fifteenth Amendment"—which only prohibits facially neutral laws "motivated by a discriminatory *purpose*." *Id.* at 60, 62 (emphasis added).

2. This italicized language was later codified at VRA §2(b) to limit the "results" test that Congress created in 1982.

So "a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment," must "establish that the State or political subdivision acted with a discriminatory purpose." *Bossier Par.*, 520 U.S. at 481.

Bolden "galvanized" support to amend VRA §2 and reinstate the Court's *Regester* test for vote-dilution. Boyd & Markman, 40 Wash. & Lee L. Rev. at 1348. So in 1982, Congress amended VRA §2 to create the new "results" component of VRA §2(a). Crucially, however, Congress clarified—in the new VRA §2(b)—that the "results" component is assessed under the same vote-dilution test previously used by *Regester*. The Senate Judiciary Committee Report explained:

> This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.

S. Rep. No. 97-417, at 2, 97th Cong., 2d Sess. (1982) (hereinafter S. Rep.); *see also id.* at 27 ("The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. Plaintiffs must prove such

intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.").

Indeed, VRA §2(b)'s plain text is almost a verbatim recitation of *Regester*'s test for vote dilution. Compare *Regester*, 412 U.S. 766 (holding that a vote dilution plaintiff must show "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."), *with* 52 U.S.C. §10301(b) ("A violation * * * is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens * * * 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.").

The fact that this language codified *White v. Regester* confirms that §2 was not enacted to massively expand the scope of banned voting regulations. But the Ninth Circuit here applied vote-dilution factors bearing no relation to a so-called "vote denial" claim.

B. The VRA's structure in 1982 further undermines any effort to turn §2 into a vehicle to attack—on a disparate-impact basis—longstanding time, place, and manner statutes aimed at ensuring election integrity. Namely,

Congress amended §2's language while retaining §5's preclearance requirements for "covered jurisdictions."

Until the Court declared §4 unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013), VRA §5 required covered jurisdictions to seek preclearance from the Department of Justice or the district court in Washington, D.C., for any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 52 U.S.C. §10304(a). This extraordinary exercise in federal control over state law applied to "all changes [in voting laws], no matter how small." *Allen v. State Bd. Of Elections*, 393 U.S. 544, 568 (1969).

The states subject to preclearance had been "areas of flagrant disenfranchisement * * * that had used a forbidden test or device in November 1964, and had less than 50% voter registration or turnout in the 1964 Presidential election." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198–99 (2009). These "supplicant jurisdiction[s]," *Shelby County*, 570 U.S. at 545, bore the burden of establishing that any change to existing voting laws did not have a "retrogressive" effect on minority voters. *See, e.g.*, *Beer v. United States*, 425 U.S. 130, 141 (1976) ("[T]he purpose of [§5] has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

Section 2, by contrast, applies to every jurisdiction in the United States. Under the Ninth Circuit's approach, however, §2 would apply these retrogression concepts to

the mere *maintenance* of a voting law anywhere in the United States, no matter how long the law has been on the books. In other words, so long as an expert can testify that voting patterns or societal trends develop in such a way that minorities were disparately impacted by a state voting-practice law (for instance, that election-day voting must occur in a precinct), then the law would be vulnerable to attack under §2.

It would be incongruous to the point of absurdity, however, to conclude that Congress meant to subject every *non*-covered jurisdiction to comparable, if not closer, scrutiny in federal court under §2 than covered jurisdictions faced under §5, by allowing private plaintiffs to sue over any existing voting procedure that was accompanied by any minimally-statistically-disparate impact. To the extent Congress thought disparate impacts were actionable under the VRA, those claims were confined to §5, not §2. *See Luft v. Evers*, 963 F.3d 665, 673 (7th Cir. 2020) (rejecting assertion that "§ 2 forbids any change in state law that makes voting harder for any identifiable group," and noting that VRA already has "an anti-retrogression rule" in §5; "Section 2 must not be read as equivalent to § 5(b)").

C. The text and structure of the VRA are dispositive—Congress did not establish a disparate-impact test when it amended Section 2. The Ninth Circuit's opinion, reflecting a "bygone era of statutory construction," *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), leaned on the legislative record underlying VRA §2 to conclude the opposite. *See Democratic Nat'l Comm.*

v. Hobbs, 948 F.3d 989, 1012 (9th Cir. 2020). But that legislative history only confirms that §2 does not preempt neutral time, place, and manner voting laws that impose merely some disparate impact on different racial groups.

