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.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICI*[1]

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

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

undue influence, duplicative votes from out-of-date registrations, and other tactics discussed below.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

Presidential Commission on Election Administration 56 (2014).[4]

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

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

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[4] Available at https://elections.delaware.gov/pdfs/PCEA_rpt.pdf (last visited Nov. 24, 2020).

[5] Available at https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf (last visited Nov. 24, 2020).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. The decision below affects voter protection laws nationwide.

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

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

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

CONCLUSION

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

Respectfully submitted,

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH AND WEST VIRGINIA IN SUPPORT OF THE PETITIONERS

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ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF AMICI INTEREST

The Voting Rights Act is among the most important laws that Congress ever passed. Today, Section 2 is the Act's most important piece. That section prohibits States from adopting laws that "result[] 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). Laws violate that prohibition when they keep "the political processes leading to nomination or election in the State" from being "equally open to participation by members of" a racial group. *Id.*, §10301(b). These processes are not equally open when members of one race "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*

This case presents the following question: What must a plaintiff prove to show that a State unlawfully denies the right to vote on account of race? The text of Section 2, while perhaps hazy at first, answers that question. It requires plaintiffs to make at least two showings. *First*, because Section 2 prohibits only practices that deny voters an equal "opportunity" to vote, plaintiffs must prove that the "entire voting and registration system" provides voters in some racial group with unequal voting opportunities. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (per Easterbrook, J.). It is not enough to show that one discrete provision, considered in isolation, favors one group or another; the question is whether the "opportunity" to participate in the State's "political processes" is the same for everyone. *Second*, plaintiffs who can prove unequal voting opportunities must show that the challenged law, not something else, *causes* the unequal opportunity. This follows

from the fact that Section 2 bans only those laws that "result[] in" an inequality of opportunity.

In recent years, States across the country have been amending their election codes to add new voting options that make voting easier than ever. Nonetheless, many lower courts are treating Section 2 as an "equal-outcome command," *id.* at 754, striking down any election procedure that, viewed in isolation, favors one racial group over another, *see* JA 619–20. And they do so *without regard* to whether the law in question undermines the equality of *opportunity* to vote. This misinterprets Section 2. And it does so in a way that radically alters the traditional balance of state and federal authority. *See Bond v. United States*, 572 U.S. 844, 857–59 (2014). "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank*, 768 F.3d at 754. Thus, nearly *every* voting law, when viewed in isolation, will benefit one group more than another. Reading Section 2 to forbid all disparate impacts would thus "dismantle every state's voting apparatus," *id.*, "sweep[] away almost all registration and voting rules," *id.*, and cause "the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes," *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016). The *amici* States wish to keep Section 2 from being read in a way that allows such serious inroads into their sovereign authority.

The *amici* States also have an interest in preserving the Voting Rights Act, which, as noted above, is among the most important laws ever passed. Section 2 is unconstitutional if it prohibits all laws that, viewed in a vacuum, benefit voters of one race more

than another. Congress enacted Section 2 under the Fifteenth Amendment, which empowers Congress to pass "appropriate legislation" enforcing the Amendment's prohibition on intentionally discriminatory voting laws. U.S. Const. amend. XV, §2. But if the Voting Rights Act forbids all laws that disparately impact voters of different races, then it outlaws "[m]any aspects of states' electoral systems," including aspects that are not even arguably intentionally discriminatory and thus not even arguably violative of the Fifteenth Amendment. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1590 (2019). A law that prohibits so many laws the Fifteenth Amendment allows is not "appropriate" Fifteenth Amendment legislation. *Cf. id.*

These practical and constitutional problems can be averted by reading Section 2 to mean what it says. The States are submitting this brief under Rule 37.4 to urge that reading.

SUMMARY OF ARGUMENT

I. To prove a Section 2 violation, plaintiffs alleging vote denial on account of race must make two showings.

First, plaintiffs must prove that the State's entire election system fails to provide voters of all races an equal opportunity to vote and elect candidates of their choice. This follows from the statutory text. Subsection (a) of Section 2 forbids every law that "results in" the denial or abridgement of the right to vote "on account of race …, *as provided in subsection (b).*" 52 U.S.C. §10301(a) (emphasis added). And subsection (b) says that States abridge or deny the right to vote on account of race when their "political processes" are not "equally open to participation" by

voters of all races. *Id*., §10301(b). It then explains that political processes are not equally open if voters of one race "have less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. (emphasis added). Putting all this together, Section 2 demands a systemwide analysis of voting opportunities. Because Section 2 demands equal opportunities, it requires examining *all* of the voting opportunities provided to voters—the "entire voting and registration system." *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). If the system as a whole does not make it any harder for voters of one race to vote than voters of another race, it does not matter whether a particular law, considered in isolation, is likely to be more advantageous to voters of one race or another. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 639–40 (6th Cir. 2016).

Second, plaintiffs must prove that the systemwide inequality is caused by the challenged practice, not something else. This requirement follows from subsection (a)'s use of the phrase "results in," §10301(a), which is classic causation language, *see Burrage v. United States*, 571 U.S. 204, 210–11 (2014). The existence of a causation requirement is confirmed by subsection (b), which says that a law violates Section 2 only if it affects a protected class's ability "to elect representatives of their choice." §10301(a); *accord Chisom v. Roemer*, 501 U.S. 380, 397 n.24 (1991). A law that has no causal impact on systemwide equality of opportunity has, necessarily, no effect on the ability of any group to elect representatives of its choice.

II. Despite Section 2's textual limits, many courts, including the Ninth Circuit below, have read

Section 2 to require "little more than a" showing that laws disparately impact one group rather than another. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1590 (2019); *see also* JA 619–20. These courts, instead of requiring plaintiffs to prove that a challenged law unequally burdens voting *opportunities*, require only proof that the law, viewed in isolation, will unequally affect voters of one race. Under this approach, even voting procedures that provide everyone with equal opportunities to vote are illegal if they are more or less likely to be used by voters of one race than another. For example, a law that allows for twenty-eight days of early voting instead of twenty-nine might be struck down if the twenty-ninth day would be disproportionately used by voters of one race—and it might be struck down *even if* all voters who would otherwise use that extra day adjust their conduct and vote during the twenty-eight-day period.

That approach, in addition to being textually unsupported for the just-discussed reasons, violates two other principles of statutory construction.

First, this disparate-impact reading ignores the principle that Congress must speak clearly if it intends to effect "'a significant change in the sensitive relation between federal and state … jurisdiction.'" *Bond v. United States*, 572 U.S. 844, 858–59 (2014) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). The regulation of elections is a traditional area of state responsibility. And Section 2 does not clearly signal that Congress intended a sea change to the State's traditional role. But reading Section 2 as a prohibition on all laws that have any disparate impact on voting practices, without regard to the impact on the equality of voting *opportunities*, would

massively alter the federal-state balance. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank*, 768 F.3d at 754. Thus, a reading of Section 2 that prohibits all disparate impacts would "sweep[] away almost all registration and voting rules." *Id.* Because nothing in Section 2 clearly suggests that Congress intended to intrude so greatly on state affairs, the law should not be read in a way that produces such dramatic effects.

Second, the disparate-impact approach runs afoul of the rule that courts must interpret laws so as to avoid rendering them unconstitutional. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). Congress passed the Voting Rights Act using its authority to enact "appropriate" Fifteenth Amendment legislation. U.S. Const. amend. XV, §2. Thus, the law is constitutional only if it is "appropriate" legislation—only if it is "congruent and proportional" to the Fifteenth Amendment's prohibition. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). If the Section 2 test "is too easy to satisfy"—if, practically speaking, it forbids a great many state voting procedures that do not violate the Fifteenth Amendment—that "widens the gap" between the Voting Rights Act and the Fifteenth Amendment. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. at 1590. If the gap is too wide, then Section 2 is *not* congruent and proportional, and it is thus unconstitutional.

The disparate-impact reading impermissibly widens the gap. The Fifteenth Amendment forbids only laws that *intentionally* discriminate on the basis of race. But the disparate-impact reading that the

Ninth Circuit adopted below effectively forbids all laws with any disparate impact, without regard to discriminatory purpose. As noted, that test will "sweep[] away almost all registration and voting rules," few of which will violate the Fifteenth Amendment. *Frank*, 768 F.3d at 754. A law that prohibits so many practices permitted by the Fifteenth Amendment does not constitute "appropriate" Fifteenth Amendment legislation. U.S. Const. amend. XV, §2. Thus, to save Section 2 from being held unconstitutional, the Court should reject the Ninth Circuit's disparate-impact reading.

ARGUMENT

The *amici* States are submitting this brief to address the following question: What must plaintiffs prove to show that a law violates Section 2 by denying or abridging the right to vote "on account of race"? The statutory text answers that question. Section 2 says that a State denies or abridges the right to vote "on account of race" when its "political processes … are not equally open to participation" by voters of every race. From this, it follows that a challenged law violates Section 2 only if it denies members of some racial group an equal opportunity to vote. Laws that do not cause that effect—either because they impose easy-to-satisfy obligations that all voters can meet, or because other parts of the State's election code offset whatever diminution in voting opportunities the challenged laws impose—cannot be struck down under Section 2.

The upshot of all this is that States comply with Section 2 whenever their election laws, viewed as a whole, guarantee everyone an equal opportunity to vote without regard to race. But the Ninth Circuit,

in its ruling below, effectively read Section 2 to prohibit all election-related laws that disparately impact one racial group or another, *without regard* to whether the disparate impact translates into an unequal opportunity to vote. On that basis, it invalidated two Arizona laws—one banning ballot harvesting and one requiring voters to cast votes at the proper precinct—that do not deny anyone an equal opportunity to vote.

The Ninth Circuit's reading of Section 2 contradicts the statutory text, ignores the statutory purpose, and puts Section 2's constitutionality in doubt. This Court should reverse.

I. State laws violate Section 2 only if, when viewed in light of the State's entire system of voting and registration, they cause a racial group to have an unequal opportunity to vote.

This case is a dispute about the meaning of Section 2. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). With that in mind, begin with Section 2's text:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group], as provided in subsection (b).

> (b) A violation of subsection (a) 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 protected by subsection (a) 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.

This statute is no model of clarity. But neither is it "unintelligible" and thus "inoperative." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* §16, p.134 (2012). Instead, a careful reading reveals that Section 2 prohibits only those election laws that cause voters of one race to have a diminished opportunity to vote relative to voters of another race.

The first important thing to recognize is that subsection (a) unambiguously creates a "results" test. By forbidding laws that *result in* a denial or abridgement of the right to vote on account of race, the statute focuses on the effects a law causes as opposed to the lawmakers' intent. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Deliberately so: Congress added this results-focused language to Section 2 in response to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which a plurality read an earlier version of Section 2 to prohibit only laws motivated by discriminatory intent, *see id.* at 65 (plurality); *see also Gingles*, 478 U.S. at 35.

But the use of a results test gives rise to the following question: What specific "results" does Section 2 prohibit? The final clause of subsection (a) points the way to an answer. That subsection ends by forbidding States from adopting or imposing any voting rule that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group], *as provided in subsection (b)*." (emphasis added). This final, italicized clause, tells the reader to look to subsection (b) for "guidance about how the results test is to be applied." *Chisom v. Roemer*, 501 U.S. 380, 395 (1991).

Subsection (b) provides the promised guidance. It says that plaintiffs may prove a "violation of subsection (a)" by showing, "based on the totality of circumstances," that "the political processes leading to nomination or election … are not equally open to participation by members of a class of citizens protected by subsection (a) 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." Breaking this down, subsection (b) accomplishes two key tasks. *First*, it defines the evidence that plaintiffs may use to prove a violation of subsection (a): plaintiffs may make their case based on the "totality of circumstances." *Second*, subsection (b) defines what it is that plaintiffs must prove: they have to show that the State's "political processes" are not "equally open to participation" to voters of all races, "in that" voters of a particular race "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Putting all this together, a law "results in" a denial or abridgment of the right to vote "on account of race," §10301(a), only when the totality of circumstances, §10301(b), shows that voters of one race, because of the law at issue, "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," §10301(b). Put more simply, Section 2 guarantees an equal "opportunity … to participate" in the electoral process without regard to race. *Id.*; *see also Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (op. of Kennedy, J.). State laws run afoul of Section 2 only if they deny voters that equality of opportunity.

This textual parsing yields two important insights about Section 2 and what plaintiffs must do to prove a violation. *First*, plaintiffs must prove, at a systemwide level, an inequality in the opportunity to vote. *Second*, plaintiffs must show that the challenged law causes the inequality.

A. States violate Section 2 only if their election systems provide unequal voting opportunities.

To prevail in a Section 2 case, plaintiffs must show that the State's "entire voting and registration system" provides voters of one race with an unequal opportunity to vote. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). Again, Section 2 prohibits only those laws that deny voters, on account of race, an equal opportunity to participate and to elect their chosen representatives. §10301(b); *Bartlett*, 556 U.S. at 20 (op. of Kennedy, J.). There is no way to know whether a State runs afoul of that prohibition—there is no way to know whether it denies anyone an equal *opportunity* to participate in the electoral process—

without considering the State's entire electoral process. After all, it is impossible to know what opportunities voters have without considering the entire voting and electoral system. It is also impossible to determine whether a law diminishes the equality of opportunity without knowing whether any disparities it causes are offset by some other provision. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 639–40 (6th Cir. 2016). Thus, by focusing on the equality of opportunity that States extend to voters of different races, Section 2 requires consideration of the system as a whole, not of discrete provisions.

1. Focusing on the question whether all racial groups have equal *opportunities* to vote and elect candidates of their choice ensures that Section 2 is treated as "an equal-treatment requirement," which is "how it reads," as opposed to "an equal-outcome command." *Frank*, 768 F.3d at 754. Section 2's inquiry does not focus on whether people actually, in fact, exercise their right to vote at proportional levels. *See Holder v. Hall*, 512 U.S. 874, 927–28 (1994) (Thomas, J., concurring in the judgment) (subsection (b) "necessarily commands that the existence or absence of proportional electoral results should not become the deciding factor in assessing §2 claims"). It instead cares about practices that cause disparities in the "opportunity … to participate," §10301(b), across the State's entire election system. Thus, even if a group of voters is turning out at a lower rate than others, a plaintiff must still prove that the disparity results from one group's having "less opportunity" to vote. *Id.* Said another way, the statute homes in on disparities in voting opportunities, not disparities in actual voting outcomes.

At first blush, it might seem hard to differentiate between laws that result in "less opportunity" to vote and laws that, without jeopardizing the equality of opportunity, disparately affect voters of different races. The key difference lies in the perspective of the inquiry. Section 2's opportunity-focused approach considers whether voters of all races have *the choice* to vote with comparable ease. In contrast, an outcome-focused approach would consider whether voters of different races have *in fact chosen*, or will *in fact choose*, to vote at equal rates. An example sharpens the difference. Some States allow for early voting only at fixed locations. *See Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020); Ohio Rev. Code §3501.10(C). If early-voting locations are "centrally located," there is no reason to suspect any significant difference in opportunity. *Luft*, 963 F.3d at 674. And that remains true even if the ultimate outcome is that racial groups choose to vote early at disproportionate levels. *Id.* If, however, a plaintiff could prove that voting locations were "convenient for one racial group and inconvenient for another," that could lay the groundwork for a Section 2 violation. *Id.* The theory would be that "opportunity to participate … decrease[s] as distance increases." *Id.*

Because Section 2 requires an opportunity-focused approach, claims of vote denial will almost always fail if "a challenged election practice is not burdensome or the state offers easily accessible alternative means of voting." *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 714 (9th Cir. 2018) (per Ikuta, J.), *vacated by Democratic Nat'l Comm. v. Reagan*, 911 F.3d 942 (9th Cir. 2019). In those circumstances, "a court can reasonably conclude that the law does not impair any particular group's *oppor-*

tunity to 'influence the outcome of an election,' even if the practice has a disproportionate impact on minority voters." *Id.* (quoting *Chisom*, 501 U.S. at 397 n.24). Thus, to take a real-world example, if the burdens of a voter-ID law fall disproportionately on minority voters, and if the law protects against any diminution in opportunity by allowing those without IDs to cast provisional ballots (that can be cured and counted), there is no Section 2 violation. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016); *Democratic Nat'l Comm.*, 904 F.3d at 714.

2. Because Section 2 focuses on equality of opportunity, it makes sense that plaintiffs must prove inequality on a systemwide basis. If, on the whole, protected classes of voters are able to participate equally, it makes no sense to invalidate particular regulations because of disparities that other provisions offset. *See Ohio Democratic Party*, 834 F.3d at 639–40. This point is best illustrated with a hypothetical. Imagine a State in which voters of one race disproportionately prefer one voting method (such as in-person early voting) and voters of another race disproportionately prefer another method (like mail-in voting). Expanding one group's preferred method will automatically put the other group at a relative disadvantage. If a state legislature passes an act that expands *both* methods, a provision-by-provision analysis that looks for disparate impacts on voting behavior would lead a court to strike down both provisions. Thus, perversely, legislation that makes voting easier for everyone would be deemed an illegal vote denial that violates Section 2. Such a provision-by-provision analysis ignores the fact that Section 2 guarantees "equal opportunity," not "electoral ad-

vantage." *Bartlett*, 556 U.S. at 20 (op. of Kennedy, J.).

Another problem with looking for provision-based disparities rather than focusing on the electoral system as a whole is that doing so would cause Section 2 to "sweep[] away almost all registration and voting rules." *Frank*, 768 F.3d at 754. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Id.* Thus, focusing on whether individual provisions are used unequally by different racial groups would "dismantle every state's voting apparatus." *Id.* It is doubtful that Section 2's drafters or the public ever understood the law to have such drastic effects.

B. Plaintiffs must prove that the challenged procedure causes the systemwide inequality.

If plaintiffs can show inequality of opportunity, they must also "show a *causal connection* between the challenged voting practice and the lessened opportunity of the protected class." *Democratic Nat'l Comm.*, 904 F.3d at 714. In other words, plaintiffs cannot prevail simply by coupling a challenged practice with a disparity in voting opportunities. Instead, plaintiffs must show that the challenged practice *causes* an inequality of opportunity.

This causation element follows from subsection (a), which forbids only those voting laws and procedures that "result[] in" the denial of the right to vote "on account of race." §10301(a). The phrase "results in" connotes causation. *Burrage v. United States*, 571 U.S. 204, 210–11 (2014). Subsection (b) bolsters this reading of subsection (a). That subsection requires proof that the system as a whole diminishes

the ability of members of a protected class "*both* (1) to participate in the political process, and (2) to elect representatives of their choice." *Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314–15 (3d Cir. 1994). That follows, as this Court held in *Chisom*, because subsection (b) captures laws that give groups an unequal opportunity to "participate in the political process *and* to elect representatives of their choice." §10301(b) (emphasis added); *Chisom*, 501 U.S. at 398. By requiring plaintiffs to show that a challenged practice diminishes the opportunity of voters in a protected class "to elect representatives of their choice," Section 2 requires proof that the challenged practice could plausibly "influence the outcome of an election." *Chisom*, 501 U.S. at 397 n.24. A law can influence the outcome of elections only if it causes disadvantages that persist at a systemwide level.