Initially, the House passed an amendment that "would prohibit all discriminatory 'effects' of voting practices," under which "intent would be 'irrelevant.'" *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (quoting H.R. Rep. No. 97-227 at 29, 97th Cong., 1st Sess. (1981)).

But in the Senate, the House's proposal "met stiff resistance." *Ibid.* Senator Hatch was the leading advocate against the House's broad "discriminatory effects" test, arguing it imposed a disparate-impact test remediable exclusively through racial proportionality. *See* S. Rep. at 98–99 (statement of Sen. Hatch: "Disparate impact can ultimately be defined only in terms that are effectively indistinguishable from those of proportional representation. Disparate impact is not the equivalent of discrimination.").

Senator Dole proposed the compromise that would eventually become law. It was "designed to reconcile the two competing viewpoints"—by (1) retaining the "results" test from the House bill, thus supplanting *Bolden*, (2) but "describ[ing] its parameters in greater detail" by adopting the vote-dilution test from *Regester* "with particular emphasis on whether the *political processes are* '*equally open*.'" Boyd & Markman, 40 Wash. & Lee L. Rev. at 1414–15, 1422 (emphasis added); *accord Miss. Republican Exec. Comm.*, 469 U.S. at 1010 (Rehnquist, J., dissenting) ("The compromise bill retained the 'results'

language but also incorporated language directly from this Court's opinion in [*Regester*] and strengthened the caveat against proportional representation."); *id.* at 1011 (Senator Dole argued "that 'access' only was required by amended § 2").

Not surprisingly, the legislative record repeatedly confirms that Congress was focused almost exclusively on vote-dilution claims about multi-member or at-large districts. *See*, *e.g.*, S. Rep. at 6 (identifying "dilution schemes" like "at-large elections [being] substituted for election by single-member districts"); *id.* at 8 (same); *id.* at 23–24 (before *Bolden*, "the lower federal courts followed * * * *White* [*v. Regester*]," and in "applying the results test, the courts repeatedly concluded that at-large elections were not vulnerable to attack unless, in the context of the total circumstances, [they denied] minority voters [an] equal chance to participate in the electoral system"); *id.* at 27 ("The 'results' standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote.").

In fact, the Senate Report included a lengthy discussion adopting the Fifth Circuit's nine *Zimmer* factors for vote-dilution claims. *See id.* at 28–29. This Court, in turn, then relied on the Senate Report to adopt these factors as "particularly" relevant to the "totality of the circumstances" for vote-dilution claims under the amended VRA §2. *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986).

In this vast legislative record, however, Congress did not identify *any* pattern of unconstitutional time, place, and manner voter participation laws. There was no "body

of participation law analogous to the *White/Zimmer* dilution jurisprudence" for Congress to codify. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 416 (2012).

To the contrary, in the course of observing that §2 "also prohibits practices, which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members," it identified only three examples of such "episodic" practices. S. Rep. at 30 and n.119. And none of these examples of "episodic" barriers involved the kind of neutral time, place, and manner statutes involved here:

- In *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968), a parish clerk's office in Louisiana allowed white nursing-home residents and white residents generally to vote absentee without extending the same opportunity to black voters.

- In *United States v. Post*, 297 F. Supp. 46, 51 (W.D. La. 1969), election officials issued voting instructions and then instituted different procedures but black voters were "induced to vote according to [the prior] erroneous instructions and [were] thereby prevented from casting effective votes."

- In *Toney v. White*, 488 F.2d 310, 312 (5th Cir. 1973), the "racial discrimination * * * consisted of the Registrar purging the voter rolls in a manner directed at black voters but not at white voters" in violation of Louisiana law.