All this is consistent with the Court's precedent, which makes clear that the "essence of a §2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions *to cause* an inequality in [election] opportunities." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added). That means the challenged procedure must play an active role in the inequality; correlation is not enough. If any disparity results not from legal requirements, but rather from the "societal effects of private discrimination that affect … potential voters," the claim necessarily fails. *Frank*, 768 F.3d at 753.

The causal analysis is possible, however, only if one sets a proper baseline against which to measure a law's effects. And the following point about baselines is absolutely critical: when a challenged prac-

tice furthers a valid state interest, the relevant question is whether the practice causes systemwide inequality of opportunity that would go away if the State replaced the practice with an alternative *that furthered the same interest*. This follows from the fact that election regulation is both necessary and inevitable. As "'a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). For example, States must regulate elections to ensure that only qualified electors vote, to ensure that ballots can be timely counted, and so on. If a law that serves a valid state interest imposes disparities, a court cannot assess causation by asking whether the law causes unequal opportunity relative to a world in which the State does nothing to promote that interest. The court cannot, for example, ask whether a law requiring voters to mail or deliver absentee ballots by a certain deadline causes a systemwide inequality relative to a world in which the State does *nothing* to ensure that ballots are timely cast. Instead, the court must ask whether the deadline causes systemwide inequality of opportunity that would stop if the State advanced its valid interest in timely voting in some other way. If the answer is "no"—if the inequality would persist in all worlds where the State imposes an effective deadline—then the challenged practice does not cause the inequality in question.

*

Return to the question presented: What must plaintiffs prove to show that a law violates Section 2

by denying or abridging the right to vote on account of race? To prevail in a vote-denial case, plaintiffs must show that the challenged practice, when considered in light of the State's entire voting and registration system, causes voters of one race to have a lesser opportunity than others to vote and to elect their preferred candidates.

The plaintiffs here failed to make these showings. They challenge two laws, neither of which burdens the opportunity to vote. The first law prohibits the State from counting ballots cast at the wrong precinct. That rule is easily complied with—indeed, the challenged practice results in only a negligible number of ballots being rejected. JA 701–02 (O'Scannlain, J., dissenting). What is more, anyone concerned about accidentally voting at the wrong precinct can avoid the problem completely by casting an absentee ballot by mail. *See* JA 694 (O'Scannlain, J., dissenting). Given the negligible effort it takes to comply with this requirement, and the ease with which one can avoid it completely, the District Court did not clearly err in finding that the law does not diminish voting *opportunities* for anyone. *See* JA 702–04 (O'Scannlain, J., dissenting). The second challenged law prohibits ballot-harvesting. That law does not unequally diminish the opportunity to vote: even if more minority voters would vote by handing their ballots over to a ballot-harvester were the option available, the District Court did not clearly err in concluding that, given the other ways that voters can vote in Arizona, the inability to use this one method will not deny anyone an equal *opportunity* to vote. *See* JA 711–12 (O'Scannlain, J., dissenting).

II. The Ninth Circuit erred in holding that Section 2 forbids all laws that, viewed in isolation, disparately impact a protected class in connection with voting.

The Ninth Circuit, in its decision below, interpreted Section 2 very differently. It assessed the alleged Section 2 violations by applying a two-step test now popular in many circuits. The first step asks whether the challenged procedure imposed "a disparate burden on" minority voters. JA 612. The step is satisfied by any practice that, viewed in isolation, "adversely affect[s]" the voting behavior of more than some unspecified "de minimis number of minority voters." JA 619–20; *accord* JA 661–62. The second step asks whether, under the totality of the circumstances, there is some "relationship between" the challenged practice and "social and historical" considerations. JA 613.

Wielding this two-step test, the Ninth Circuit invalidated two Arizona procedures that are commonplace in election codes across the country. *See* JA 729–31, 739–42 (Bybee, J., dissenting). It erred. The two-step test turns Section 2 into a prohibition on all laws that impose *any* disparate impact on a protected class in connection with voting practices. After all, the first step is satisfied by any such disparate impact, without regard to whether the impact translates into an inequality of opportunity to vote and elect candidates. (To illustrate, the Ninth Circuit's first step would capture a law that provides twenty-eight days of early in-person voting, instead of twenty-nine, as long as minority voters would be more likely to use that twenty-ninth day. And it would capture that law *even if* the evidence showed that everyone who would otherwise use the twenty-ninth

day votes in the twenty-eight day period.) The second step is just a formality; given the Nation's history with racial discrimination and the effects that persist still today, any disparate impact found at step one can "almost always" be linked in some manner to "social and historical discrimination." Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. at 1592. It should be no surprise, therefore, that the first step of the test is a "near-perfect" indicator of whether lower courts find a violation. *Id.* at 1591–92. As one leading voting-rights scholar has recognized, the two-step test requires "little more than a disparate impact" and casts doubt on all laws that have any disparate impact whatsoever on the voting practices of a protected class. *Id.* at 1590.

The Ninth Circuit's analysis fails to account for any of the textual arguments laid out in the previous section. Its two-step test disregards Section 2's focus on inequality of opportunity (which requires a systemwide analysis) and requires no meaningful showing of causation. In addition, the Ninth Circuit's test violates two important canons of construction: the federalism canon (which requires Congress to speak clearly if it wishes to radically alter the balance of federal and state authority) and the principle that statutes should be read, if fairly possible, to comply with the Constitution. This section elaborates on both.

A. The Ninth Circuit's test violates the federalism canon.

The Constitution gives the federal government "only limited powers; the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854 (2014); *accord* U.S. Const. amends. IX & X;

Chiafalo v. Washington, 140 S. Ct. 2316, 2333–34 (2020) (Thomas, J., concurring). Congress legislates against that default ordering of sovereign authority. *Bond*, 572 U.S. at 857–58; *accord EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). In light of this background understanding, any statute that displaces or limits a significant amount of state power constitutes a major change. And one expects Congress to speak clearly when making major changes. To borrow what some might consider a "tired metaphor," Congress "does not 'hide elephants in mouseholes.'" *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1354–55 (2020) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). Thus, absent a "plain statement," the Court will not assume that Congress intends "a significant change in the sensitive relation between federal and state … jurisdiction'" in "areas of traditional state responsibility." *Bond*, 572 U.S. at 857–59 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

This interpretative principle applies with full force here. The regulation of elections is a traditional area of state responsibility. *See Burdick,* 504 U.S. at 433. Thus, if Congress were to strip States of discretion regarding the handling of elections, one would expect it to do so clearly. *Bond*, 572 U.S. at 857–59. That militates strongly against the Ninth Circuit's reading. If Section 2 forbids all laws that have disparate impacts on voting practices, then the law refashions the balance between federal and state power. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank*, 768 F.3d at 754. Thus, a reading of Section 2 that invalidates all state laws that (considered in isolation) disparately impact

a protected class's voting practices, and that does so without regard to whether the law has any effect on the protected class's voting *opportunities*, would "sweep[] away almost all registration and voting rules." *Id.* Indeed, this approach casts doubt on even the most ordinary regulations, like the ban on ballot-harvesting at issue here, regardless of whether such laws diminish anyone's opportunity to vote and elect candidates.

If there is any doubt that reading Section 2 to create a disparate-impact test significantly alters the federal-state balance, one need only look to the cases in the circuits that apply that test. Ohio's experience is illustrative. The Buckeye State has been on the front lines of Section 2 litigation. That should be surprising. Ohio was never a covered jurisdiction that, under Section 5 of the Voting Rights Act, required preclearance before altering its election laws. *See Shelby County v. Holder*, 570 U.S. 529, 534–35, 537 (2013). And "Ohio is a national leader when it comes to early voting opportunities." *Ohio Democratic Party*, 834 F.3d at 623, 628. Voters can cast early in-person votes for weeks before Election Day. The State is also "generous when it comes to absentee voting—especially when compared to other States." *Mays v. LaRose*, 951 F.3d 775, 779–80 (6th Cir. 2020). "Any registered voter may cast their vote by absentee ballot, for any reason or no reason at all, starting about a month before election day." *Id.* at 780. They can request an absentee ballot beginning eleven months *before* Election Day, and they have until noon on the Saturday before Election Day to make such a request. Ohio Rev. Code §3509.03(D). Voters can either mail in their ballots or personally deliver them to their county boards of elections.

Ohio Rev. Code §3509.05. And this year, in response to the COVID-19 pandemic, Ohio required all eighty-eight county boards of elections to install dropboxes at which voters could leave absentee ballots without having to enter the boards' offices or interact with anyone. *See* Directive 2020-16 (Aug. 12, 2020), https://bit.ly/34XgEsV (last visited Nov. 30, 2020).

Given the many opportunities to vote, it abuses the English language to suggest that Ohio denies or abridges anyone's right to vote, on account of race or otherwise. Given the many opportunities to vote, *everyone* can choose the voting method that is best for them, and *no one* is denied an equal opportunity to participate in the political process and to elect representatives of their choice. §10301(b).

Yet Ohio is very often sued for violating Section 2. For example, in 2014, Ohio reduced its early-voting period from five weeks to four weeks based in part on bipartisan suggestions from election officials. *Ohio Democratic Party*, 834 F.3d at 624. In response, the Ohio NAACP filed a Section 2 case. It argued that this change illegally denied minority voters their right to vote in violation of Section 2. *Id.* at 624–25. Remarkably, the Sixth Circuit held that the NAACP was likely to succeed and affirmed preliminary-injunctive relief. *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 555–60 (6th Cir. 2014). This Court stayed that ruling, *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014), and Ohio settled the case, agreeing to an early-voting schedule starting twenty-nine days before Election Day. *See* Ohio Election Manual at 5-8 n.19, https://bit.ly/2SjNfCs (last visited Nov. 30, 2020). But the Ohio Democratic Party responded to that settlement by filing a new suit, arguing that twenty-nine days *still* were not

enough to satisfy Section 2. That suit should have been rejected under the laugh test; after all, it alleged that *the NAACP* agreed to a racially discriminatory voting schedule. But because of the disparate-impact test that the Sixth Circuit sometimes applies, the case led to a ten-day bench trial. The district court struck down the law before the Sixth Circuit reversed on appeal. *Ohio Democratic Party*, 834 F.3d at 623–24, 636–40.

During the same election cycle, Ohio faced separate Section 2 claims challenging the intricacies of absentee and provisional voting. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625–29 (6th Cir. 2016). After another multi-week trial, and another unfavorable district-court ruling, the Sixth Circuit again rejected the Section 2 claims. *Id.* With each case, litigants dive further into the weeds of the State's election processes. For example, Ohio has been made to defend its laws setting a deadline by which voters must request an absentee ballot—a generous deadline that allows voters to seek a ballot until just *three days* before Election Day. *See Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014).

Ohio's experience is not unique. It instead serves as an example of what is happening across the country in circuits that take a disparate-impact approach comparable to the Ninth Circuit's. For example, in 2014, the Fourth Circuit enjoined North Carolina's rules regulating the places where votes may be cast and the timeframe for voter registration. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 230 (4th Cir. 2014). According to that court's reading of Section 2, a disparate impact flowing from the behavior of "even one" voter lays the foundation

for a violation. *Id.* at 244. Two years later, Ohio's neighbor to the north lost a battle over its choice to eliminate "straight-ticket" voting—an option that allowed voters to vote for all of one party's candidates in one fell swoop, instead of voting on a candidate-by-candidate basis. The district court held that, by eliminating this option, Michigan likely violated Section 2 of the Voting Rights Act. *Mich. State A. Philip Randolph Inst. v. Johnson,* 833 F.3d 656, 661 (6th Cir. 2016). The Sixth Circuit refused to stay that decision, saying that the Voting Rights Act analysis presented a "challenging question." *Id.* at 668–69.

As all this indicates, reading Section 2 to establish a disparate-impact test like the one the Ninth Circuit adopted would radically alter the balance of federal and state authority over election laws. And there is nothing in Section 2 that clearly (or even unclearly) creates so radical an alteration. The statute is therefore best read to create no such alteration. *Bond*, 572 U.S. at 857–59.

Reading Section 2 as an expansive power shift for the first time now would be especially strange, given how States have been expanding voting opportunities of late. In recent years, the States have vastly expanded early and absentee voting options. As recently as the 1990s, most States did not offer early voting or absentee options unless a voter had a good excuse for not showing up at the polls on Election Day. *See* Paul Gronke et al., *Early Voting and Turnout*, PS Online 639, 641 (2007), *available at* https://bit.ly/2TjRjTf (last visited Nov. 30, 2020); *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 803–04 (1969). Times have changed. In recent years, the States have enacted a great many laws that make voting easier than ever. Today, forty-three States

allow some form of early voting for all voters, with Delaware poised to follow suit. *State Laws Governing Early Voting*, Nat'l Conf. of State Legislatures, https://bit.ly/2vY5qpd (last visited Nov. 30, 2020). Most States, moreover, have made voting even easier during the COVID-19 pandemic. *See* Quinn Scanlan, *Here's how states have changed the rules around voting amid the coronavirus pandemic*, ABC News (Sept. 22, 2020), https://abcn.ws/31nSMwb (last visited Nov. 30, 2020).

True, these new and expanded voting options come with new voting rules. *See Burdick*, 504 U.S. at 433. For example, States allowing early voting must decide when to begin that process. *See Ohio Democratic Party*, 834 F.3d 620. And many States have adopted rules addressing who may handle a voter's absentee ballot. *See* JA 739–42 (Bybee, J., dissenting). But such rules must be placed in broader context: they are part of the recent "expansion of opportunities" for voting. *Tex. League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 U.S. App. LEXIS 32211 at *13 (5th Cir. Oct. 12, 2020). Though many regulations of these expanded opportunities are challenged in court under the "rhetoric of 'disenfranchisement,'" *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 590 U.S. __, No. 20A66, 2020 U.S. LEXIS 5187 at *29, (Oct. 26, 2020) (Kavanaugh, J., concurring), such suits almost always involve arguments about *how far* to extend voting opportunities, not disagreements regarding whether to extend them.

One final note: if Congress had wanted to prohibit all laws that disparately impact the voting behavior of a racial group, it would have had no trouble doing so clearly. Disparate-impact theories were hard-

ly novel when, in 1982, Congress adopted the current version of Section 2. In one prominent case decided just a few years earlier, this Court considered (and rejected) the argument that the Equal Protection Clause prohibits disparate impacts without regard to discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Because Congress knew of disparate-impact theories, it would have amended Section 2 to expressly outlaw all disparities in voter registration, voter turnout, or some other voting metric if that was what it wanted. But Congress did not write that type of outcome-driven statute, it wrote an opportunity-focused statute, and the law "does not say what it does not say." *Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, 138 S. Ct. 1061, 1069 (2018).

B. If Section 2 means what the Ninth Circuit said it means, the law is unconstitutional.

Courts interpret statutes to avoid constitutional problems when it is reasonably possible to do so. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). But the Ninth Circuit's disparate-impact approach *creates* constitutional problems. If Section 2 imposes that disparate-impact test on all States, then Congress lacked authority under the Fifteenth Amendment to enact it. Because it is reasonably possible to read Section 2 in a way that avoids this constitutional problem, the Court should do so.

Congress enacted the Voting Rights Act using the power conferred upon it by the Fifteenth Amendment. That Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied

> or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 1 defines the right as an "'exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude.'" *Mobile*, 446 U.S. at 62 (plurality) (quoting *United States v. Reese*, 92 U.S. 214, 218 (1875)). "Racial discrimination, as a constitutional matter, occurs only when a public official intends to hold a person's race against him." *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020). This follows from the fact that the Fifteenth Amendment forbids States from denying or abridging the right to vote "on account of"—in other words, "because of"—race, color, or previous condition of servitude. Voting laws that facially discriminate on the basis of race violate this prohibition. So do laws that have the *purpose* of limiting voting rights based on race. *See, e.g.*, *Guinn v. United States*, 238 U.S. 347, 363–64 (1915). But facially neutral laws enacted without discriminatory purpose do not deny or abridge the right to vote "on account of" race, even if they have a disparate impact. *Mobile*, 446 U.S. at 62 (plurality). Thus, such laws do not violate the Fifteenth Amendment.

Section 2 of the Fifteenth Amendment empowers Congress to enforce its guarantee with "appropriate legislation." U.S. Const. amend. XV, §2. To be "appropriate," legislation must be "adapted to carry out the objects" of the Fifteenth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966)

(quoting *Ex parte Va.*, 100 U.S. 339, 345 (1879)). The grant of authority to pass "appropriate legislation" thus functions as the Necessary and Proper Clause of the Fifteenth Amendment: it permits laws "derivative of, and in service to," the Fifteenth Amendment. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012) (op. of Roberts, C.J.). That means Congress may pass "laws that are 'convenient, or useful' or 'conducive' to" enforcing the Fifteenth Amendment's prohibition on intentional discrimination, *even if* those laws prohibit conduct not prohibited by the Fifteenth Amendment itself. *See United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)). Appropriate legislation does not, however, encompass laws that "work a substantial expansion of federal authority." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 560 (op. of Roberts, C.J.), by prohibiting "a broad swath of conduct that is constitutionally innocuous" under the Fifteenth Amendment, Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. at 1593; *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

It follows that what constitutes "appropriate legislation" is a matter of degree. To be "appropriate," a law must be doing something that can be fairly characterized as "incidental to" the Fifteenth Amendment; laws that substantially expand the power that the Amendment confers on Congress are not "appropriate." *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559–60 (op. of Roberts, C.J.). Thus, Congress has no Fifteenth Amendment authority to pass laws that forbid a wide range of electoral procedures that the Fifteenth Amendment allows.

With all this in mind, turn back to Section 2 of the Voting Rights Act. Because Section 2 sets a results test instead of an intent test, it deviates to some degree from the Fifteenth Amendment. But the extent of the deviation depends on how Section 2 is interpreted. If Section 2 prohibits only those laws that cause systemwide disparities in voting opportunities—as this *amicus* brief argues—Section 2 is "appropriate" Fifteenth Amendment legislation and thus constitutional. No doubt, the proposed test will invalidate *some* state laws that do not rest on discriminatory intent—in other words, some laws that do not violate the Fifteenth Amendment. But it will pick out relatively few such laws, and it will serve as a reasonable heuristic for identifying laws that *do* rest on an unstated desire to deny voting rights because of race. Thus, if read to incorporate this test, Section 2 can be fairly characterized as "derivative of, and in service to," the Fifteenth Amendment's prohibition on racially discriminatory voting laws. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559–60 (op. of Roberts, C.J.).

If, however, Section 2 imposes a disparate-impact test along the lines the Ninth Circuit adopted below, it is not "appropriate" Fifteenth Amendment legislation and Congress had no power to enact it. As the analysis above and the case law show, the Ninth Circuit's disparate-impact approach to Section 2 is "easy to satisfy," Stephanopoulos*, Disparate Impact*, 128 Yale L.J. at 1590, and would require invalidating a great many election laws that do not even arguably violate the Fifteenth Amendment. As a result, the disparate-impact approach greatly "widens the gap" between the Voting Rights Act and the Fifteenth Amendment, *id.*, to such a degree that Section

2 can no longer fairly be described as "derivative of, and in service to," the Fifteenth Amendment, *see Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 521 (op. of Roberts, C.J.).