This legislative record shows that VRA §2 was not designed to target election-integrity provisions that have a

mere disparate impact on different racial groups. Congress never intended to "completely prohibit a widely used prerequisite to voting which is not facially discriminating." S. Rep. at 43. And Congress believed the results test "is not an easy test." *Id.* at 31. The Senate Report expressly disavowed a "discriminatory effects" standard. *See, e.g.*, *id.* at 68 & n.224 ("[T]he amendment distinguishes the standard for proving a violation under section 2 from the standard for determining whether a proposed change has a discriminatory 'effect' under Section 5 of the Act."). And Congress's reliance on *Regester* and *Zimmer* makes clear that Congress consciously rejected a mere disparate-impact test. *See Regester*, 412 U.S. at 764 ("relatively minor population deviations" do not dilute votes); *Zimmer*, 485 F.2d at 1305 ("Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.") (citation omitted).

II. ADOPTING THE NINTH CIRCUIT'S ERRONEOUS VRA §2 INTERPRETATION WOULD JEOPORDIZE COUNTLESS LEGITIMATE TIME, PLACE, AND MANNER VOTING LAWS ACROSS THE COUNTRY

Without any showing that voters lacked equal opportunity to vote, the Ninth Circuit invalidated Arizona's (1) ballot-collection law—recommended by the bipartisan Carter–Baker Commission and "substantially similar to the laws in effect in many other states," No. 19-1257 Pet. App. 164 (Bybee, J., dissenting) (hereinafter Pet. App.); and (2) precinct-voting requirement—similar to the laws of 26 other States, *see id.* at 155.

The Ninth Circuit's interpretation of VRA §2 jeopardizes scores of neutral voting laws that prevent and deter fraud and promote election integrity.

A. "[T]he risk of voter fraud [is] real." *Crawford*, 553 U.S. at 196 (controlling op. of Stevens, J.). "Voting fraud is a serious problem in U.S. elections." *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) (citations omitted). And while it "is difficult to measure, it occurs." Carter–Baker at 45. In fact, "election fraud [is] successful precisely because [it is] difficult to detect." *Burson v. Freeman*, 504 U.S. 191, 208 (1992).[3] Given the difficulties in detecting voter fraud, States may enact preventive measures even when the "record contains no evidence of any such fraud." *Crawford*, 553 U.S. at 194 (controlling op. of Stevens, J.).

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Id.* at 196. So "there must be a substantial regulation of elections if they are to be fair and honest." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion

3 Recent examples of voter fraud prosecutions demonstrate that fraud is still being attempted on a very large scale and targets the most vulnerable members of society. *See, e.g.*, KNBC Los Angeles, *Pair Charged With Voter Fraud Allegedly Submitted Thousands of Fraudulent Applications on Behalf of Homeless People* (Nov. 17, 2020), https://bit.ly/3orc25f (Los Angeles); CBS DFW, *Social Worker Charged with 134 Counts Involving Election Fraud* (Nov. 6, 2020), https://cbsloc.al/3mzBtkt (charging Texas social worker with submitting voter registration applications for living center residents with intellectual and developmental disabilities).

that government must play an active role in structuring elections.").

"Election laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. And, of course, "the usual burdens of voting" do not deny anyone an equal opportunity to vote. *Crawford*, 553 U.S. at 198 (controlling op. of Stevens, J.). Importantly, while "restrictions on the right to vote are invidious if they are unrelated to voter qualifications," *id.* (referring to standard developed in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (enjoining the collection of poll taxes)), "'even-handed restrictions that protect the integrity and reliability of the electoral process itself' are not invidious." *Id.* at 189–90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

B. But in the past few years, many recommended election-integrity regulations — which impose no more than "the usual burdens of voting," *ibid.* — have been challenged in a wave of novel VRA §2 litigation. These laws being challenged now on so-called "vote denial" grounds are nothing like the poll taxes and grandfather clauses that invidiously blocked minorities from voting more than 50 years ago.

Absentee Voting. As part of its comprehensive recommendations to modernize the Nation's electoral system after the 2000 presidential election, the bipartisan Carter–Baker Commission observed: "Absentee ballots remain the largest source of potential voter fraud." Carter–Baker at 46. To "reduce the risks of fraud and abuse in absentee voting," the Commission recommended "prohibiting

'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.*

Courts have recognized for decades that fraud is *especially* "facilitated by absentee voting," *Griffin*, 385 F.3d at 1130–31 (citations omitted), because "voting by mail makes vote fraud much easier to commit," *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004) (citation omitted). *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc) (recognizing the "reality of fraud * * * in the mail-in ballot context"); *Wrinn v. Dunleavy*, 440 A.2d 261, 270 (Conn. 1982) ("[T]here is considerable room for fraud in absentee voting."); *see also Crawford*, 553 U.S. at 225 (Souter, J., dissenting) ("absentee-ballot fraud * * * is a documented problem"). Moreover, absentee voting carries the perception of fraud risk that can undermine confidence in elections. *Feldman v. Ariz. Sec. State's Office*, 843 F.3d 366, 390 (9th Cir. 2016) ("[A]bsentee voting may be particularly susceptible to fraud, or at least perceptions of it."). "[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197.