As all this suggests, a restrained interpretation of Section 2 benefits not only the States, but also the law's intended beneficiaries. If Section 2 invalidates all state laws that disparately impact the voting practices of a protected class, then Congress had no power to enact the law and it must be given no effect. As a result, it "behooves" everyone who supports Section 2's critically important mission to read Section 2 in a way that "prevent[s] it from imposing liability in almost all circumstances where policies produce disparate impacts." Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. at 1594. The *amici* States' test does that. The Ninth Circuit's test does not.

CONCLUSION

The Court should reverse the Ninth Circuit's judgment.

Respectfully submitted,

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Nos. 19-1257 & 19-1258

In The
Supreme Court of the United States

MARK BRNOVICH, 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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

1. Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act?

2. Does Arizona's ballot-collection law violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Petitioners.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. In support of its Equality Under the Law practice group, PLF advocates for a color-blind interpretation of the United States Constitution and opposes race-based decisionmaking by government. PLF has participated as amicus curiae in this Court's major Voting Rights Act decisions. *See, e.g.*, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980).

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, immigration, and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences in areas such as employment, education, and voting. CEO has participated as amicus curiae in past significant voting rights cases. *See, e.g.*, *Shelby Cty.*, 570 U.S. 529; *Bartlett*, 556 U.S. 1; *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).

Project 21, the National Leadership Network of Black Conservatives, is an initiative of the National Center for Public Policy Research to promote the views of African Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 has participated as amicus curiae in past significant voting rights cases. *See, e.g.*, *Shelby Cty.*, 570 U.S. 529; *Bartlett*, 556 U.S. 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

Eleven years ago, Justice Scalia predicted that "the war between disparate impact and equal protection will be waged sooner or later." *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring). These cases represent the latest front of that war. The questions presented require the Court to choose between two fundamentally different interpretations of the Voting Rights Act. One proposed interpretation, endorsed by the Ninth Circuit below and urged by Respondents here, would prohibit enforcement of practically any state election

law merely on a showing of some statistical impact on a particular racial group. As in other contexts, such disparate impact liability "place[s] a racial thumb on the scales" by requiring decisionmakers "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.* at 594. These cases demonstrate the deep conflict between disparate impact laws and the fundamental constitutional guarantee of equality before the law—the Equal Protection Clause is an individual right, but disparate impact theory treats individuals simply as members of a racial group. The court below effectively transformed Section 2 from an individual right to equal treatment under the law into a group right to a particular outcome.

Fortunately, the text of the Voting Rights Act does not require such a result. Section 2 of the Act prohibits the enforcement of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which 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). Subsection (b) explains that a violation occurs only when the political processes "are not equally open to participation by members of a class of citizens protected" by the Act. *Id.* § 10301(b). This means that individuals in protected groups must have demonstrably "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* Notably, nothing in the text authorizes an inquiry into the effect of state election laws on the voting power of various racial groups. *Cf.* JA 658 ("Arizona's OOP policy imposes a significant disparate burden on its American Indian, Hispanic, and African American

citizens . . . ."). The text instead speaks of equality of opportunity, prohibiting those election regulations that deprive protected individuals equal *access* to the polls. Put another way, Section 2 is an "equal-treatment requirement," not an "equal-outcome command." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

Even if these two readings were equally persuasive, constitutional avoidance counsels in favor of rejecting the disparate-impact-only interpretation. Any statute that requires government decisionmakers to draw racial classifications is inherently suspect and must satisfy strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). "Disparate impact doctrine's operation requires people to be classified into racial groups, and liability hinges on a comparison of the statuses of those groups." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 564 (2003). It follows that interpreting Section 2 to prohibit the enforcement of all election provisions that might lead to a disparate racial outcome would place the statute in significant constitutional jeopardy. There is no way to reconcile a constitutional provision that protects individual rights with a statutory provision that demands equal group-based outcomes.

Aside from the potential equal protection problem, such a broad reading of the Act would potentially render it ultra vires. Congress' power to enforce the Fourteenth and Fifteenth Amendments is remedial in nature, and those Amendments prohibit only intentional discrimination. Absent a Congressional finding of pervasive race-based voting discrimination nationwide, it is doubtful Congress could impose such

a broad provision on the States. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The Voting Rights Act was enacted in response to pervasive racial discrimination, particularly across the South. *See Shelby Cty. v. Holder*, 570 U.S. 529, 536–37 (2013). Yet Section 2's national prohibition on racially discriminatory voting practices or procedures is now often employed to enjoin race-neutral election administration measures. These cases concern two particular Arizona election regulations—its policy prohibiting the counting of ballots cast in the wrong precinct on Election Day and its law against third-party ballot delivery. Reasonable minds can and do differ as to whether these policies are advisable or necessary. But neither policy imposes a racially discriminatory burden on voting. And neither policy deprives any Arizona voter of the equal opportunity to cast a legal ballot. The Voting Rights Act should prohibit racial discrimination, not encourage race-based decisionmaking.

ARGUMENT

I. Section 2 Protects Equality of Opportunity—It Does Not Require a Particular Racial Outcome

After nearly a century of failure to adequately enforce the Fifteenth Amendment's guarantee of racial nondiscrimination in voting, Congress enacted the Voting Rights Act in 1965. *See id*. The core of the Act was a nationwide prohibition on the use of any "qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1976). After this

Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that the statute required proof of discriminatory intent, Congress amended it to prohibit any regulation that "*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) (emphasis added). Citing a Senate Report, the Court remarked that Congress in 1982 "substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*, 412 U.S. 755 (1973), and by other federal courts before *Bolden*." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). But until now, the Court has never had the occasion to interpret the new statute in this context.

The Court's prior Section 2 cases have thus far been of the "vote dilution" variety—that is, challenges to the drawing of electoral districts or other mechanisms, like multimember districts, that affect the *weight* of an individual's vote. *See Gingles*, 478 U.S. 30; *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). These cases, on the other hand, are what courts have dubbed "vote denial" cases. *See Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc). In fact, the very existence of that term explains why the Court must decide these cases; "vote denial" assumes that a statistical disparity in the usage of a particular device by race means that taking such a device away results in the "denial" of votes. As the foregoing analysis will demonstrate, this is mistaken.

A. The "Results" Test Does Not Require Disparate Impact Analysis

Interpreting the 1982 amendment, courts have understandably focused on the "results" language Congress added to Section 2. But the so-called "results test" derived from vote dilution cases—including this Court's decision in *White*, which the Senate Report cited as an example of how the amendment should be applied. It is particularly tailored to those circumstances. In *White*, for example, this Court upheld an order directing two Texas counties to replace multimember legislative districts with single-member ones, because the effect of the multimember districts was to exclude Black (in one county) and Mexican-American (in the other county) voters from political power. 412 U.S. at 765–69. Whether or not the Court's vote dilution cases are correct, *see Holder*, 512 U.S. at 944 (Thomas, J., concurring in the judgment); *LULAC*, 548 U.S. at 512 (Scalia, J., concurring in the judgment in part and dissenting in part), they are different in kind from the species of cases presented here. The Senate Report cited in *Gingles* did not contemplate the type of claim brought in these and other recent Section 2 cases. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 709 (2006) ("The legislative history of the 1982 amendments, however, provides little guidance on how Section 2 should apply to practices resulting in the disproportionate denial of minority votes.").

The primary reason these cases are so different from *White* and *Gingles* is the lack of causation present here. In a challenge to district lines or structure, there is no doubt that the officials who drew

the lines or authorized the structure *caused* the racial result. After all, voters can only vote in the districts they are placed in—the racial composition of those districts is up to those who draw the maps. But where the challenge is based on the racial effect of some election regulation that applies to all voters, that is far from clear. Early cases brought under this theory generally failed for precisely that reason. For example, the Third Circuit rejected a Section 2 challenge to the enforcement of a statute requiring the purging of nonvoters from the voter rolls because "registered voters are purged—without regard to race, color, creed, gender, sexual orientation, political belief, or socioeconomic status—because they do not vote, and do not take the opportunity of voting in the next election or requesting reinstatement." *Ortiz v. City of Philadelphia*, 28 F.3d 306, 314 (3d Cir. 1994). The Ninth Circuit agreed, as it flatly rejected a challenge to a property ownership requirement for voting in a utility district while noting that "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595-96 (9th Cir. 1997); *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989) (rejecting a Section 2 challenge to Virginia's choice to pick school board members through appointment, rather than election, because there was no evidence the appointive system caused the observed racial disparity).

These cases are consistent with the principle that a government entity is not responsible for racial disparities that it did not cause. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (school districts may only seek to remedy

racial disparities "traceable to segregation"); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (rejecting interdistrict remedy when the plaintiffs failed to show that any government actions "have been a substantial cause of interdistrict segregation"). Were it otherwise, the use of race to avoid disparate impact liability would be "pervasive," and "'would almost inexorably lead' governmental . . . entities to use 'numerical quotas.'" *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

The theory adopted below stretched the "results" test beyond any recognizable limits, sweeping in racial disparities not caused by the challenged regulation. The Fourth, Fifth, and Sixth Circuits have all held that Section 2 required plaintiffs to demonstrate only that the statistically disparate effect of a particular voting regulation is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (adopting same test); *Veasey v. Abbott*, 830 F.3d 216, 264–65 (5th Cir. 2016) (en banc) (same).[2] The Ninth Circuit below followed its sister circuits in

[2] The Sixth Circuit later vacated its opinion as moot following an order of this Court. *See Ohio State Conf. of NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). A different panel repudiated much of the initial panel's reasoning two years later, but not before the Fourth Circuit had already adopted the initial panel's analysis. *See Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

sweeping away any meaningful causation requirement.

This works by substituting present socioeconomic disparities—and their link to past official discrimination—for the traditional causation analysis. *See Husted*, 768 F.3d at 556 ("African Americans in Ohio tend to be of lower-socioeconomic status because of 'stark and persistent racial inequalities . . . [in] work, housing, education and health,' inequalities that stem from 'both historical and contemporary discriminatory practices.'" (quoting expert testimony)); *Veasey*, 830 F.3d at 259 ("[T]he history of State-sponsored discrimination led to . . . disparities in education, employment, housing, and transportation."). Because these racial disparities exist in almost every state, and public and private discrimination was once widespread, the same analysis would invalidate election laws nationwide without regard to contemporary state action. Indeed, that is what has happened in states as different as North Carolina, Texas, Arizona, and Ohio. But that cannot be the law; "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not in itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Bolden*, 446 U.S. at 74 (plurality opinion)). At some point, it becomes absurd to suggest that state action decades ago has caused a disparate effect upon the implementation of a voting regulation today. After all, "history did not end in 1965." *Shelby County*, 570 U.S. at 552.

Section 2 demands more than a simple statistical showing coupled with general socioeconomic disparities. While the "results" language of the 1982 amendment abrogated *Bolden*'s interpretation of the

original statute that required plaintiffs to prove discriminatory intent, it did not absolve plaintiffs of the obligation to prove that state law caused the alleged disparity. In short, the "results" test is not simply a prohibition of all state election regulations that might disproportionately affect a racial group.

B. Equal Opportunity Is the Touchstone of Section 2

What, then, does it mean for an election law to "result[] 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). Subsection (b) of Section 2 provides the answer: a plaintiff must show that the political processes in the jurisdiction "are *not equally open* to participation by members of a class of citizens protected" by the Act, such that the protected group has "*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). The inquiry into equality of opportunity must consider "the totality of circumstances," *id.*—that is, the entirety of a State's voting apparatus—and then determine whether the existence of the challenged provisions effectively deprives members of a protected group the equal opportunity to participate in elections. *See Frank*, 768 F.3d at 753 ("To the extent outcomes help to decide whether the state has provided an equal opportunity, we must look not at Act 23 in isolation but to the entire voting and registration system.").

Equality of opportunity goes hand-in-hand with causation. If a statistical impact is observed, but a State's election laws provide equal opportunity for everyone to participate in the process, it follows that

the State's election laws have not caused the disparate impact. The cause of the disparity in such a case is simply the "failure to take advantage of political opportunity." *Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992). The same was true in *Ortiz*, where voters could have avoided being purged from the rolls simply by voting or requesting reinstatement, *see* 28 F.3d at 314, and *Irby*, where the lack of Black school board members was the result of lack of interest, not any state-imposed barriers, 889 F.2d at 1358. If it were otherwise, simple failure to turn out and vote would transform the implementation of an otherwise legal provision into a Section 2 violation. Of course, "a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage" than other voters. *Salas*, 964 F.2d at 1556.

Rather than mere disparate impact, the statute demands the Court focus on the overall climate for voting to determine whether the State has deprived any particular group of the equal opportunity to participate. With respect to Arizona's policy against votes cast in the wrong precinct, it turns out that this is a simple task. The precinct system is used only during in person voting on Election Day, but Arizona does not require voters to vote in person on Election Day. Indeed, *most* Arizona voters do not do so. JA 119 (O'Scannlain, J., dissenting below). That is because "Arizona law permits all registered voters to vote early by mail or in person at an early voting location in the 27 days before an election." *Id.* And Arizona has online voter registration, along with an option to request automatic delivery of a mail-in ballot. *Id.* What is more, less than one percent of all ballots in recent elections have been cast in the wrong precinct

on Election Day. *Id.* at 43 (majority opinion below). On these facts, it is hard to see how Arizona's policy against counting votes cast in the wrong precinct on Election Day has deprived *anyone* of the opportunity to cast a vote. *See Frank*, 768 F.3d at 753 ("Although these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as § 2(a) requires . . . ."). That some voters choose to vote on Election Day and arrive at the wrong precinct does not render Arizona's policy illegal—even if those voters are disproportionately members of a particular racial group.

This still leaves ample room for courts to find a violation of Section 2 without proof of discriminatory intent. Were a State to make it "*needlessly* hard" to register or vote, it could still run afoul of Section 2 by denying equal opportunity to those who could not complete the process or comply with the requirements. *See id.*[3] And a State that maintains

[3] It is here where courts might consider, as a part of the totality of the circumstances analysis, the strength of the asserted state interest in maintaining the challenged practice. *See Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426–27 (1991) (noting in vote dilution context that "[a] State's justification for its electoral system is a proper factor for the courts to assess"). After all, even statutes that authorize disparate impact liability often provide that legitimate, nondiscriminatory reasons for enforcing the challenged practice may defeat liability. *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (an unlawful employment practice under Title VII of the Civil Rights Act is established only if the plaintiff demonstrates disparate impact and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"). Section 2 analysis cannot be divorced from the significant interest states have in regulating elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and

different rules in various counties, so as to make it harder for residents of one county to vote than those of another, also runs the risk of violating Section 2. *See Brooks v. Gant*, No. CIV-12-5003-KES, 2012 WL 4482984, at *1, *6-7 (D.S.D. Sept. 27, 2012) (finding a Section 2 "results" violation where a substantially Native American county offered far fewer early voting days than majority-white counties). These examples involve state action denying the equal opportunity to participate in the political process, which is precisely what Section 2 prohibits. As Judge Easterbrook observed, Section 2 is an "equal-treatment requirement," not an "equal-outcome command." *Frank*, 768 F.3d at 754.

In short, while the 1982 amendment did substantially broaden the scope of Section 2 liability, it did not go as far as Respondents or the Ninth Circuit would have it. Just as the Voting Rights Act provides no right to proportional representation by race, *see* 52 U.S.C. § 10301(b), it does not require that States consider the racial effect of every regulation of elections. Instead, the statute simply requires each jurisdiction to provide every voter, regardless of race, the same opportunity to participate in the political process.

C. Disparate Impact Is Indistinguishable from Section 5 Retrogression

There is still another reason why Respondents and the court below must be wrong about the interpretation of Section 2. Under the standard applied below, there effectively exists a one-way

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honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

ratchet for voting regulations. Inevitably, disparate impact analysis involves a comparison between the previous standard and the current one—the old law provides the reference point by which the effect of the new law is measured. So a state which has had a law requiring voters to show photo identification could eliminate that requirement without Section 2 scrutiny, and a jurisdiction which had three weeks of in-person early voting may increase to four weeks without trouble. But were those jurisdictions to attempt to shift back to their previous laws, or enact new regulations, they might run into a Section 2 problem. *See League of Women Voters of N.C.*, 769 F.3d at 232–33, 248–49 (directing the district court to issue a preliminary injunction requiring North Carolina to maintain same-day registration and count out-of-precinct votes—both policies the State attempted to repeal after less than a decade on the books). The one-way ratchet demonstrates that the broad disparate impact interpretation of Section 2 is contrary to the statutory text—and indeed, more consistent with an inquiry under Section 5 of the Voting Rights Act.

Unlike Section 2, Section 5 does not apply nationally—it is instead targeted at certain covered jurisdictions determined to have a "specified history of voting discrimination." *Young v. Fordice*, 520 U.S. 273, 276 (1997). It requires these jurisdictions to obtain the "preclearance" of the Attorney General or a three-judge district court in Washington, D.C., before enforcing any law that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). While the Court at the time acknowledged that Section 5's

preclearance requirement, which deviated from the typical understanding of federalism and equal sovereignty of the States, *Shelby County*, was an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), it nevertheless upheld its constitutionality. But in *Shelby County*, the Court invalidated Section 4(b)'s formula for determining covered jurisdictions, finding it not tailored to the present realities in the covered states. 570 U.S. at 556 ("If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story."). Because Congress has yet to enact a new formula, Section 5's strong medicine is not currently enforceable.

The non-retrogression standard of Section 5 is a bare disparate impact provision which "necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997). The non-retrogression standard was never meant to apply nationwide; after all, Section 2 and Section 5 "combat different evils." *Id.* at 477. Nevertheless, cases like the one below have effectively "concoct[ed] a version of Section 2 that mirrors the retrogression standard in Section 5 and mobilizes Section 2 to undertake what *Shelby County* ended, except nationwide." J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act Into Something It Is Not*, 31 Touro L. Rev. 297, 325 (2015).

It is hard to understand the results of many recent Section 2 cases except as applications of the non-retrogression principle. In the case below, for example, the Ninth Circuit found disparate impact simply by observing that the ballots cast in the improper precinct were disproportionately cast by racial minorities. JA 617–22. The Fourth and Sixth Circuits measured the effect of a limited rollback of early-voting days by noting that black voters disproportionately use early voting. *See Husted*, 768 F.3d at 533 ("African Americans will be disproportionately and negatively affected by the reductions in early voting in SB 238 and Directive 2014–17."); *League of Women Voters*, 769 F.3d at 245 (finding disparate impact based on black voters' disproportionate use of early voting). The comparison of racial effects of the old and new laws is a quintessential Section 5 non-retrogression inquiry. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1251 (M.D. Fla. 2012) (denying a preliminary injunction against Florida's reduction of early-voting days and noting that the court was "not conducting a 'retrogression' analysis," but instead determining "whether, under the totality of the circumstances, application of the 2011 Early Voting Statute serves to deny African American voters equal access to the political process"). It has no place in Section 2's equal opportunity analysis.

If adopted, the transformation of Section 2 would all but render *Shelby County* a dead letter by extending Section 5's non-retrogression analysis nationwide. The Court should reject Respondents' attempt to graft Section 5's standard onto the text of Section 2.