The States' ability to prevent absentee voter fraud and to ensure voters of the integrity of election results has thus become even more important as States expand or consider expanding absentee voting and uncover sophisticated absentee voter fraud schemes. North Carolina, for instance, recently discovered a "coordinated, unlawful and substantially resourced [fraudulent] absentee ballot scheme." N.C. State Board of Elections, State Board

Unanimously Orders New Election in 9th Congressional District (Feb. 25, 2019), https://bit.ly/36NFlsx.

Nevertheless, limits on absentee voting, like Arizona's ballot-collection law here, have been challenged multiple times in recent years. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628–29 (6th Cir. 2016) (overturning district court's permanent injunction of law reducing period for corrections to absentee ballots from ten to seven days); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2190793 (W.D. Va. May 5, 2020) (witness-signature requirement on absentee ballots); *Lewis v. Bostelmann*, No. 3:20-cv-00284 (W.D. Wis.) (same); *Power Coal. for Equity & Justice v. Edwards*, No. 3:20-cv-00283 (M.D. La.) (witness-signature requirements and the permissible "excuses" to vote absentee); *Thomas v. Andino*, No. 3:20-cv-01552 (D.S.C.) (same).

Precinct Voting. Arizona and 26 other States limit voting outside a voter's own precinct. Pet. App. 155 (Bybee, J., dissenting). The Carter–Baker Commission recommended that States provide voters the opportunity to "check their proper precinct for voting." Carter–Baker at 14. *But see* Pet. App. 116 (decision below enjoining the enforcement of precinct-voting law); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014).

Early Voting. The Carter–Baker Commission noted that early voting has various "drawbacks," so the Commission suggested limiting early voting periods to "15 days prior to the election." Carter–Baker at 35–36.

Yet laws limiting early voting periods have been challenged successfully in the district courts. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931, 952, 956–57 (W.D. Wis. 2016) (successful challenge based on "anecdotal and circumstantial evidence"), *rev'd sub nom. Luft v. Evers*, 963 F.3d 665, 673–75 (7th Cir. 2020); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 768 (S.D. Ohio 2016) (successful challenge to five-day reduction in early voting period), *rev'd sub nom. Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *see also Navajo Nation Human Rights Comm'n v. San Juan County*, 281 F. Supp. 3d 1136, 1143 (D. Utah 2017).

Voter ID. Because fraud and multiple voting "both occur" and "could affect the outcome of a close election," the Carter–Baker Commission recommended that States require voters to present REAL ID to "deter, detect, or eliminate several potential avenues of fraud." Carter–Baker at 18–19.

Yet voter-identification laws are frequent targets of VRA §2 litigation. *See Veasey*, 830 F.3d at 250; *Frank*, 768 F.3d at 753; *N.C. State Conference of NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019); *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1108, 1116 (N.D. Ala. 2016).

Election Observer Zones. The Carter–Baker Commission recommended that "interested citizens * * * should be able to observe the election process, although limits might be needed." Carter–Baker at 65. *But see One Wis. Inst.*, 198 F. Supp. 3d at 944.

Registration. "Effective voter registration and voter identification are bedrocks of a modern election system."

Carter–Baker at 9. *But see League of Women Voters*, 769 F.3d at 245 (restriction on same-day registration).

Durational Residency. Challengers have targeted requirements that voters reside within the State for a prescribed period of time before an election. *See One Wis. Inst.*, 198 F. Supp. 3d at 956 (increase in durational-residency requirement from 10 days to 28 days), *rev. sub nom. Luft*, 963 F.3d at 675–76.