II. A Disparate Impact Interpretation of Section 2 Presents Significant Constitutional Concerns

Even if the statutory interpretation question were close, there is an independent reason to reject the interpretation of Section 2 proposed by Respondents and the Ninth Circuit—it would threaten to render the statute unconstitutional. It is an "elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted." *The Abby Dodge v. United States*, 223 U.S. 166, 175 (1912). Here, Respondents' proposed interpretation would call into doubt both Section 2's consistency with the Equal Protection Clause *and* whether Congress had the power to enact such a broad statute under its power to enforce the Fourteenth and Fifteenth Amendments. The Court can avoid this problem by adhering to the statutory text.

A. The Ninth Circuit's Interpretation Presents the Conflict Between Disparate Impact and Equal Protection

The recent spate of Section 2 decisions invalidating state voting regulations on a disparate impact theory come at a time when courts and commentators are beginning to grapple with the conflict between laws that premise liability solely on impact to a racial group and the individual's right to equal protection of the laws. Equal protection should ensure that government decisionmaking is free from the taint of racial considerations, but disparate impact liability

does not allow racial impartiality. Indeed, "[d]isparate impact doctrine's operation requires people to be classified into racial groups, and liability hinges on a comparison of the statuses of those groups." Primus, *supra*, 117 Harv. L. Rev. at 564. It necessarily places a "racial thumb on the scales, often requiring" governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring); *see also Wards Cove*, 490 U.S. at 652–53 (1989) (noting that employers would be compelled to establish racial quotas in response to a disparate impact provision). That sort of decisionmaking is usually recognized as discriminatory. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Failing to correct an interpretation of Section 2 that effectively requires race-based decisionmaking would place Section 2 itself on shaky constitutional ground. *See* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, 85 Miss. L.J. 1357, 1363–66 (2017).

That is especially true because Respondents' interpretation—echoed by the Fourth, Fifth, Sixth, and Ninth Circuits—eschews any traditional causation requirement. *See supra* I.A. Not long ago, this Court was asked whether the Fair Housing Act countenances disparate impact liability. It answered in the affirmative, but with an important caveat. A "robust causality requirement" was necessary even at the prima facie stage to "protect[] defendants from being held liable for racial disparities they did not create." *Tex. Dep't of Housing*, 576 U.S. at 542. Without such a requirement, the Court said, governments might have to resort to "numerical quotas," which would raise "serious constitutional

questions." *Id.*; *see also id.* at 540 ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity."). But that is precisely what we have here—potential liability untethered to any recent state action, linked to the state based only on the combination of socioeconomic conditions and past discrimination, which in many cases occurred decades ago. Such a hand-waving causation requirement is not "robust" by any stretch, and if adopted would leave Section 2 vulnerable to constitutional attack.

The concern about race-based decisionmaking is not hypothetical. Already, the debates in state legislatures surrounding election regulations are sordidly consumed with race. To take one example from Texas, the Fifth Circuit was forced to clarify that a finding of discriminatory intent in a voting rights case could not be based on speculation by the bill's *opponents* that the *supporters* had a racially discriminatory motive. *Veasey*, 830 F.3d at 233–34. Reading Section 2 as imposing liability for every statistically disparate effect will only exacerbate this trend, making race the primary consideration in many legislative debates and "effectively assur[ing]" that "the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race,' will never be achieved." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)). This Court should avoid a reading of

Section 2 that would bring it into conflict with the text and ultimate goal of the Equal Protection Clause.

B. Respondents' Interpretation Would Place Section 2 Beyond Congress' Power To Enforce the Reconstruction Amendments

The Voting Rights Act was an exercise of Congress' enforcement power granted under the Fourteenth and Fifteenth Amendments. Both enforcement provisions grant Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. But such legislation must be remedial in nature. *City of Boerne*, 521 U.S. at 519, 532. And "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.* at 530. The Fourteenth and Fifteenth Amendments prohibit only intentional discrimination, *see Washington v. Davis*, 426 U.S. 229, 239 (1976) (Fourteenth Amendment), *Bossier Parish*, 520 U.S. at 481 (Fifteenth Amendment), so if the Voting Rights Act authorized liability based on statistical disparities, it would certainly qualify as a preventive rule which "must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530.

The last time this Court considered such a question, it held that Congress lacked the authority to impose the Religious Freedom Restoration Act (RFRA) on the States. That is because RFRA, in purporting to require that even generally applicable laws that substantially burden religious exercise must pass strict scrutiny, provided greater protection than the First Amendment. That is why the Court looked for real-world evidence of intentional religious

discrimination in the States in order to justify RFRA as a preventive measure. It found none. *See City of Boerne*, 521 U.S. at 530 ("The history of persecution in this country detailed in the [RFRA] hearings mentions no episodes occurring in the past 40 years."). Without any "reason to believe that many of the laws affected by" RFRA would be unconstitutional under *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held RFRA was "a substantive change in constitutional protections," rather than a remedial statute. *Id.* at 532. After all, "[l]egislation which alters the meaning of [a constitutional clause] cannot be said to be enforcing [that] Clause. Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519.

City of Boerne contrasted its holding with cases upholding the Voting Rights Act's constitutionality as a remedial measure. *See id.* at 530 ("In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."); *see also id.* at 518 (collecting cases upholding the VRA). But in the early days of the VRA, the evidence of widespread discrimination was staggering, justifying even an extraordinary remedy like Section 5's preclearance provision. *See Shelby County*, 570 U.S. at 555; *Katzenbach*, 383 U.S. at 334–35. At that point, Congress *did* have the authority to "prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." *City of Boerne*, 521 U.S. at 529. A similar record of religious discrimination likely would have given Congress the authority to enact RFRA, too. But none existed.

Now, however, things have changed. As the Court recognized seven years ago, the conditions that prompted the Voting Rights Act's passage are largely gone. *See Shelby County*, 570 U.S. at 535. As a result, were Section 2 of the Act interpreted to prohibit all voting regulations that might disproportionately affect minority voters, acting as a one-way ratchet prohibiting states even from repealing relatively new election laws, it would no longer be a remedial statute. This version of Section 2 would instead be a substantive expansion of the rights guaranteed by the Fourteenth and Fifteenth Amendments, and therefore not remedial. And unfortunately, such an expansive reading of these guarantees against racial discrimination would not even protect anyone from racial discrimination; it would instead encourage *more* race-based decisionmaking.

Given the current evidence considered by the *Shelby County* Court, Section 2, read as Respondents and the Ninth Circuit would have it, would be unconstitutional. For obvious reasons, this Court should reject any interpretation of the Voting Rights Act that would render it unconstitutional. Therefore, constitutional avoidance counsels strongly against adopting the Ninth Circuit's interpretation and in favor of reversal or remand.

CONCLUSION

This Court should either reverse the judgment below or vacate it and remand the cases to the Ninth Circuit for application of the proper Section 2 standard.

DATED: December 2020.

Respectfully submitted,

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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.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Public Interest Legal Foundation and Former Justice Department Civil Rights Division Officials as *Amici Curiae* in Support of Petitioners

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Table of Contents

Table of Authorities

Cases

Constitutions and Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae have a significant and long-standing interest in this matter. The Public Interest Legal Foundation ("Foundation") is a 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving the constitutional balance between states and the federal government regarding election administration procedures. The Foundation has sought to advance the public's interest in balancing state control over elections with Congress's constitutional authority to protect the public from racial discrimination in voting. This is best done by ensuring that the Voting Rights Act and other federal election laws are preserved and followed as the drafters intended. Specifically, the Foundation has filed *amicus* briefs in cases across the country to fight against the growing effort to misapply Section 2 of the Voting Rights Act.

The other signatories are each former officials with the Department of Justice who have spent their careers enforcing the Voting Rights Act.

Thomas E. Wheeler, II served as an Assistant Attorney General in the U.S. Department of Justice's Civil Rights Division. Bradley Schlozman was Acting Assistant Attorney General for Civil Rights and Principal Deputy Assistant Attorney General in the Civil

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Each party provided a blanket consent to the filing of *amicus curiae* briefs.

Rights Division. Roger Clegg was Deputy Assistant Attorney General in the Civil Rights Division. Robert "Bob" N. Driscoll served as a Deputy Assistant Attorney General and Chief of Staff in the U.S. Department of Justice's Civil Rights Division. Hans A. von Spakovsky served as the career Counsel to the Assistant Attorney General for Civil Rights.

Each *amici* has a strong dedication to and interest in preserving the proper Constitutional arrangement between the states and the federal government as it relates to administration of elections. Their significant experience enforcing the Voting Rights Act provides the Court with unique and considerable help.

INTRODUCTION

This case presents the opportunity to correct an increasing disregard of the requirement of Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, that there be some causal connection between a state election practice or procedure and actual denial or dilution of a vote on account of race. The decision below disregards the causality requirement and was instead based on an impermissible element—disparate impacts. Allowing disparate racial impacts as an element giving rise to a Section 2 violation is not only contrary to this Court's longstanding requirement that a practice or procedure must have some causal connection to actual denial or dilution, it also intrudes into the federalist presumption where states have power to run their own elections. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (internal quotation marks

omitted). "States retain broad autonomy in structuring their governments and pursuing legislative objectives." *Id.* The challenge here to Arizona's election laws, like challenges in other circuits, did not rest on traditional theories of liability under Section 2 and therefore erodes the Constitutional arrangement of power between states and the federal government.

SUMMARY OF ARGUMENT

The Court should reverse the decision below because the Ninth Circuit Court of Appeals applied an analysis that conflicts with this Court's causality requirements of a Section 2 claim articulated in *Thornburg v. Gingles*, 478 U.S. 30, 44-46 (1986). Causality, namely the notion that a practice or procedure is under the totality of the circumstances responsible for a denial or dilution of the vote on account of race, is constitutionally essential for Section 2's intrusion into state powers. Without genuine causality, and certainly by replacing causality with a disparate impacts element, Section 2 becomes an impermissible intrusion into the federalist arrangement. *See Shelby County*, 570 U.S. at 543 ("[T]he federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (internal citations omitted).

The Ninth Circuit's opinion is the latest example of a misapplication of Section 2 in a vote dilution or denial case. Other circuits have also misapplied Section 2 and may continue to do so absent guidance from this Court.

ARGUMENT

I. A Section 2 Analysis Requires a Causal Connection Between the Challenged Practice or Procedure and Actual Vote Dilution or Denial on Account of Race.

Section 2(b) provides that a violation has occurred if, "based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation" by a class based on race or color "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). This Court established a framework for analyzing a Section 2 "results" cause of action challenging at-large elections in *Thornburg v. Gingles*. 478 U.S. at 44-46. In the absence of a different standard, the general *Gingles* framework has been used to analyze Section 2 cases outside of the legislative redistricting context as well, albeit with some adjustments for the particular challenged practice or procedure. *See e.g., U.S. v. Brown*, 494 F. Supp.2d 440, 446-48 (S.D. Miss. 2007).

According to *Gingles*, to establish a Section 2 claim, a plaintiff must prove (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the group "is politically cohesive"; and (3) that a majority's bloc voting usually defeats the minority's preferred candidate. 478 U.S. at 50-51. Moreover, even if those *Gingles* preconditions are satisfied, a plaintiff must show that based on the totality of the circumstances, the challenged procedure results in a denial or dilution of the vote on account of

race. *Id.* at 44-45 ("The Senate Report specifies factors which typically may be relevant to a § 2 claim… The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive.")

The three *Gingles* preconditions are elements that a plaintiff must prove to establish a causal connection between the challenged practice or procedure and actual vote dilution or denial on account of race under Section 2, as amended. As to the first precondition, the Court stated: "If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50. As to the second precondition, this Court stated: "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* at 51. And as to the third precondition, this Court inferred that the actual recurring defeat of a minority candidate demonstrates an impediment. *Id.* The emphasis on causality and tangible results contained in the third *Gingles* precondition is core to a Section 2 claim. For a federal court to intrude into a state's constitutional prerogative to run their own elections, the challenged law must, in reality, result in unequal access to participation on account of race, or, concrete barriers to full participation. Otherwise, Section 2's federal intrusion would strain the federalist structure in the Constitution.

The Ninth Circuit below, and other courts reviewing Section 2 claims, have replaced this Court's emphasis on causality in *Gingles* with an emphasis on disparate racial impacts. The Ninth Circuit conducted a "two-step analysis" because "the jurisprudence of

vote-denial claims is relatively underdeveloped … .” JA 612. Under its analysis, the first step is to “ask whether, ‘as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.’” JA 612-613 (quoting *Gingles*, 478 U.S. at 44). “Second, if we find at the first step that the challenged practice *imposes a disparate burden*, we ask whether, under the ‘totality of circumstances,’ there is a relationship between the challenged ‘standard, practice, or procedure’ on the one hand, and ‘social and historical conditions’ on the other.” JA 613 (emphasis added). The second step then uses the Senate factors, albeit incorrectly, to assess the totality of circumstances. JA 613-615.

In the leap between the first and second steps, the Ninth Circuit asks the wrong question. Instead of asking whether the law provides minorities with the same or equal opportunity to participate in the political process, it changes the question to whether the law disparately impacts minorities. JA 617. The Ninth Circuit has conflated the two:

> First, we ask whether the challenged standard, practice or procedure *results in a disparate burden* on members of the protected class. *That is*, we ask whether, ‘as a result of the challenged practice or structure[,] plaintiffs *do not have an equal opportunity* to participate in the political processes and to elect candidates of their choice.’

JA 612-13 (emphasis added).[2]

The standard used by the Ninth Circuit would turn the VRA into a one-way federal racial ratchet. The fact is that every election regulation will burden someone.[3] "Very few new election regulations improve everyone's lot, so the potential allegations of severe

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[2] *See generally,* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, 85 MISS. L.J. 1357-1372 (2017), originally published as a Heritage Foundation paper, *available at* http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf (criticizing aggressive "disparate impact" interpretations of Section 2 because of the constitutional problems that would raise).

[3] Indeed, such a twisted application of Section 2 would consider every election law through a racial lens where the impacts on every racial subset could be purportedly cataloged by experts, and if any discriminatory effect could be detected, would give rise to a claim as long as some other long-ago instance of discrimination could be exhumed. This would create a 50-state standard where any discriminatory effect could be a basis to strike down state election laws, similar to the analysis under Section 5 of the VRA, 52 U.S.C. § 10304, before *Shelby County*, found the Section 4 triggers to be outdated. *Shelby County*, 570 U.S. at 557 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

burden are endless." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring, joined by Thomas, J., Alito, J.).

The misapplication of Section 2 jeopardizes scores of other presumptively valid state election administration laws. Advocates active in this area often brand these state election administration laws, wrongly, as "voter suppression." *See generally* Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CENTER FOR AMERICAN PROGRESS (July 11, 2018, 12:01 AM), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/ ("Furthermore, states must have in place affirmative voter registration and voting policies in order to ensure that eligible voters who want to vote are able to and are not blocked by *unnecessary and overly burdensome obstacles such as arbitrary voter registration deadlines and inflexible voting hours*.") (emphasis added).

Among the practices targeted by the contorted version of Section 2 are preregistration for elections, in precinct voting, list maintenance procedures, election-day only voting, laws permitting observers to observe the election, witness requirements on absentee ballots, procedures to assess a registrant's citizenship, and naturally, voter identification requirements. Basic, accepted American norms such as registering to vote at all is now a "voter-suppression tool." Ellen Kurz, *Registration Is a Voter-Suppression Tool. Let's Finally End It*, WASHINGTON POST (Oct. 11, 2018), https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-

it/2018/10/11/e1356198-cca1-11e8-a360-85875bac0b1f_story.html.

The contorted interpretation of Section 2 as containing a disparate impact element and dispensing with genuine causality analysis is the primary weapon advocates are using to undermine the laws that have governed election administration in the states for at least a century. Indeed, this interpretation allows courts to become "entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016).

Section 2 of the VRA does not permit a disparate impact analysis and instead requires an analysis of the equal opportunity to participate and of causality and real-world results. According to *Gingles*:

> The "right" question . . . is whether "*as a result of* the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." . . .
>
> In order to answer this question, a court must assess the impact of the contested structure or practice on minority *electoral opportunities* "on the basis of objective factors."

Gingles, 478 U.S. at 44 (emphasis added). The *Gingles* Court was not using "impact" in the sense of statistical disparities. Instead, it is referring to how the structure impacts actual access to election processes and how the structure has impacted actual elections.

Distilled to its essence, *Gingles* requires courts to look to real-world electoral results and to be able to draw a causal nexus between them and the challenged practice. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (Section 2 has a "requisite causal link between the burden on voting rights" and historical conditions that affect racial minorities differently.)

II. The Ninth Circuit's Analysis Erroneously Used Disparate Impact as a Threshold Element.

By making disparate racial impact the threshold element in a Section 2 case, the Ninth Circuit employed an improper standard. The dissent in the Ninth Circuit noted correctly that the "majority's reading of the VRA turns § 2 into a 'one-minority-vote-veto rule' that may undo any number of time, place, and manner rules." JA 726.

The Ninth Circuit's decision imports the analysis formerly used by the Department of Justice in reviewing election law changes pursuant to Section 5 of the VRA by jurisdictions covered by Section 4 of the VRA. Under Section 5, covered jurisdictions had to show that there would be no statistical impact, or retrogression, on minorities in order to obtain federal preclearance for an election law change. 52 U.S.C. § 10304(b) (referring to "diminishing the ability" of minorities to vote); *see generally Bush v. Vera*, 517 U.S. 952, 983 (1996) (referring to Section 5 as precluding any change that would lead to "a retrogression in the position of racial minorities") (internal citations omitted). But the coverage formula under Section 4, which captured all or parts of sixteen states, was struck

down by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 529. Section 5's statistical retrogression standard, therefore, was effectively rendered dormant.

Section 2 remains to prohibit racially discriminatory voting rules, but it does not employ the strict statistical retrogression trigger of Section 5. The Supreme Court foreclosed using Section 2 as a substitute for Section 5's statistical retrogression standard in *Holder v. Hall*, 512 U.S. 874 (1994). Statistical "retrogression is not the inquiry in § 2 . . . cases." *Id*. at 884. This Court should reject the attempt to make an end-run around the *Shelby County* decision and Congress's creation of very different burdens for Section 2 as compared to Section 5.

The *de minimis* trigger in Section 5 has never been understood to apply to Section 2 because Section 2 does not rely on the concept of reduction or diminishment. Instead, Section 2 focuses on whether an equal opportunity to participate in the political process exists and whether a practice or procedure, in reality, denies or dilutes a vote on account of race.[4]

Other circuits have rejected Section 2 claims built on a disparate impact analysis. *See, Frank v. Walker,* 768 F.3d 744, 753 (7th Cir. 2014) ("Although these findings document a disparate outcome, they do not show a 'denial' of anything … as § 2(a) requires.");

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[4] Importantly, this Court acknowledged that Section 5, which "required States to obtain federal permission before enacting any law related to voting[,]" was "a drastic departure from basic principles of federalism." *Shelby County*, 570 U.S. at 535.

Johnson v. Governor of State of Fla., 405 F.3d 1214, 1228 (11th Cir. 2005) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect."). Section 2 does not incorporate a disparate impact standard for liability. Instead, it evaluates whether a standard, practice or procedure gives less opportunity to a protected class to participate in the voting process than it gives to an unprotected class. If the opportunity is given to all, it is generally applicable and facially neutral, and the inquiry ends.

If disparate racial impacts had any relevance to a Section 2 claim, the burden on states would raise similar constitutional concerns as those addressed in *Shelby County*. Simply put, if the Section 2 standards employed by the Ninth Circuit were correct, every state could face litigation for every voting practice that might have the slightest adverse statistical consequence on any minority group. This case presents the opportunity for this Court to ensure that the correct analysis of vote denial or dilution claims brought under Section 2 can be consistently and correctly evaluated.

III. The History of the VRA and the *Shelby County* Decision Preclude Grafting Section 5's Retrogression Standard onto Section 2.

The VRA was enacted in 1965 to combat contemporaneous methods that were used to prevent minorities from registering to vote. Rather than formally disenfranchising minorities, some states had devised voting qualifications that were either only applied to

minorities (such as separate tests) or effectively applied disproportionately to minorities (literacy tests). *See*, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 937 (1995); *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Because of these procedures, the registration process was not equally open to all.

As recognized by this Court in *Shelby County*, the application of a disparate impact retrogression standard was a constitutionally burdensome means to combat a specific and grave historical problem. *Shelby County*, 570 U.S. 529, 534-535; *see also id.* at 557-59 (Thomas, J., concurring) (characterizing Section 5's retrogression standard as an unconstitutional burden). The Court struck down the Section 4 coverage formula because it no longer matched modern circumstances. *Id*. at 534-536. Thus, while Section 2 remains to combat racial discrimination in election laws, it employs a different analysis than Section 5. If Section 2 were to employ a standard based on statistical disparate impacts, this burden on states would effectively raise the same constitutional concerns in *Shelby County* and impose an effective preclearance requirement (through the federal courts) on the entire country.

Simply, if the Section 2 standards set forth by the Ninth Circuit in this case were correct, every state might face litigation for every voting change that might have the slightest adverse statistical consequence for the political party preferred by a racial minority group. That would be an exceedingly perverse result, especially given this Court's opinion in *Shelby County*.

IV. The Ninth Circuit Misapplied Senate Factors.

Courts across the country, and the Ninth Circuit in this case, have grotesquely misapplied the Senate Factors and considered evidence outside of the relevant inquiry under Section 2.

As the district court in this case explained, "When determining whether, under the totality of the circumstances, a challenged voting practice interacts with social and historical conditions to cause inequality in the electoral opportunities of minority and non-minority voters, courts may consider…the following factors derived from the Senate Report accompanying the 1982 amendments to the VRA." JA 312. As articulated by this Court in *Gingles*, these Senate Factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 36-37.

The Ninth Circuit considered evidence far beyond the relevant inquiry in analyzing Senate Factor One, "the extent of any history of official discrimination." The Ninth Circuit went as far back as the period when Arizona was not even a state, beginning with "the Territorial Period" in 1848, right up to the present day. JA 625-642. Included in its historical analysis were 64 years of events that occurred *before Arizona's statehood* in 1912, complete with references to massacres and "blood thirsty efforts by whites" to exterminate American Indians. JA 625. Only a small portion of the Ninth Circuit's analysis pertains to the current millennium and focused on one Arizona County's reduction of the number of polling places, JA 642-43, and translation errors in Spanish-language materials, JA

643. The Ninth Circuit improperly downplayed Arizona's recent history in favor of focusing on centuries-old evidence. "Further, the 'mixed bag of advancements and discriminatory actions' in 'Arizona's recent history' does not weigh in Arizona's favor." JA 645.

Yet, this Court made it clear that the VRA "imposes current burdens and must be justified by current needs." *Shelby County*, 570 U.S. at 536 (internal citation omitted). This Court went on to explain that the VRA's encroachment on the States' Constitutional authority to regulate elections cannot be based on "decades-old data and eradicated practices," but can be justified only by "current needs" to prevent discrimination. *Id.* at 550-51. Yet that is what the Ninth Circuit has done.

In a different context from a VRA claim, this Court has similarly held that historical evidence, to be relevant, must be "reasonably contemporaneous." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). Historical evidence dating back to "laws in force during and just after the Civil War," rather, provide "little probative value." *Id.* "Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken so long ago as evidence of current intent." *Id.*

It is crucial that this Court settle the issue of the proper application of the Senate Factors, particularly limits on the relevance of distant historical evidence under Senate Factor One.

Regarding Senate Factor Two, the degree of racial polarization, this Court should clarify that partisan polarization is not the same thing as racial polariza-

tion. A defendant should enjoy the ability to conclusively rebut Senate Factor Two evidence with evidence that partisan polarization exists in the elections of the state or political subdivision.

Regarding Senate Factor Three, this Court should clarify that evidence is only relevant under Senate Factor Three if the evidence of unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices directly relate to the challenged practice or procedure. For example, evidence of "unusually large election districts" should never be admissible evidence in a Section 2 challenge to absentee ballot witness signature requirements. Otherwise, evidence of wholly unrelated and potentially longstanding voting practices will be used to intrude on a state's power to enact voting practices having nothing whatsoever to do with the other practices listed in Senate Factor Three. There should be a close fit between the challenged practice and plaintiff's evidence under Senate Factor Three. Without this close fit, the federalist arrangement is unduly burdened.

Regarding Senate Factor Four, evidence of candidate slating should not be admissible in a Section 2 challenge to a practice or procedure unless that slating process can be shown to have a *de minimis* nexus to the challenged practice or procedure. Otherwise, treating that evidence as relevant to a Section 2 claim would also intrude into the federalist arrangement where states have power to run their own elections.

Senate Factor Six is in need of wholesale reevaluation by this Court. The mere existence of racial ap-

peals under *Gingles* attaches unfairly as relevant evidence against a defendant regardless of who made the racial appeal. In other words, the mere existence of a racial appeal in any context in a jurisdiction is now relevant evidence to aid a plaintiff in a Section 2 case. Private third party behavior wholly unrelated to the challenged practice or procedure in a Section 2 case, therefore, is used against a state or subdivision. A state defending a practice or procedure has only one means of rebutting evidence under Senate Factor Six related to any private party behavior constituting a racial appeal – argue the evidence presented is imaginary or fake. Indeed, that is no limit on Senate Factor Six and results in a state election procedure being subject to a Section 2 challenge in part because of statements or political speech by private parties that have nothing to do with the challenged practice or procedure. Senate Factor Six, as currently constituted, creates an absurdist burden on states and an impermissible intrusion into the power to run their own elections.

CONCLUSION

For these reasons, the Court should reverse the lower court's decision and make it plain that a violation of Section 2 of the VRA requires some causal connection between a state election practice or procedure and actual denial or dilution of a vote on account of race.

Respectfully submitted,

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No. 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 AMICUS CURIAE OF AMERICAN CONSTITUTONAL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Arizona, like every other State, has adopted rules to promote the order and integrity of its elections. At issue here are two such provisions: an "out-of-precinct policy," which does not count provisional ballots cast in person on Election Day outside of the voter's designated precinct, and a "ballot-collection law," known as H.B. 2023, which permits only certain persons (*i.e.*, family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot. A majority of States require in-precinct voting, and about twenty States limit ballot collection.

After a ten-day trial, the district court upheld these provisions against claims under Section 2 of the Voting Rights Act and the Fifteenth Amendment. A Ninth Circuit panel affirmed. At the en banc stage, however, the Ninth Circuit reversed—against the urging of the United States and two vigorous dissents joined by four judges.

The questions presented are:

1. Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act?

2. Does Arizona's ballot-collection law violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

STATEMENT OF AMICUS CURIAE[1]

The American Constitutional Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the integrity and honesty of elections, promoting accuracy in voter registration and vote counting. Through its Protect Military Votes and its Protect Elderly Votes projects, it seeks to defend the voting rights of two vulnerable groups of voters. In addition, the ACRU's mission includes defending the legislative role in

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[1] All parties have consented to the filing of this brief by blanket consent. *See* Sup. R. 37.3(a). Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

redistricting, which the Constitution vests in the States. It carries out these parts of its mission by participating in redistricting and other cases that present free speech and election integrity issues in the context of elections. These cases include *Bellitto v. Snipes*, 935 F. 3d 1192 (11th Cir. 2019); *Turzai v, Brandt*, 139 S. Ct. 445 (2018); *North Carolina v. Covington*, 138 S. Ct. 974 (2018) (No. 17A790); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); and *A. Philip Randolph Institute v. Husted*, 838 F. 3d 699 (6th Cir. 2016), rev'd, 138 S. Ct. 1833 (2018).

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify the standards that apply to vote denial claims brought under the results prong of Section 2 of the Voting Rights Act. The Ninth Circuit relied, in substantial part, on an analysis of the totality of the circumstances, drawn from *Thornburg v. Gingles*, 478 U.S. 30 (1986). But *Gingles* is a redistricting case, not suitable for use in analyzing whether to count ballots cast in the wrong precinct in part or discard them or whether it is appropriate to limit the range of people who can handle another person's ballot.

Analysis of vote denial claims like those must start with the statutory text. The text of § 2 demands consideration whether a voting regulation provides "less opportunity" to minority voters than to others, not whether the outcomes are equal. The Ninth Circuit erred by focusing its attention on outcomes.

By going further, the Ninth Circuit stretched § 2 beyond its constitutional limits.

ARGUMENT

I. The Constitution does not recognize disparate impact claims, and any congressional recognition of such claims is subject to constitutional limits.

Section 2 of the Voting Rights Act is not "some all-purpose weapon for well-intentioned judges to use as they please in the battle against discrimination. It is a statute." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J. dissenting). As such, it should be interpreted according to its text. In addition, that interpretation should not be construed in a way that violates the Constitution "if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

The Ninth Circuit's understanding and application of Section 2 of the Voting Rights Act's results test fails both of these tests. The court's decision represents a free-wheeling application of disparate impact that is inconsistent with the Constitution and with the statutory text.

A. Section 2 must be restrained in order to satisfy constitutional standards.

The Court has made it clear that the Fourteenth Amendment prohibits only intentional discrimination. *Vill. of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252 (1977). There, it

noted, "our decision last term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264-65. Likewise, a plurality of the Court held that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment empower Congress to enforce the amendments "by appropriate legislation." U.S. Const., amend. XIV § 5, amend. XV § 2. Those powers are not, however, "unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Rather, where those Fourteenth Amendment powers are exercised, "[t]here must be a congruence and proportionality between the injury to be remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

City of Boerne addresses the powers of Congress under the Fourteenth Amendment, not the Fifteenth, but there is "no reason" to conclude that the powers of Congress under the Fifteenth Amendment are different from or greater than those under the Fourteenth Amendment. Von Spakovsky & Clegg, *"Disparate Impact" and Section 2 of the Voting Rights Act* at 3 (Heritage Foundation 2014) (Von Spakovsky & Clegg").[2] Those authors explain that "the two post-Civil War Amendments were ratified within 19

[2] available at https://report.heritage.org/lm119

months of each other, have nearly identical enforcement clauses, were prompted by a desire to protect the rights of just-feed slaves, and have been used to ensure citizens' voting rights." *Id.* Accordingly, the Enforcement Clauses in those Amendments must be read *in pari materia*, such that a federal statute enacted pursuant to Section 2 of the Fifteenth Amendment must also be a congruent and proportional remedy to the problem identified by Congress.

Even if Congress could enact the results test in Section 2 of the VRA using its Enforcement Clauses powers, it cannot open the door to all kinds of disparate impact claims. Rather, its legislation must be tailored to "the end of ensuring no disparate treatment." Von Spakovsky & Clegg at 4. As the Court has explained, when Congress enacts "so-called prophylactic legislation" that reaches otherwise constitutional conduct, it can do so only "in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003); see also *id.* at 728 ("Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations."). Again, even such prophylactic legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

With respect to Section 2's results test, that means reading the statutory language as something other than a simple disparate impact test. First, and most importantly, the "results" language must be

read "to require challengers to demonstrate a close nexus between the practice in question and actual disparate treatment (action taken for a discriminatory purpose.)." Von Spakovsky & Clegg, at 5. In addition, the defendant must be "afford[ed] . . . a rebuttal opportunity to show that they have legitimate, nondiscriminatory reasons for a challenged practice." *Id.*

Furthermore, the test should respect the States' constitutional power to set the "Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. Const. Art. I, 4. The States also have the power to determine the qualifications of voters in federal elections. See U.S. Const. Art. I, § 2, amend. XVII. The States, thus, have substantial powers that should not lightly be overridden.

Put simply, an untethered application of the results test in Section 2 that turns it into a simple disparate impact test is at odds with the Constitution. See *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 of the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30 (1986), is consistent with the requirements of the United States Constitution.").

B. The text of Section 2 creates only a results test of limited scope.

Section 2 of the VRA begins by barring the imposition or application of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner *which results* in a denial or

abridgement of the right to vote . . . *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). It further provides that [a] violation . . . is established if, *based on the totality of circumstances*," citizens protected by the VRA "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).

By including a "results" test in Section 2, Congress went farther than the Constitution. It added that test to the VRA in 1982, after the Court held that the prior language prohibited only intentional discrimination in *City of Mobile v. Bolden*.

The statutory text does not support reading the results test as an undiluted disparate impact approach. The statutory text hedges "results in" with "on account of," "the totality of circumstances," and "less opportunity." Taken together, those statutory elements "suggest that something other than a pure effects test—that is, a disparate impact test—is appropriate; surely Congress would not have used all this language had it intended *that*." Von Spakovsky & Clegg at 8 (emphasis added). Put differently, "[s]howing a disparate impact on poor and minority voters is a necessary but not sufficient condition to substantiate a Section 2 vote denial or abridgement claim." *Veasey v. Abbott*, 830 F. 3d 216, 310-11 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part).

The Eleventh Circuit, sitting *en banc*, agreed, endorsing a reading of Section 2 with a "linguistic conclusion . . . supported by the fact that any other

reading might well render section 2 outside the limits of Congress' legislative powers and therefore unconstitutional." *Nipper v. Smith*, 39 F. 3d 1494, 1515 (11 th Cir. 1994) (*en banc*); see also *Chisom v. Roemer*, 501 U.S. at 417 (Kennedy, J., dissenting) (noting the unsettled question of the constitutionality of § 2 as construed in *Gingles*). Under the Eleventh Circuit's reading, "The existence of some form of racial discrimination . . . remains the cornerstone of section 2 claims." *Id*. "[T]o be actionable, a deprivation of a minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race, not on account of some other racially neutral cause." *Id*. As the court explained, a straight disparate impact test reads "on account of race or color" out of the statute and, in vote dilution cases, "create[s] a de facto right to proportional representation, a result expressly prohibited by section 2 itself." *Id*. at 1516.

Other courts have concluded that statistical disparities unlinked to intentional discrimination are insufficient to warrant relief where they have been external to voting. The alternative would leave no generally-applicable race neutral voting regulation immune from a disparate impact challenge. The Seventh Circuit pointed to that prospect in rejecting a challenge to Indiana's photo ID law, when it noted:

> At oral argument, counsel for one of the two groups of plaintiffs made explicit [what a free-wheeling disparate impact theory] implies: that if whites are 2% more likely to register than are blacks, then the registration system

> top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2.

Frank v. Walker, 768 F. 3d 744, 754 (7th Cir. 2014); see also *id*. ("Motor-voter registration, which makes it simple for people to register to vote by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore to get drivers' licenses.").

In *Smith v. Salt River Project Agricultural & Power Improvement District*, 109 F. 3d 586 (9th Cir. 1997), for example, the court rejected a § 2 based challenge to a land-owning condition on eligibility to vote in an agricultural improvement district. While there was a statistical disparity between the rates of home ownership of whites and others, there was no "causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Id*. at 595 (quoting *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F. 3d 306, 315 (3d Cir. 1994)). In *Ortiz*, the Third Circuit rejected the contention that Pennsylvania's voter-purge law violated § 2 because it affected more inactive minority voters than inactive majority voters. The voters were removed from the rolls because they did not vote, not because of their race. 28 F. 3d at 313-14.

In vote denial cases, the text of § 2 mandates consideration whether the opportunity to participate in the election processes is equal, not whether more minorities fail to take advantage of an otherwise equal opportunity.

C. The Ninth Circuit's application of Section 2's results test fails these standards.

In essence, the Ninth Circuit, joining several other circuits, transferred *Gingles* and its analysis of redistricting and vote dilution claims to the vote denial context. It recognized that "the jurisprudence of vote-denial claims is relatively underdeveloped in comparison to vote-dilution claims." *Democratic National Committee v. Hobbs*, 948 F. 3d 989, 1012 (9th Cir. 2020) (en banc); see also *Veasey*, 830 F. 3d at 305 (Jones, J., concurring in part and dissenting in part) ("In transitioning from redistricting cases . . . to the new generation of 'vote abridgement cases, courts have found it difficult to apply the Section 2 results test.").

The Ninth Circuit's two-step analysis starts by asking "whether the challenged standard, practice results in a disparate burden on members of the protected class." *DNC v. Hobbs*, 948 F. 3d at 1012. Then, it considers "whether, under the 'totality of the circumstances,' there is a is a relationship between the challenged 'standard, practice or procedure,' on the one hand, and 'social and historical conditions' on the other." *Id*. That second step leads to the consideration of "factors such as those laid out in the Senate Report accompanying the 1982 amendments" to the Voting Rights Act. *Id*.

That test is not appropriate for use in vote denial cases. For Section 2 to be violated, "the challenged regulation, . . . rather than 'socioeconomic

conditions' or a 'history of discrimination,' . . . must cause the disparate impact." *Veasey*, 830 F. 3d at 311 (Jones, J., concurring in part and dissenting in part). But the *Gingles*-guided analysis of the totality of the circumstances focuses the attention of courts and litigants on socioeconomic conditions and a history of discrimination. Those Senate factors are now almost 40 years old and no longer represent current conditions in a legally compelling way when used as the basis for a challenge to unremarkable and common voting regulations that are generally applicable and race neutral. This Court should use this case to make it clear that *Gingles* does not apply to vote denial cases.

1. *Gingles* and the 1982 Senate Factors should not be transferred to the vote denial context.

Since *Gingles* was decided in 1986, it has guided States and localities in the redistricting process. In particular, it has told them when the creation of a minority-majority district is required. It says nothing, other than *dicta* taken out of context, about vote denial cases. Accordingly, the courts should be told to start with the text of § 2.

As Judge Jones explains, the "salient guidance" for considering challenges to voting regulations is "the statute itself." *Veasey*, 830 F. 3d at 310 (Jones, J., concurring in part and dissenting in part). The challenged practice must cause the disparate impact, not a history of discrimination, socioeconomic conditions, or both. *Id.* at 311. As the Seventh Circuit noted, "Section 2(b) tells us that Section 2(a) does not condemn a voting practice just because it has a

disparate effect on minorities. (If things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive factors in vote-dilution cases.)." *Frank v. Walker*, 768 F. 3d 744, 753 (7th Cir. 2014). Focusing on the practice at issue to the exclusion of the *Gingles* factors has the advantage of reading § 2 as an "'equal treatment requirement (which is how it reads) rather than 'an equal-outcome command.'" *Veasey*, 830 F. 3d at 311 (Jones, J., dissenting) (quoting *Frank v. Walker*, 768 F. 3d at 754.). After all, Section 2 is violated when processes are not "equally open," and minorities have "less opportunity" than the majority. 52 U.S.C. § 10301(b).