Straight-Ticket Voting. In 2020, only six States will offer straight-ticket voting. Nat'l Conf. of State Legs., Straight Ticket Voting States, https://bit.ly/3lnndtC. Yet eliminating straight-ticket voting has similarly been challenged. *See Michigan State A. Philip Randolph Inst. v. Johnson*, 326 F. Supp. 3d 532, 572 (E.D. Mich. 2018) (invalidating prohibition on straight-ticket voting because communities with higher percentages of African-American residents had higher rates of straight-ticket voting; later vacated as moot); *see also Bruni v. Hughes*, No. 5:20-cv-35 (S.D. Tex.).

C. Were this Court to adopt the sweeping interpretation of VRA §2 adopted by the Ninth Circuit and advocated by Respondents, these recommended laws and other neutral time, place, and manner voting laws would be put in grave danger across the country.

1. By VRA §2's plain text, the prohibited "result" is an unequal "*opportunity to participate* in the political process"—so "the existence of a disparate impact, in and of itself," cannot be "sufficient to establish the sort of injury that is cognizable and remediable under Section 2." *Ohio Democratic Party*, 834 F.3d at 637 (emphasis added); *accord Frank*, 768 F.3d at 753 (VRA §2 "does not condemn a

voting practice just because it has a disparate effect on minorities"). Otherwise, "[v]irtually any voter regulation that disproportionately affects minority voters can be challenged successfully." *Veasey*, 830 F.3d at 310 (Jones, J., dissenting in part).

Plaintiffs must do more than show "election rules that result in a disparity in the *convenience of voting*." *Lee*, 843 F.3d at 601 (emphasis added); *see Ohio Democratic Party*, 834 F.3d at 631 (VRA §2 does not ban a voting law simply because certain minority groups use particular methods "at higher rates than other voters"). After all, the means by which a State regulates its elections will necessarily "filter[] out some potential voters." *Frank*, 768 F.3d at 749; *see id.* at 754 ("No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system.").

Rather, plaintiffs must show that an election regulation "is an obstacle to a significant number of persons who otherwise would cast ballots." *Id.* at 749.

2. The Ninth Circuit's decision below demonstrates how neutral voting laws would be roundly transformed into VRA §2 violations if this Court were to interpret the VRA as requiring plaintiffs to show only that "more than a de minimis" number of "minority voters are disparately *affected*" by the challenged laws. Pet. App. 44, 46 (emphasis added).

In its decision below, the Ninth Circuit equated a mere disparate impact on "convenience"—that higher rates of minority voters cast out-of-precinct votes or availed themselves of ballot collection—with a direct "denial or abridgement of the right to vote." *Lee*, 843 F.3d at 600–01

(emphasis omitted). It concluded that the disparate rates of out-of-precinct voting "result in a disparate burden on minority voters," and therefore are unlawful. Pet. App. 47.

Even on its own terms, however, the effect the court identified was minimal: In 2016, approximately 1% of Hispanic, black, and Native American voters cast an out-of-precinct ballot, as compared to approximately 0.5% of "nonminority" voters. Pet. App. 20–21. Stated differently, 99.5% of nonminority voters and 99.0% of minority voters complied with this law.

But no matter. The Ninth Circuit was able to inflate this small disparity's magnitude by erroneously "[d]ividing one percentage by another," *Frank*, 768 F.3d at 752 n.3, to conclude that minority voters "are overrepresented" by "a ratio of two to one," Pet. App. 43—even though this ratio "produces a number of little relevance to the problem" because it "mask[s] the fact that the populations were effectively identical." *Frank*, 768 F.3d at 752 n.3.

Similarly, to rule against Arizona's ballot-collection law, the court relied on testimony that "many thousands of early ballots were collected from minority voters by third parties" and "white voters did not significantly rely on third-party ballot collection." Pet. App. 86.

This erroneous mode of analysis, unfortunately, is not unique. In a case challenging Texas's Voter ID law, the Fifth Circuit concluded that Texas's voter-identification law violated VRA §2 based on a small disparity in preexisting ID possession: 98% of white voters already had the requisite ID, compared to 94.1% of Hispanic voters and 91.9% of black voters. *Veasey*, 830 F.3d at 311 n.56 (Jones,

J., dissenting in part). Texas offered free voter IDs, and the challengers did not "demonstrate[] that any particular voter * * * cannot get the necessary ID or vote by absentee ballot" (which does not require voter ID in Texas). *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014) (recounting evidence).