As Judge Jones notes, this analysis "dispenses with the *Gingles* factors" in vote denial cases. *Veasey*, 830 F. 3d at 311 (Jones, J., concurring in part and dissenting in part). She points to three reasons for "dispens[ing]" with them. First, "[t]he Senate report cannot claim the same legal status, if any as that of the enacted law." *Id.* at 306. Tying social and historical conditions to the discriminatory effect "does not distinguish discrimination by the defendants from other persons' discrimination." *Id.* (quoting *Frank v. Walker*, 768 F. 3d at 755). Second, the totality of the circumstances analysis in *Gingles* is to be used only after the plaintiff satisfies the first three criteria. *Id.* (citing *Thornburg v. Gingles*, 478 at 48-51 (1986)); cf. *Bartlett v. Strickland*, 556 U.S. 1 (2009) (importance of satisfying the first *Gingles* criterion). Third, the *Gingles* factors are "non-exclusive and non-mandatory." *Id.* (citing *Gingles*, 478 U.S. at 45).

Put simply, any test for identifying a results-based violation of Section 2 must be consistent with

the statutory text. The Ninth Circuit's test fails to meet that standard.

2. If applicable to vote denial claims, any totality of the circumstances analysis must focus on current conditions.

Separate and apart from the text of Section 2 and the *Gingles*-based reasons for limiting the reach of the 1982 Senate Factors, they are problematic because they drive the analysis of vote denial claims in the wrong direction. They inexorably lead to a focus on social and historical conditions that are unrelated to generally applicable, race-neutral voting regulations.

More generally, the 1982 Senate factors no longer represent current conditions. In 2009, the Court warned that, with respect to Section 5 of the Voting Rights Act, its "past success alone . . . is not adequate justification to retain the preclearance requirement." *Northwest Austin Municipal Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009). Rather, "current burdens . . . must be justified by current needs." *Id*. at 203. Four years later, the Court returned to this theme when it concluded that § 4(b) of the VRA, which looked at voter participation in the 1964, 1968, and 1972 presidential elections, was unconstitutional noting that the formula did not reflect current conditions. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). As it explained, "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on

40-year-old data, when today's statistics tell an entirely different story." *Id*. at 2630-31.

The 1982 Senate factors that form the basis for Section 2's analysis of the totality of the circumstances are now 38 years old, almost as old as the 40-year-old presidential elections used in § 4(b). As such, they tempt courts to focus on the past to the exclusion of the present. In this case the Ninth Circuit's consideration of Arizona's history of discrimination started in the territorial period almost 175 years ago, spending 8 pages before getting to the present. *Democratic National Committee v. Hobbs*, 948 F. 3d at 1017-25.

In addition, as Justice Scalia explained, an appellate court's reliance on the totality of the circumstances to explain its decision means the court "is not so much pronouncing law in the normal sense as engaging in the less exalted function of fact-finding." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (Fall 1989), at 1180-81. The framing of the 1982 Senate factors can also lead courts to make policy judgments for States.

Such policymaking is inherent in the Ninth Circuit's rationale. It observed, "Twenty States, including Arizona's neighboring States of California, Utah, and New Mexico, count [Out of Precinct] ballots." *Democratic National Committee v. Hobbs*, 948 F. Supp. 3d at 1031. As Judge Bybee noted in his dissent, though, "twenty-six states, the District of Columbia, and three U.S. territories disqualify ballots cast in the wrong precinct." *Id*. at 1064 (Bybee, J., dissenting). Thus, Arizona's rule disqualifying out-of-

precinct ballots is "nothing unusual" *Id.* at 1063 (Bybee, J., dissenting). This begs the question why the Ninth Circuit compels Arizona to make the same policy choice that California did, but not the one that Nevada did. *Id.* at 1064 (Bybee, J., dissenting).

In a similar way, when considering Senate Factor 8, the State's responsiveness to the needs of minority citizens, the Ninth Circuit turns its disagreement with Arizona's policy choices into a thumb on the scale. It may be the case that Arizona was the last State to join the Children's Health Insurance Program and may be seen to be behind on school funding and state services. *Democratic National Committee v. Hobbs*, 948 F. 3d at 1030. Those are policy choices to be made in a political manner, not rights. The Ninth Circuit has no business telling the Arizona Legislature which laws it must pass or which political decisions it should make. Those policy choices also have no direct connection to whether the opportunity Arizona's laws provide to voters is equal for all or lesser for some.

Accordingly, the totality of the circumstances analysis cannot focus on past wrongs to the exclusion of present circumstances. In addition, that test should not make the State responsible for any discrimination other than its own. *Frank v. Walker*, 768 F. 3d at 753. As the Seventh Circuit explained, § 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.*

II. The Ninth Circuit erred in rejecting Arizona's justifications for its generally applicable, race-neutral voting regulations as tenuous.

> "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualification of voters, the selection or eligibility of candidates, or the voting process itself, inevitably affects—at least in some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are *generally sufficient to justify reasonable, nondiscriminatory restrictions*.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)(interior citation and quotation omitted) (emphasis added).

This case involves two such race-neutral, generally applicable voting restrictions that are designed to bring order out of potential chaos. The Ninth Circuit declared that Arizona can no longer discard ballots that have been cast in the wrong precinct and may no longer limit the range of people

who may legally handle another voter's ballot. As Judge O'Scannlain pointed out, Arizona has required voters to cast their ballots in their assigned precinct since 1970 and has restricted the number of people who can handle other voters' ballots since 1992. *Democratic National Committee v. Hobbs*, 948 F. 3d at 1047-48 (O'Scannlain, J., dissenting). The Ninth Circuit found the rationale for these long-standing voting regulations to be tenuous. Those conclusions are wrong because the policies supporting Arizona's policies cannot be dismissed as tenuous.

1. Arizona law's discarding of out-of-precinct ballots provides an equal opportunity to all voters and protects the precinct system.

The Ninth Circuit declared, "[C]ounting or partially counting [out-of-precinct ballots] would [not] threaten the integrity of Arizona's precinct-based system." *Democratic National Committee v. Hobbs*, 948 F, 3d at 1065, 1065 (Bybee, J., dissenting). The court reasoned that, because Respondents said they were not challenging the precinct system, what mattered was the number of minorities who voted out-of-precinct, who had their ballots discarded. *Id*. at 1031.

In so doing, the court gave Arizona voters the right to vote wherever they want to. As Judge Bybee noted, "Under the majority's new rule, a voter from Tucson may cross precinct lines and vote in any precinct in Arizona—for instance, in Phoenix." *Id*. at 1065 (Bybee, J., dissenting). Judge Bybee explained that the partial counting of such a voter's ballot overvalues national elections and undervalues local

contests. "[T]he majority has lowered the cost to voters of determining where they are supposed to vote, but only as to presidential, U.S. Senate, and statewide races." *Id.* But it is local elections "that most directly affect the daily lives of ordinary citizens, and often provide the first platform by which citizen-candidates, not endowed with personal wealth or name recognition, seek on the path to obtaining higher office." *Id.* at 1066 (Bybee, J., dissenting).

It is not only that voters are free to vote where they want to under the Ninth Circuit's rule, they can do so for any reason. But, as Judge Bybee explains, "[U]nder Arizona law, no voter should inadvertently vote at the wrong precinct without some indication that something is amiss." *Id.* at 1066, n. 9 (Bybee, J., dissenting). Now, instead of learning of from a mistaken understanding of where to vote, voters can persist in their error. Cf. *id.* (Bybee, J., dissenting) ("Under Arizona's current [out-of-precinct] rules, a voter, having gone to the trouble of having to fill out a provisional ballot, is less likely to make the same mistake the next year. A voter who has been disqualified is more likely to figure out the correct precinct the next time—or, better yet, sign up for the convenience of early voting, a measure that avoids the conundrum of [out-of-precinct] altogether.").

The effect, whether Respondents claim it or not, is to undermine the precinct system. But, that system, which is well-established:

> caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen

> may cast for all pertinent, federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and generally puts polling places in closer proximity to voter residences.

Sandusky Cty. Democratic Party v. Blackwell, 387 F. 3d 565, 569 (6th Cir. 2004); see also *Democratic National Committee v. Reagan*, 329 F. Supp. 3d 824, 860 (D. Ariz. 2018). The precinct system also assists in the allocation of voting machines; already, in some elections where turnout is unexpectedly high, the hours for voting have had to be extended by court order. But that should be the exception, not the rule.

Finally, the Ninth Circuit upsets the precinct system for a marginally small number of voters. In so doing, it erroneously looked at the results of Arizona's policy to the exclusion of the fact that the policy provides an equal opportunity to all voters. That said, in presidential election years, the number of out-of-precinct votes cast has declined from 0.47% of the total in 2012 to 0.15% in 2016. *Id.* at 872. For voters casting ballots in person on Election Day, 99% of minority voters cast their votes in the right precinct, while 99.5% of the majority did so too. *Id.* And, the vast majority of Arizona's voters take advantage of early voting options. As Judge O'Scannlain explained, "[T]he small number of voters who choose to vote in-person and the even smaller number who fail to do so in the correct precinct demonstrate that any minimal burden on racial minorities does not satisfy the

challenger's burden." *Democratic National Committee v. Hobbs*, 948 F. 3d at 1052 (O'Scannlain, J., dissenting),

2. Arizona's law limiting the range of people who may lawfully handle another person's ballot deters vote fraud.

The Ninth Circuit en banc majority concluded that Arizona's justification for its restrictions on ballot harvesting were tenuous. In so doing it rejected the district court's conclusion that limiting ballot harvesting prevents fraud by "creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction." *Democratic National Committee v. Hobbs*, 984 F. 3d at 1035 (quoting *Democratic National Committee v. Reagan*, 329 F. Supp. 3d at 852). The court also dismissed Arizona's reliance on the federal bipartisan Commission on Federal Election Reform and the recent events in North Carolina relating to its congressional district 9 (CD 9). *Id*. at 1036. The court explained that it had to "make an 'intensely local appraisal'" and that appraisal supported the "long and honorable history" of ballot harvesting in Arizona before the Arizona Legislature limited it. *Id*. at 1037 (quoting *Gingles*, 478 U.S. at 78).

The Ninth Circuit got it wrong. If an "intensely local appraisal" means that only Arizona's experience matters, the court limits Arizona, and every other State, from learning from the experience of others. That's plainly not the case.

More to the point, not only the bipartisan Commission's recommendation and North Carolina CD 9 are pertinent. Alabama's experience in its 1994 elections and a recent Texas referral support Arizona's concern with the potential for fraud. Both demonstrate the potential for fraud arising from the collection and completion of ballots in the name of other voters.

In Alabama, Frank Smith and Connie Tyree were convicted of voting the absentee ballots of other voters without the knowledge or consent of those voters in the 1994 elections. See *United States v. Smith*, 231 F. 3d 800, 805, 812 (11th Cir. 2000). The evidence demonstrated that Tyree fraudulently applied for, completed, or both, ballots of seven voters, and that Smith did the same for three voters. *Id*. at 812. In addition, the evidence showed that Tyree knowingly or willfully gave false information to establish the ability to vote in the name of six voters, and that Smith did the same for three. *Id*.

The 1994 election in Alabama was marked by unusual spikes in the use of absentee ballots in several thinly populated rural counties; in Greene County, for example, which is where Smith and Tyree acted, 30% of the votes in 1994 were absentee, where only 5% were two years later. Winthrop E. Johnson, Courting Votes in Alabama: When Lawyers Take Over a State's Politics (Prescott Press, 1999), at 85 ("Courting Votes"). Part of that spike was facilitated by a glitch in Alabama's absentee voting law, which allowed voters to receive ballots where they customarily received mail. In Greene County, 14 ballots were sent to the Post Office box of the local

Democratic Committee, 24 to the acting chair of the local Democratic Committee, and 8 to the county Sewer and Water Authority. *Id*. at 78.

One Witness testified that, on election day, men bearing suitcases opened them and handed absentee ballots to the postal clerks in the post office in Eutaw, the county seat of Greene County. The witness said that five men walked into the post office with three suitcases containing absentee ballots. Id. at 85. Another said that 500 ballots in a single suitcase showed up at the post office the day of the election for delivery to a nonexistent post office box. *Id*. at 137.

The Eleventh Circuit rejected Smith's and Tyree's contention that they were the victims of selective prosecution. It explained

> [F]or Smith and Tyree to establish selective prosecution, they must show that there are other individuals who voted twice or more in a federal election by applying for and casting fraudulent absentee ballots, and who forged the voter's signature or knowingly gave false information on a ballot affidavit or application, and that the voter whose signature those individuals signed denied voting.

United States v. Smith, 231 F. 3d at 811. The evidence showed that Tyree, on of Smith's election assistants, supervised the "assembly line" completion of nearly 100 absentee ballots at the Eutaw Community Center shortly before election day. Courting Votes at 278.

Further, in early May 2020, the Texas Secretary of State referred a complaint regarding alleged ballot harvesting to the State's Attorney General. See Holly Hansen, *Alleged Ballot Harvesting in Harris County Prompts Investigation Request by Secretary of State*, The Texan (May 8, 2020), available at https://thetexan.news/alleged-ballot-harvesting-in-harris-county-prompts-investigation-request-by-secretary-of-state. The complaint relates to a precinct in Houston in which 32 ballot applications appear in the same handwriting, and all of those applications were returned in the same preprinted envelope with the same stamp style. Even though there were more than 150 offices on the ballot, several of the ballots included votes for only two candidates, Representative Sheila Jackson Lee (D) and State Representative Harold Dutton (D). One of the alleged ballot harvesters said she was working for the Sheila Jackson Lee campaign.

Plainly, the Ninth Circuit underestimated the potential for fraud when third parties are permitted to handle the ballots of other voters.

CONCLUSION

For the reasons stated in the briefs of the State Petitioners and the Private Petitioners and this amicus brief, this Court should reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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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 FOR *AMICI CURIAE* LEGISLATORS ELIJAH HAAHR, PAUL GAZELKA, DAVID RALSTON, RON RYCKMAN, BRADY BRAMMER, MATT SIMPSON, MIKE SHIRKEY, AND LEE CHATFIELD IN SUPPORT OF NEITHER PARTY

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December 7, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legislators and legislative leaders from various states across the country who share the constitutional duty to regulate our national election system. This case has profound implications for that duty.

Elijah Haahr has served in the Missouri House of Representatives since 2012. At the time of his selection in 2018 as Speaker of the Missouri House of Representatives, he became the youngest Speaker in the nation.

Paul Gazelka is Majority Leader of the Minnesota Senate and a long-standing Minnesota legislator. From 2005 to 2007 he served in the Minnesota House of Representatives. In 2010 he was elected to the Minnesota Senate, and in 2016 became the Senate Majority Leader.

David Ralston is Speaker of the Georgia House of Representatives and a long-serving legislator. From 1992 to 1998, he served as a member of the Georgia Senate. In 2002 he was elected to the Georgia House of Representatives and became its Speaker in 2010.

Ron Ryckman is Speaker of the Kansas House of Representatives. He has served in the Kansas House since 2013 and became its Speaker in 2017.

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[1] Under Supreme Court Rule 37, *amici* state as follows: This brief is filed with the consent of all parties. No party or person other than *amici* and their counsel authored this brief in whole or in part or contributed money for the preparation or submission of this brief.

Brady Brammer is a member of the Utah House of Representatives, representing District 27. He assumed office in January 2019.

Matt Simpson is a member of the Alabama House of Representatives, representing District 96. He has been a member since 2018.

Mike Shirkey is Majority Leader of the Michigan Senate. From 2011 to 2015 he served in the Michigan House of Representatives. He has served in the Michigan Senate since 2015 and was chosen as Majority Leader in 2019.

Lee Chatfield is the Speaker of the Michigan House of Representatives. He was first elected in 2016 and became the House Speaker for his final term in 2019. He is currently the youngest Speaker in the nation.

Together, Speaker Haahr, Majority Leader Gazelka, Speaker Ralston, Speaker Ryckman, Representatives Brammer and Simpson, Majority Leader Shirkey, and Speaker Chatfield submit this brief to explain the crucial role of state legislatures in ensuring fair, honest, and orderly elections. Regardless of which party prevails, *amici* urge the Court to adopt clear, comprehensible, and predictable legal standards to govern disputes like this one. Lawmakers across the country, in fulfilling their constitutional duty to regulate the "Time, Places, and Manner" of elections, should have a fair opportunity to enact neutral voting regulations without subjecting state officials to a flood of lawsuits—lawsuits which are often filed after voting has begun and force state officials to change rules and regulations mid-election.

SUMMARY OF ARGUMENT

This case has been in active litigation for over four and a half years. During that time, the litigants—including the Democratic Party, Arizona State Officials, and the Arizona Republican Party—have fought two evidentiary hearings before the district court (one of which was a ten-day merits trial), two appeals before the Ninth Circuit, two en banc appeals before the Ninth Circuit, and an emergency proceeding before this Court (which was forced to intervene just days before the 2016 presidential election to avoid throwing Arizona's election system into a state of confusion). Dozens of lawyers have represented the scores of parties and *amici* who have participated in this case. Thousands of pages of briefing and judicial orders have been written, including six published court opinions.

At issue is the enforceability of two Arizona voting laws similar to those that have long operated in dozens of other states. Those two Arizona laws were repeatedly upheld by the district court and a panel of the Ninth Circuit—only to be enjoined, and then struck down, by the en banc Ninth Circuit.

This is no way to run an election system.

Amici do not wish to take sides in the partisan fight at the heart of this case and do not file this brief in support of either party. Instead, as state legislators who share the constitutional duty to enact laws governing the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, they wish to emphasize three points that should inform the legal standards

this Court adopts for vote-denial claims based on the "results" test of Section 2 of the Voting Rights Act:

I. The Constitution requires state legislators to adopt comprehensive regulations to ensure fair, orderly, and equitable elections for federal office. Because no State is the same—geographically, politically, or demographically—each State's election regulations must uniquely address different on-the-ground conditions. But common to every State is the need for "substantial regulation of elections" to ensure they are "fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

In order to carry out their constitutional duty to regulate elections, state legislators need clear and comprehensible legal rules for determining whether policy changes they wish to enact are likely to survive judicial scrutiny. Every change in a State's voting laws will impose some burden on voters, and it is often difficult to predict with precision how significant the burden will be and which specific groups of voters may be inconvenienced. But not every burden is unlawful, and judges wielding laws like Section 2 are ill-equipped to revise election policy without imposing unintended negative consequences on the voting system as a whole. Because "detailed judicial supervision of the election process" is unworkable and "especially disruptive," state legislators need "an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose [through a new voting regulation] is too severe" and thus violates Section 2.

Cf. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment).

II. The existing legal framework for vote-denial claims under the results test of Section 2 of the Voting Rights Act is far from objective and uniform. Lower courts have struggled to arrive at an administrable doctrinal structure, instead taking a highly fact-dependent—and oftentimes legally unpredictable—approach. The result is constant litigation which is disruptive to the election process and precludes legislators from reasonably ascertaining whether a change in election policy will survive Section 2 review.

The unpredictability exists at both "steps" of the two-step results test under Section 2. Under step one, which asks whether a new voting law imposes a "disparate burden," courts often allow Section 2 claims to proceed based on slight differences in voters' behavior, even if those differences are not statistically significant or are based on faulty math. At step two, meanwhile, courts engage in an open-ended analysis of whether "social and historical conditions" affect the burdens of voting in a particular State. This analysis can include factors that have little or nothing to do with the voting law under challenge. Here, for example, the majority below claimed that instances of discrimination occurring during a more than 175-year historical period condemns present-day election policy.

III. To avoid the inconsistency and unpredictability that currently characterizes the legal standards governing cases like this one—and to

allow state legislators to carry out their constitutional duty to regulate elections—this Court should make three doctrinal clarifications to ensure that the legal framework for vote-denial claims under Section 2's results test is clear, comprehensible, and predictable.

First, statistical disparities in voting behavior should not be used as the basis for a Section 2 vote-denial claim unless those disparities reflect something more than the "usual burdens of voting." *Crawford*, 553 U.S. at 198. Neutrally drawn election regulations similar in kind to other valid laws—if they in fact apply to all voters equally—do not deny or abridge the "right . . . to vote" and therefore do not implicate Section 2. 52 U.S.C. § 10301(a).

Second, a voting law should not implicate Section 2 unless a challenger can show that the law actually causes a denial or abridgement of voting rights. This causation requirement comes from Section 2 itself, which states that it applies only to voting regulations that "result[ ] in a denial or abridgement." *Id.* 10301(a). A mere statistical correlation between the challenged law and some aspect of the election process is insufficient. Instead, the law under challenge must causally contribute to loss of the opportunity to participate in the political process.

Finally, historical and societal factors should be relevant under Section 2 only if they relate to the voting law that is the subject of the legal challenge. An open-ended inquiry that spans decades or even centuries should not be used to condemn a present-day law unless it can be shown that the alleged

historical or societal conditions interact with the law in such a way as to prove a denial or abridgment of voting rights.

ARGUMENT

I. State legislatures play a crucial, constitutionally mandated role in the regulation of the nation's elections.

A. The Elections Clause vests state legislatures with primary authority to set the "Times, Places, and Manner" for holding elections for federal officeholders. U.S. Const. art. I, § 4, cl. 1. This is not a trivial provision—the Clause creates a "duty" on the part of state legislative bodies. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013), commanding that they "provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Fulfilling this duty is no simple task. By necessity, voting in this country is highly decentralized, with officials at the county level (or even the city level) responsible for implementing state and federal policy to coordinate multiple layers of elections. Moreover, each State is different in different ways:

- geographically (large, sparsely populated states present different voting challenges than do states with major metropolitan centers);
- politically (the number and type of elections at the state and local levels vary widely, and how each state organizes its political subdivisions is largely idiosyncratic); and
- demographically (Florida's electorate is dramatically different from Minnesota's).

Thus, no two States can run their elections in precisely the same manner.

Within this complicated setting, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And because no two States are the same, each state legislature must "devis[e]" its own "solutions to [the] difficult legal problems" inherent in the administration of the election process. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice,* 555 U.S. 160, 171 (2009)).

B. Legislators of good faith can't do their jobs—particularly in a complicated area such as election regulation—if they can't predict with some confidence whether courts will uphold the laws they enact. As this Court has observed in a different setting, it is "of paramount importance" that

policymakers "be able to legislate against a background of clear interpretive rules." *Finley v. United States*, 490 U.S. 545, 556 (1989).

Almost every voting law imposes "some burden upon individual voters." *Burdick*, 504 U.S. at 433 (1992). And it is often impossible to predict, before a voting law is enacted and implemented, precisely how much of a burden each incremental change in a State's election system might impose on any particular group of voters in any particular area of the State—or *why* some particular voters might appear to be burdened while others might not be. *E.g.*, *Frank v. Walker*, 768 F.3d 744, 748–50 (7th Cir. 2014) (analyzing evidence concerning the potential burden of a voter-ID law, and noting that many voters possessed the proper ID but simply declined to register, even though registration is "the easiest step" in the election process). The only certainty is that "[*e*]*very decision* that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others." *Lee v. Va. Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (emphasis added).

Section 2 of the Voting Rights Act is not a comprehensive election code. It is instead a *remedy* reserved for election laws that are racially discriminatory and deny or abridge the right of citizens to vote and participate in the election process. 52 U.S.C. § 10301(a). Courts should not interpret or apply it to unduly "tie the hands of States" in enacting policy to ensure elections are orderly and fair. *Burdick*, 504 U.S. 433. When it comes to regulating elections, "the striking of the

balance" among valid but competing policy objectives—for example, "between discouraging fraud and other abuses and encouraging turnout"—"is quintessentially a *legislative judgment* with which . . . judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). "One size need not"—and indeed *cannot*—"fit all." *Id.* Thus, at least some "[d]eference to state lawmaking" in this area is necessary if state legislatures—and not the federal judicial branch—are to remain primarily responsible for making election policy. *Ariz. State Legislature*, 576 U.S. at 817.

And there is no reason to think that judges wielding laws like Section 2 will always produce fairer and more orderly election rules than the give-and-take of the state legislative process. The legislative process typically results in incremental change within the context of a comprehensive set of election regulations and is informed by the views of state and local officials with decades of experience managing on-the-ground election conditions in the various geographical areas of the State. In contrast, when a Section 2 lawsuit is filed, a court is asked to examine one particular controversy concerning one particular state law (or, here, two). This can lead to myopia. As Judge Bybee pointed out in his dissent below, striking down Arizona's out-of-precinct policy will have unintended effects: it "will skew future elections in Arizona" by "*overvalu*[*ing*] national elections" and "*undervalu*[*ing*] local elections." Pet.

App. 154a (Bybee, J., dissenting).[2] And in striking down Arizona's restriction on which third parties may collect and turn in ballots on behalf of voters, the en banc majority not only overruled the state legislature's policy judgment but also disregarded the recommendation of "a bi-partisan commission," which supported just such "neutrally-drawn" election regulations. *Id.* at 169a.

Thus, "detailed judicial supervision of the election process" is not only unworkable and suboptimal as a policy matter; it also "flout[s] the Constitution's express commitment of the task to the States." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment) (citing U.S. Const., art. 1, § 4). "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Id.* "Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe." *Id.*

[2] Citations to the Petition Appendix are to the appendix filed in case number 19-1258.

II. The imprecise and subjective legal standards courts often employ in Section 2 vote-denial cases have fueled an explosion of election-related litigation that makes the fate of voting legislation nearly impossible for state legislators to predict.

A. Often, the legal standards that judges apply in cases like this one are not, in fact, "objective" and "uniform" and they do not allow state legislators to "determine, *ex ante*," whether a voting law they wish to enact will be upheld or struck down. *Id.* Indeed, "[l]ower courts have struggled to come up with a workable framework" for Section 2 vote-denial cases brought under the results test despite "the whirlwind of activity" in this area. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 463–64, 474 (2015) (urging an "administrable doctrinal structure" that is "not too complex or amorphous"). The struggle to define consistent legal standards for these cases can be seen in the unusual number of en banc decisions that present sharply contrasting views of the law, both across and within circuits.[3]

[3] *See, e.g.*, Pet. App. 7a–113a (en banc majority), 114a (Watford, J., concurring), 114a–142a (O'Scannlain, J., dissenting), 143a–169a (Bybee, J., dissenting); *Veasey v. Abbott*, 830 F.3d 216, 247 (5th Cir. 2016) (en banc); *id.* at 272–80 (Higginson, J., concurring); *id.* at 280–318 (Jones, J., concurring in part and dissenting in part); *id.* at 318–19 (Smith, J., dissenting) ("The en banc court is gravely fractured and without a consensus."); *id.* at 319–36 (Dennis, J., concurring in part, dissenting in part, and concurring in the judgment); *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014) (Posner, J.) (on

Currently, the legal standards courts apply in these cases draw on "highly fact dependent" factors that attempt to make fine distinctions between "different laws, different states with varying histories of official discrimination, and different populations of minority voters." *Veasey v. Abbott*, 830 F.3d 216, 247 n.37 (5th Cir. 2016) (en banc). This prompts judges to, for example, scour a "multi-thousand page record" for any "trace" or "inference" of discrimination to determine whether a burden caused by a voting law—even if exceedingly slight—must be invalidated. *Id.* at 281 (Jones, J., concurring in part and dissenting in part). As one judge has implied, this means that a law's legality cannot be predicted: "[w]hether a practice is permissible under a given set of facts is . . . not legally determinative of whether it is permissible under a different set of facts." *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 670 (6th Cir. 2016) (Gilman, J., concurring).

The consequence of this approach to Section 2 is a flood of "constant litigation" that calls into question the validity of commonplace voting regulations. *Cf. Crawford*, 553 U.S. at 208 (Scalia, J., concurring). Because "potential allegations of severe burden are endless," even laws that have "already [been] on the books" for decades can become grist for the lawsuit mill. *Id.*; *see also Veasey*, 830 F.3d at 310 (Jones, J.,

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suggestion of rehearing en banc) ("I asked for a vote on whether to rehear these appeals en banc. The judges have voted, the vote was a 5 to 5 tie, and as a result rehearing en banc has been denied.").

concurring in part and dissenting in part) (listing the wide range of voter regulations potentially and actually subject to challenge under amorphous Section 2 legal standards: "polling locations; days allowed and reasons for early voting; mail-in ballots; time limits for voter registration; language on absentee ballots; the number of vote-counting machines a county must have; registering voters at a DMV (required by the federal Motor Voter law); holding elections on Tuesday").

The confusion hamstrings well-meaning legislators who wish to enact new voting laws while avoiding litigation under Section 2, which is often filed in the middle of an election season and requires judges to issue decisions at a breakneck pace so that voters and state officials have advance notice of what rules will apply when voting begins. *Mich. State A. Philip Randolph Inst.*, 833 F.3d at 661 (explaining that the Michigan Secretary of State repeatedly sought emergency relief from the district and circuit courts after a voting law was preliminarily enjoined). Even judges on the same court can hopelessly disagree about the validity of a particular election law. *Veasey*, 830 F.3d at 318 (Smith, J., dissenting) ("The en banc court is gravely fractured and without a consensus. There is no majority opinion, but only a plurality opinion that draws six separate dissenting opinions and a special concurrence."). Legislators themselves thus have little chance of navigating the current morass of Section 2 case law.

B. A claim under the results test of Section 2 of the Voting Rights Act is typically adjudicated using a two-step framework. As applied by some courts, both

steps of the framework invite excessive judicial second-guessing of voting legislation under often amorphous and subjective legal standards.

1. At the first step, a court asks whether a plaintiff has shown that the challenged voting law creates a "disparate burden" on a minority group. Pet. App. 36a. Below, the Ninth Circuit majority asserted that a "bare statistical showing" is not enough to support a Section 2 claim. *Id.* at 37a (citation omitted). But in practice, courts often find a "disparate burden" when a voting law is claimed to have any perceptible effect on voter participation, no matter how minor.

For example, the Ninth Circuit majority based its step-one conclusion regarding Arizona's out-of-precinct policy on voting data showing a mere 0.5% difference in voting patterns among racial groups. Pet. App. 123a (O'Scannlain, J., dissenting). The majority did not ask whether this miniscule difference was statistically significant or whether it was likely to persist over multiple elections. Instead, the court divided one percentage by another (i.e., it divided the share of successful votes by one racial group by the share of successful votes by another) to arrive at what appeared to be massive discrepancies in voter behavior. As Judge Easterbrook has explained, this approach amounts to junk science and is a "misuse of data": "[d]ividing one percentage by another produces a number of little relevance" and "mask[s] the fact that the populations [are] effectively identical." *Frank*, 768 F.3d at 752 n.3. This is a common problem; many other courts have brushed aside the implications of actual data in a

quest to subject a challenged voting law to Section 2 scrutiny. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 639 (6th Cir. 2016) (explaining that the district court and the challengers effectively ignored statistical evidence demonstrating that, despite a reduction in Ohio's early-voting period, voters were "no less likely to vote").

To protect a State's laws from lawsuits based on this kind of statistical manipulation, a conscientious legislator would have to ensure that a proposed voting law, once implemented, will have absolutely no differential effect on groups of voters. Of course, no legislator, no matter how well meaning, could do so.

2. In the second step of the Section 2 results test, courts ask whether "there is a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them." Pet. App. 37a. To answer that question, courts often look not to Section 2 itself, but to the Senate Report accompanying the 1982 amendments to the Voting Rights Act. The Senate Report lists nine "factors" available for consideration, including a wide-ranging historical inquiry into whether "official discrimination" ever "touched the right of the members of the minority group to . . . vote" and whether minorities might be affected by discrimination "in such areas as education, employment and health." *Id.* at 38a–39a. As the majority explained below, this list is "neither comprehensive nor exclusive." *Id.* at 39a. Each factor may or may not have "probative value," and courts

may consider each of them—or not—"as appropriate." *Id.* 37a–40a.

This approach is "incredibly open-ended." *Veasey*, 830 F.3d at 309 (Jones, J., concurring in part and dissenting in part). A case in point is the majority below, which examined historical examples of discrimination over the span of nearly *175 years*, including during the territorial period before Arizona became a state. Pet. App. 48a–81a. As this Court has recognized, "current burdens . . . must be justified by current needs." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009). Basing a decision about the validity of a present-day law on discrimination that occurred dozens or even hundreds of years ago violates this basic principle and can lead to "bizarre" results—for example, it can lead to condemning current legislative policy based on the decades-old actions of an opposing political party, "whose legacy has been repudiated by current" officeholders. *Veasey*, 830 F.3d at 318 (Jones, J., concurring in part and dissenting in part). In this way, "[v]oting rights litigation is . . . decoupled from any 'results' caused by the state." *Id.*

Because current legislators like *amici* have no control over what might have happened in their State decades ago (let alone over 170 years ago), there is little if anything they can do during the legislative process to insulate potential voting legislation from legal claims based on this approach to Section 2.

III. This Court must adopt clear and comprehensible legal standards for cases like this one so that state legislatures may effectively fulfill their constitutional duty.

Litigation under Section 2 should not amount to a game of "gotcha" in which a newly enacted election law can be struck down based on tiny statistical differentials and decades-old acts of discrimination unconnected to present policy decisions. State legislators acting in good faith should have a fair chance of predicting whether the election regulations they enact are likely to survive judicial review. In deciding this case, the Court should make at least the following three doctrinal clarifications to ensure that the Section 2 results test is clear, comprehensible, and predictable.

A. First, the Court should clarify that not every statistical difference in voting behavior that arises after a new voting law is implemented amounts to a "denial or abridgement of the right . . . to vote." 52 U.S.C. § 10301(a). The focus should be on whether the voting process is "equally open" to all voters and gives everyone an equal "opportunity." *Id.* § 10301(b). Unless a voting law creates an unnecessary impediment to voting, it does not meet this standard.

With these principles in mind, a neutral voting regulation that causes voters some amount of inconvenience but is similar in kind to other valid voting regulations—for example, a standardized early-voting period or a change to the universal deadline for mail-in ballots—does not amount to "denial or abridgement" if it inconveniences everyone equally. *Lee*, 843 F.3d at 600 (holding that a voter ID

law did not burden the right to vote because even voters without an ID could cast ballots and cure by later presenting a photo ID). Under this approach, "[a] complex § 2 analysis is not [always] necessary," *id.*, when it is clear that a challenged law does no more than equally impose on all potential voters "the usual burdens of voting," *Crawford*, 553 U.S. at 198; *see also* Pet. App. 126a (O'Scannlain, J., dissenting) (explaining that the en banc majority struck down Arizona's out-of-precinct policy without explaining "how or why the burden of voting in one's assigned precinct is severe or beyond that of the burdens traditionally associated with voting"); *id.* at 152a (Bybee, J., dissenting) (explaining that Arizona's out-of-precinct policy "applies statewide; it is not a unique rule, but a traditional rule, common to the majority of American states").

B. Second, the Court should impose a causation requirement: "the challenged standard or practice [must] causally contribute[ ] to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process." *Ohio Democratic Party*, 834 F.3d at 638. The language of Section 2 itself imposes this element of causation by requiring that only voting laws "which *result*[ ] *in* a denial or abridgment" are vulnerable to invalidation. 52 U.S.C. § 10301(a) (emphasis added); *see also Burrage v. United States*, 571 U.S. 204, 211 (2014) ("'Results from' imposes . . . a requirement of actual causality.")

Thus, the law must not merely be correlated with some statistical differential in the behavior of certain voters—it must also *cause* an actual denial of *voting*

rights. For example, a "motor voter" law, which allows citizens to register to vote whenever they obtain or renew a driver's license, could not be invalidated simply because certain groups of voters are less likely to take advantage of the law. The question should be whether the law *itself*—not other factors unconnected to the law—causes both a failure to register *and* a denial of voting rights. *Frank*, 768 F.3d at 754 (explaining that a motor voter law should not be invalidated simply because some groups of voters "are less likely to own cars and therefore less likely to get drivers' licenses"); *see also Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310–14 (3d Cir. 1994) (requiring this type of "causal connection" when analyzing a law allowing election officials to maintain accurate voter registration lists by removing the names of those who hadn't voted and hadn't re-registered).

C. Finally, the Court should clarify that when historical and societal factors are used in the Section 2 analysis to gauge whether a law is discriminatory, those factors must be related to the challenged voting law itself. In other words, the challenged voting law must "interact[ ] with social and historical conditions that have produced discrimination" to be vulnerable to invalidation under Section 2. *Ohio Democratic Party*, 834 F.3d at 639.

Section 2, by its terms, is a statute designed to address the current discriminatory effects of current voting laws and practices. Condemning a modern voting regulation based on generations-old instances

of discrimination or generalized societal conditions that have nothing to do with the regulation itself strays far beyond Section 2's text and any fair understanding of its purpose.

CONCLUSION

In deciding this case, the Court should adopt legal standards that are clear and comprehensible enough to allow state legislators to reasonably predict whether the election regulations they enact will be vulnerable to vote-denial or vote-abridgement claims brought under the results test of Section 2 of the Voting Rights Act.

Respectfully submitted,

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Nos. 19-1257, 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, 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 WISCONSIN MAJORITY LEADER FITZGERALD AND SPEAKER VOS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Acts

Other Authorities

INTEREST OF *AMICI CURIAE*[*]

Amici are the leaders of the two houses of the Wisconsin State Legislature.

Scott Fitzgerald was elected to the Wisconsin State Senate in 1994 and has served continuously as Majority Leader since 2013.

Robin Vos was elected to the Wisconsin State Assembly in 2004 and has served as Speaker since 2013. He is also the President of the National Conference on State Legislatures and Vice Chair of the State Legislative Leaders Foundation.

As leaders of the Wisconsin Legislature, Leader Fitzgerald and Speaker Vos take seriously their responsibilities of enacting laws to promote fair, honest, and accessible elections.

Despite Wisconsin's accessible voting scheme, including no-excuse early absentee voting and same-day registration, the state has been the target of

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[*] Rule 37 statements: All parties filed blanket consents to the filing of this amicus brief. No party's counsel authored any part of this brief, the preparation and submission of which was funded entirely by *amici*.

copious lawsuits seeking to erode ballot security measures that have been repeatedly upheld in court.

The Seventh Circuit's reading of Section 2 of the Voting Rights Act creates a manageable standard for legislators to follow for potential election law changes. The Ninth Circuit's en banc holding below would create great uncertainty and open Wisconsin to further litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since Wisconsin's founding in 1848, the Legislature has carefully crafted its statutes to balance the interests of ballot access and security and fit the unique and changing needs of the state. Wisconsin has successfully complied with federal law due to clear guidance from the courts.