3. The Ninth Circuit's interpretation of VRA §2 also demonstrates the mortal risk to neutral time, place, and manner restrictions if this Court were to abandon a proper causation analysis.

VRA §2 covers only those laws that "result" in an unequal "opportunity" to vote "*on account of race or color*." 52 U.S.C. §10301(a) (emphasis added). A statistical disparity, without more, shows only correlation—not that race was the cause for enacting the law. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 521 (2015) ("A robust causality requirement ensures that '[r]acial imbalance * * * does not, without more, establish a prima facie case of disparate impact.'") (citation omitted); *Gingles*, 478 U.S. at 55–58 (repeatedly emphasizing that challengers in vote-dilution cases must show "*legally* significant" racial bloc voting) (emphasis added).

This is especially true when the disparate impact is as minimal as in the decision below. In contrast, past invidious practices like literacy tests produced such large racial disparities in actual voter participation that they could only be explained as preventing minorities from voting rather than actually addressing voter fraud. *See supra* pp. 7–8.

The Ninth Circuit skipped the proper causation inquiry by analyzing only the *Gingles*/Senate Report factors for vote-dilution claims. Pet. App. 38–41; *see also Veasey*, 830 F.3d at 257–66. These factors were created to analyze whether retaining a multi-member district constitutes vote dilution, so they were not calibrated to ask whether a voting regulation legitimately furthered the State's interest in deterring voter fraud. This is precisely why other circuits have held that the factors are not useful in voter-participation cases. *See Frank*, 768 F.3d at 754 (Fourth, Sixth, and Seventh Circuits found "*Gingles* unhelpful" in voter-participation cases); *Simmons v. Galvin*, 575 F.3d 24, 42 n.24 (1st Cir. 2009) ("[T]he Supreme Court's seminal opinion in *Gingles* * * * is of little use in vote denial [*i.e.*, participation] cases.") (citation omitted).

III. VRA §2 WOULD BE UNCONSTITUTIONAL UNDER THE NINTH CIRCUIT'S INTERPRETATION

The Ninth Circuit's interpretation of VRA §2 raises serious constitutional concerns and should be rejected under the constitutional-avoidance doctrine. *See Nw. Austin*, 557 U.S. at 205. Multiple Members of this Court have recognized that VRA §2's constitutionality is an open question. *See Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *Johnson v. De Grandy*, 512 U.S. 997, 1028–1029 (1994) (Kennedy, J., concurring); *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

A. As construed by the Ninth Circuit, VRA §2 cannot be "congruent and proportional" to the Constitution's targeted prohibition on voting laws enacted "with a discriminatory purpose." *Bossier Par.*, 520 U.S. at 481. At least 24 circuit judges have joined opinions explaining that a disparate-impact interpretation of VRA §2 raises congruence-and-proportionality problems. *See Veasey*, 830 F.3d at 317 (Jones, J., dissenting in part); *Hayden v. Pataki*, 449 F.3d 305, 329–337 (2d Cir. 2006) (en banc) (Walker, C.J., concurring); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1230–1234 (11th Cir. 2005) (en banc); *Farrakhan v. Washington*, 359 F.3d 1116, 1122–1225 (9th Cir. 2004) (Kozinski, J., dissenting from denial of reh'g en banc).

Indeed, under this Court's Enforcement Clause precedents, preventive legislation limiting otherwise constitutional conduct requires "a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520 (emphasis added). Evaluating such legislation first requires "identify[ing] with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. A "disparate impact" theory of statutory liability lacks "congruence and proportionality" to a constitutional prohibition of laws enacted with a "racially discriminatory purpose." *Id.* at 372–373.

B. The "legislative record" in 1982 also "fail[ed] to show that Congress did in fact identify a pattern" of unconstitutional time, place, and manner voter participation laws. *Id.* at 368. This is unsurprising, given Congress's focus on vote-dilution claims. And when Congress previ-

ously identified voting practices with a pattern of unconstitutional discrimination (like literacy tests), it directly banned those practices. *See supra* pp. 7–8.

The 1982 Senate Report essentially conceded that Congress found nothing close to a pattern of unconstitutional time, place, and manner voting restrictions. *See* S. Rep. at 42 (Congress "can use its Fourteenth and Fifteenth amendment powers to enact legislation whose reach includes those *without a proven history of discrimination*") (emphasis added).

To be sure, the Senate Report contains a footnote referencing three voter-participation cases—rather than vote-dilution cases—referred to as "episode discrimination." *Id.* at 30 n.119; *see* Elmendorf, 160 U. Pa. L. Rev. at 416 ("The authors of the Senate Report identified only three previous participation cases under the VRA.").[4] But the legislative record must contain more than a handful of examples, or else it "fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which [Enforcement Clause] legislation must be based." *Garrett*, 531 U.S. at 369–370 ("half a dozen" examples is insufficient). As this Court just reiterated, "only a dozen possible examples" is far from enough. *Allen v. Cooper*, 140 S. Ct. 994, 1006 (2020).

4 The Senate Report also recounted various efforts to amend laws that raised scrutiny under VRA §5's preclearance requirements—although those were predominantly vote-dilution cases too. *See* S. Rep. at 10 (listing "annexations; the use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines").

C. Regardless of what the legislative record showed in 1982, "the Act imposes current burdens and must be justified by current needs." *Shelby County*, 570 U.S. at 536 (quoting *Nw. Austin*, 557 U.S. at 203).

Since 1982, Congress has enacted additional voting legislation. For example, Congress enacted the National Voter Registration Act of 1993 (NVRA)—"a complex superstructure of federal regulation atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5 (2013). "The Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). To achieve the former goal, the NVRA requires States to permit voter registration in elections for federal office "by any of three methods: simultaneously with a driver's license application, in person, or by mail." *Inter Tribal Council*, 570 U.S. at 4; *see* 52 U.S.C. §20503. "To achieve the latter goal, the NVRA requires States to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence," and the NVRA then provides fair procedures for this (including "prior notice" and sending a "return card"). *Husted*, 138 S. Ct. at 1838–39.

The NVRA thus would have ameliorated problems raised in various voter-participation cases. For example, the NVRA would have closed the wide "25%" racial disparity in voter registration in the 1980s caused by Mississippi's "dual voter registration law and limited registration offices." *Veasey*, 830 F.3d at 312 (Jones, J., dissenting

in part) (discussing *Operation Push, Inc. v. Ma-bus*, 932 F.2d 400 (5th Cir. 1991)). And it would have addressed the hypothetical posed by Justice Scalia's dissent in *Chisom v. Roemer* (a county limiting "voter registration to one hour a day three days a week"). *Ibid.* (discussing 501 U.S. at 408). The NVRA's prescribed procedures for maintaining accurate voter registration rolls would have addressed the concerns in *Toney v. White*, 488 F.2d at 312. And funds from the Help America Vote Act of 2002 could have fixed the voting-machine failure at issue in *United States v. Post*, 297 F. Supp. at 48–49; *see* 52 U.S.C. §20901.

D. The decision below also raises significant Equal Protection Clause problems, validating Senator Hatch's concern that VRA §2's results test "would make race the over-riding factor in public decisions in this area." S. Rep. at 94.

The Ninth Circuit's interpretation of VRA §2 will "inject racial considerations" into government decisionmaking, *Inclusive Cmtys.*, 576 U.S. at 521, and "subordinate[] traditional race-neutral * * * principles" to "racial considerations," *Miller*, 515 U.S. at 916. If the validity of every voting regulation turns on mere disparate racial impacts, the VRA would *require* States to consider race each time they enact or amend election laws. *See Veasey*, 830 F.3d at 317 (Jones, J., dissenting in part) ("[U]sing [VRA] Section 2 to rewrite racially neutral election laws will force considerations of race on state lawmakers who will endeavor to avoid litigation by eliminating any perceived racial disparity in voting regulations.").

Interpreting VRA §2 to *compel* "race-based" decisionmaking "embarks [courts] on a most dangerous

course" and may well "entrench the very practices and stereotypes the Equal Protection Clause is set against." *De Grandy*, 512 U.S. at 1029, 1031 (Kennedy, J., concurring). This Court should avoid interpreting the VRA to require race-based decisionmaking, especially when the entire point of the VRA was to prohibit government actions "on account of race." 52 U.S.C. §10301(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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