Wisconsin's photo identification requirement for voting, also known as Act 23 or photo-ID, is one critical measure that has balanced access and security. After a ruling from the Eastern District of Wisconsin misinterpreted Section 2 of the Voting Rights Act (VRA) and struck down photo-ID, the Seventh Circuit overruled the district court and provided a clear, manageable standard for state legislatures. The court held Section 2 requires equal access to the voting process, not equal outcomes, and

determining equal access includes looking at the totality of a state's voting scheme.

The circuit split exacerbated by the ruling below puts the Seventh Circuit's clear standards at risk. *Amici* expect that election laws will be the frequent subject of litigation, as they have been in the past. And a de minimis statistical difference standard, like the Ninth Circuit adopted, would create so much uncertainty, the legislature couldn't predict how a court would interpret its laws. We urge this Court to resolve the circuit split and adopt a manageable standard.

ARGUMENT

I. Wisconsin Has Carefully Created An Accessible Voting Scheme With Security Measures And Requires A Reasonable Standard From The Courts To Continue

"Change is a constant in Wisconsin's rules for holding elections." *Luft v. Evers*, 963 F.3d 665, 668 (7th Cir. 2020). Wisconsin is continually trying to find the correct balance between ballot access and security, while retaining the decentralized structure that has been with the state since its founding in 1848. H. Rupert Theobald & Patricia V. Robbins (ed.), *The State of Wisconsin 1979-1980 Blue Book*, pgs. 185-

186 (1980). In fact, much of the organization would be familiar to our earliest voters. *Id*.

Even today, Wisconsin has the most decentralized voting system in the country, which presents unique opportunities and challenges. Maayan Silver, *Election Officials In Closely Divided Wisconsin Take Steps To Secure The Vote*, National Public Radio, (January 25, 2020). There are 1,850 municipal clerks who administer the state's elections. "Directory of Wisconsin Clerks," Wisconsin Elections Commission, https://elections.wi.gov/clerks/directory (last accessed December 3, 2020). Municipalities range in size from the Village of Big Falls, population 59, to Milwaukee, population 595,993. League of Wisconsin Municipalities, *Facts about Wisconsin Municipalities*, available at https://www.lwm-info.org/590/Facts-About-Wisconsin-Municipalities (last accessed December 6, 2020).

Given the great differences of resources between the municipalities, the state created a central agency to help clerks administer elections. The opportune time came in the wake of the Watergate scandal in 1973, when the state removed election administration duties from the Secretary of State and placed them with the bipartisan Wisconsin Elections Board. Anthony J. Gaughan, *The 40-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 Ohio State Law

Journal 791 (2016). The goal was to shift power away from a single politically motivated official to protect election integrity. *Id.* The latest iteration of the Elections Board is the Wisconsin Elections Commission (WEC). WEC is an agency with a chief election official who reports to a six member board consisting of three appointees each from Republican and Democrat leaders. Wis. Stat.§ 15.61. WEC provides guidance on the laws that the clerks implement. *Id.*

Although Wisconsin's election scheme has seen changes, two things have remained constant: (1) decentralized election administration and (2) a legislative commitment to balancing ballot access and security.

Legislators have crafted election laws that, on the whole, make voting accessible. "Wisconsin has lots of rules that make voting easier," compared to "the rules of many other states." *Luft*, 963 F.3d at 672; *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014). ("*Frank I*). Voters must register before they can vote, Wis. Stat. § 6.27, but "[r]egistering to vote is easy in Wisconsin." *Frank I*, 768 F.3d at 748. Voters may register at their clerk's office, by mail, or online using WEC's "MyVote" website. Wis. Stat. §§ 6.28(1), 6.29(2)(a).

Once registered, Wisconsin has no-excuse absentee voting, Wis. Stat. §6.86 (1)(ac). Prior to 1999,

only some voters could cast ballots absentee, but Wisconsin has since adopted an easier process for both election officials and voters. 1999 Wisconsin Act 182; Samara Kalk, *Absent and Accounted For*, The Capital Times (Nov. 28, 1998).

Wisconsin also has in-person absentee voting, informally known as "early voting," enacted in 2006. 2005 Wisconsin Act 451; Wis. Stat. §6.86(1)(b). That same legislation balanced increased early voting opportunities with a more rigorous prohibition on "electioneering," or campaigning too close to a polling location. *Id*. In 2018, the legislature passed a law to limit the period of early voting to two weeks to create equal opportunity for voters from the Village of Big Falls to Milwaukee. Katelyn Ferral, *Wisconsin's extraordinary session: Is absentee voting a fairness issue?* The Capital Times, (Dec. 5, 2018) https://madison.com/ct/news/local/govt-and-politics/wisconsins-extraordinary-session-is-absentee-voting-a-fairness-issue/article_93e38df0-bc71-56b5-a9cd-2cc3dd159883.html (last accessed December 6, 2020).

For voters who want to cast their ballot on Election Day, the state has "generous" same-day voter registration at the polls. *Luft*, 963 F.3d at 676. The state first implemented same-day registration in 1976. Wisconsin Chapter 85, §28 (1975).

Wisconsin has numerous election security measures, many of which were enacted years after those that created greater ballot access. For example, in 2011, the state enacted photo-ID, a crucial security measure. 2011 Wisconsin Act 23. This change came more than two decades after allowing no-excuse absentee voting.

Act 23 also requires a photo-ID for mail-in absentee voting, one of several security measures. Namely, after a proper request is made, the appropriate municipal clerk verifies the name on the absentee ballot request matches the proof of identification submitted by the elector. Wis. Stat. § 6.87. Once verified, the clerk then secures the ballot in an unsealed envelope and submits the materials to the absentee voter *Id*. For an absentee ballot to count, the voter must return a ballot that has been verified by a witness, who adds her name, address, and signature to the certificate envelope. *Id*. The absentee ballot must be returned to the polling place by 8 p.m. on election day. Wis. Stat. § 6.87(6).

This sampling of Wisconsin's laws illustrates how carefully the legislature has balanced easy access to the polls with ballot security to reach a fair compromise. This balance didn't always come from the same bills, as sometimes conditions change and different provisions are needed later.

Legislators try their best to craft laws that will withstand any legal challenge and have been largely successful in recent years because of the clear standards from the Seventh Circuit. As our sometimes patchwork approach to election laws has shown, legislators also need to be free to experiment with increasing access to the ballot without fear they may never be able to implement appropriate security measures due to litigation untethered from understandable guidelines.

II. Wisconsin Needs Clear Guidance to Continue Crafting Election Laws that Meet Federal Requirements

Despite Wisconsin's success in creating a very accessible voting system and crafting bills that comport with federal law, opponents have brought a barrage of unsuccessful challenges under both the Constitution and Section 2 of the VRA. *Frank I*, 768 F.3d 744; *Luft* 963 F.3d 665; *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 589 U. S. ____ (2020); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020).

Because opponents of Wisconsin's election laws will continue to bring challenges in federal court, this section will address why legislators need clear guidance from this Court to understand how to craft laws that comport with Section 2's requirements. The

Seventh Circuit's holding in *Frank I* provides that guidance. The Ninth Circuit's holding below that requires only a de minimis statistical difference in outcome regarding racial disparities to implicate Section 2 would be extremely problematic. This misreading creates two problems: first, the legislature will not know how to craft laws and second, laws that should be upheld might be rejected by the courts.

A. The Seventh Circuit's Reading of Section 2 is Correct and the Ninth Circuit's is Incorrect

Congress enacted the Voting Rights Act of 1965 (VRA) "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *S.C. v. Katzenbach*, 383 U.S. 301, 308 (1966). The VRA was later amended to remove the requirement that plaintiffs must show discriminatory intent. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). Section 2 now provides that no state may "den[y] or [abridge]" any citizen's right to vote based on race or several other characteristics and a violation occurs if given "the totality of the circumstances" the "political process leading…to [the] election" is not "equally open" to a "protected" "class of citizens" and those people have "less opportunity than other members of the

electorate to participate in the political process[.]" 52 U.S.C. §10301.

Frank I held that Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities" or produces a "statistical disparity." 768 F.3d at 752 —53. Instead, the court correctly interpreted Section 2's language that requires considering "the entire voting and registration system," not only the law at issue that makes the election "not equally open" to minorities, or leaves them with "less opportunity" to vote. *Id.* at 753 (emphasis in original). Any other approach to Section 2 "*would dismantle every state's voting apparatus*." *Id.* at 754 (emphasis added).

In contrast, the en banc Ninth Circuit ruling below set a standard that implicates Section 2 where "more than a de minimis number of minority voters" "are disparately affected" by an election policy. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1015 (9th Cir. 2020).

The Ninth Circuit's interpretation is clearly at odds with the text of Section 2. It requires a something more than a mere de minimis impact on minority voters' opportunity to participate in elections, not a substantial impact. As the *Frank I* court noted, reading Section 2 in its totality "does not condemn a voting practice just because it has a

disparate effect on minorities," 768 F.3d at 753. Instead, to show a "denial" of voting rights, the state would need to make participation "*needlessly* hard." *Id*. (emphasis in original). This is the plain reading of the "totality of the circumstances" text.

B. The Ninth Circuit's Holding Causes Two Problems for Wisconsin if Adopted

The Ninth Circuit's holding causes two problems if adopted. First, the legislature won't know how to avoid litigation because there will be no clear guidelines when drafting bills. Second, laws that would remain on the books under the correct interpretation of Section 2 would be struck down.

First, under the Ninth Circuit's holding, the legislature would be unable to avoid litigation. If *any* disparate impact could cause a law to be challenged in the courts, there is no feasible way legislators could craft bills to avoid litigation. How could a legislator know if decreasing early in-person voting by one day would impact minority voters in Milwaukee disproportionately to white non-Hispanic voters in Big Falls? Would committee chairs have to anticipate the expert witnesses a potential plaintiff might call at trial to get their opinion? Legislators use many sources to craft bills, but knowing which expert witness to contact who may be able to predict the

impact of a piece of legislation at a certain point in time is simply not possible.

The second major problem with the Ninth Circuit's holding is that Wisconsin could lose in court when its laws should be upheld. A law like photo-ID could be struck down in 2012, but then meet the Ninth Circuit's standard in 2020. Would the legislature chance passing that law again if it had been struck down only eight years earlier? Would enough minority citizens have obtained photo-ID in the ensuing years to eliminate a statistical disparity? Would expert witnesses produce different evidence from each other so that the fate of legislation hinged on the credibility of one expert over the other in the eyes of a judge? In addition to hindering the legislative process, any bills that become law would almost certainly be litigated in federal court.

C. The Wisconsin Legislature Needs Clear Guidelines Like Those Given by the Seventh Circuit

The Wisconsin legislature cannot do an effective job under the uncertainty of the Ninth Circuit's en banc holding. Whether listening to constituents, expert testimony at committee hearings, or reading studies by nonpartisan service agencies, legislation comes together from a number of different sources. And then there's the legislative process of debate and

amendment, which includes working through both houses and both parties. At none of those steps can legislators predict the exact outcome a bill will have once it becomes law, let alone the exact language of a bill. This is especially true if the bill is subject to the Governor's veto pen. Lawmaking would either grind to a halt or forever be in litigation, neither of which is a good option.

Wisconsin has a unique, decentralized system with more than 1,800 voting districts administering elections. The state has a history of passing laws that balance security and access at different times. If election provisions are viewed in a vacuum, all of Wisconsin's good work creating an accessible yet secure voting scheme could be dismantled.

The *Frank I* holding gives Wisconsin the freedom to experiment with ballot access and security, balancing each when necessary. That holding looks at Wisconsin's entire election scheme, which "has lots of rules that make voting easier." *Luft*, 963 F.3d at 672. If this Court finds that standard to be insufficient, *amici* request some clear standard from the Court regarding Section 2.

CONCLUSION

This Court should reverse the en banc holding below and set clear standards regarding Section 2 of the Voting Rights Act.

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Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, 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 AMICI CURIAE GOVERNOR DOUGLAS A. DUCEY, PRESIDENT OF THE ARIZONA STATE SENATE KAREN FANN, AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES RUSSELL BOWERS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

Amici Curiae are Arizona lawmakers whose integrity the en banc Ninth Circuit impugned and whose authority that court tried to displace.

Douglas A. Ducey is the Governor of the State of Arizona, Karen Fann is the President of the Arizona State Senate, and Russell Bowers is the Speaker of the Arizona House of Representatives. All three held office in 2016, when Arizona adopted House Bill 2023, a ban on ballot harvesting, and all three supported that measure. Speaker Bowers and President Fann voted for the bill; Governor Ducey signed it into law. Their mutual objective was to guarantee the integrity of the ballot while maintaining easy access to early voting. And they succeeded. HB 2023 is a commonsense—and commonplace—law that prevents fraud by limiting who can handle a voter's early ballot, but nonetheless allows relatives, caregivers, and others to help voters in returning their ballots. HB 2023 *protects* the right to vote; it does not diminish that right.

None of the Amici were in public office decades earlier, when Arizona joined the overwhelming majority of States in adopting precinct-based voting for in-person voters on election day. But as state officers, Amici have an interest in defending Arizona's laws against an activist attack.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from Amici made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

SUMMARY OF ARGUMENT

The en banc Ninth Circuit disregarded the text of the Voting Rights Act to create a new policy outlawing inconveniences associated with a State's voting process if a court identifies: (1) any statistical or even anecdotal correlation with race, and (2) any evidence of historical discrimination, even occurring before statehood. That is not the law. This Court has recognized in the related context of Fourteenth Amendment voting claims that "the usual burdens of voting" do not impair the right to vote. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J., op.). Section 2 likewise focuses on "the right . . . to vote" and protects minority voters' ability "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. The *ordinary* burdens of voting do not, by definition, threaten voting rights.

For state lawmakers like Amici, the Ninth Circuit's policy amounts to a policymaking straitjacket. While other circuits allow States to try different policies—sometimes relaxing voting procedures, sometimes tightening them—the Ninth Circuit now precludes States from changing policy direction if doing so would produce any statistical correlation with race. Yet Section 2 addresses vote denial or abridgement "on account of race." 52 U.S.C. § 10301(a). Section 2 does not forbid other, race-neutral policy motives, including protecting Arizona's electoral process for all voters. This Court should restore the States to their constitutional role as "laboratories for devising solutions to difficult legal problems." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n* (*AIRC*), 135 S. Ct. 2652, 2673 (2015) (quotation omitted).

Finally, the Ninth Circuit's approach to discriminatory intent would ensnare every State in the Union. That approach began by faulting Arizona for historical instances of discrimination dating back to the Treaty of Guadalupe Hidalgo, 64 years before Arizona became a State. JA 626–27. Regarding more recent events, the Ninth Circuit impugned Arizona's entire legislature based on the theory that dozens of elected officials served as a "cat's paw" for one bad actor. JA 677–78, 680. This demeaning and implausible conclusion contradicted factual findings in the district court and further paralyzes state legislatures' ability to enact electoral regulations by imputing to the entire body the improper motives of a single member.

ARGUMENT

I. The Decision Below Created a Results Test that Makes Electoral Regulation Practically Impossible.

The Ninth Circuit created a test that every jurisdiction would fail. It finds a violation of the Voting Rights Act based on either a bare statistical disparity (out-of-precinct voting) or anecdotal evidence (ballot harvesting), combined with historical discrimination. This approach departs from the Voting Rights Act and prevents the States from experimenting with policy solutions. For state policymakers like Amici, these effects are devastating. The Court should apply the statute as written and free States to fulfill their roles as laboratories of democracy.

A. Section 2 Requires More than Bare Statistical Disparities Plus Historical Discrimination.

The circuit courts have struggled to identify a test for vote-denial cases under Section 2. The leading candidate in many circuits bears no relation to the text of the statute.

See, *e.g.*, *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). The Ninth Circuit's version goes even further afield with its hair trigger that prevents virtually all regulation. This Court, in its first vote-denial case, should announce a test that incorporates each of the elements in the statute itself. At a minimum, that would include the following:

1. the contested regulation must affect "the right to vote" and not just one particular method of voting;

2. "denial or abridgement" requires something more than the "usual burdens of voting," *Crawford*, 553 U.S. at 198; and

3. minority voters' "opportunity . . . to participate in the political process *and* to elect representatives of their choice," "based on the totality of circumstances," requires evidence that the contested provision actually affects electoral outcomes.

The current tests for vote denial under Section 2 fixate on historical discrimination and give courts wide latitude to impose their policy preferences. This Court should announce a test that follows the language of the statute.

1. The Voting Rights Act protects "the right to vote," not the right to vote however one pleases. That distinction is not new. It was the basis for this Court's holding in *McDonald* v. *Board of Election*, 394 U.S. 802 (1969). Applying the Fourteenth Amendment, the *McDonald* Court distinguished between "the right to vote" and "a claimed right to receive absentee ballots." *Id.* at 807.

Textually, the Voting Rights Act reflects the same basic insight. Its first subsection speaks in terms of the "right to vote." The second subsection then defines violations in terms of "the totality of circumstances" and minority voters' ability "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). This holistic standard requires courts to consider the cumulative effect of voting regulations, which necessarily encompasses both restrictive and permissive features of a State's voting system. JA 616 (O'Scannlain, J., dissenting); JA 705 (Bybee, J., dissenting).

Here, the record shows that Arizona provides a "flexible mixture" of opportunities to vote—including in-person voting on election day, early in-person voting, voting by mail, and in-person drop-off of early ballots. JA 259. For in-person voters in precinct-based counties, the district court found after a 10-day trial that locating the correct precinct is easy. JA 303. And both the district court and the Ninth Circuit panel correctly focused on the statutorily protected "right to vote." JA 319–21; JA 400–04. The en banc court, in contrast, narrowed its gaze to two voting *practices* that Arizona law forbids—voting in the wrong precinct and giving a ballot to unauthorized ballot harvesters. As a matter of text and logic, those two practices are not what Section 2 protects. Any standard that faithfully applies the statute must focus on "the right to vote."

2. Congress did not pass the Voting Rights Act to combat inconvenience. As its text says, the Act addresses a "denial or abridgement of the right . . . to vote." 52 U.S.C. § 10301(a). Any orderly electoral system necessarily entails a degree of inconvenience. Fortunately, the

mechanism for separating denials and abridgements from mere inconveniences is already in place. The safe harbor announced in *Crawford* for "the usual burdens of voting," 553 U.S. at 198, logically applies to Section 2 as well.

In vindicating the right to vote under the Fourteenth Amendment, this Court held that a State may require voter identification because doing so "does not qualify as a substantial burden on the right to vote, *or even* represent a significant increase over the usual burdens of voting." *Ibid.* (emphasis added). The language of a "substantial burden" is specific to the Fourteenth Amendment. See *Burdick* v. *Takushi*, 504 U.S. 428, 444 (1992). The lesser standard—"usual burdens of voting"—applies to a species of regulation that cannot burden the right to vote in a legally cognizable way. After all, what is "usual" cannot be a denial or abridgement.

The circuit courts have already recognized the logic of extending *Crawford*'s safe harbor to Section 2. The Fourth Circuit, for example, applied *Crawford* to a Section 2 vote-denial claim, noting that the "'usual burdens of voting'" do not amount to a denial or abridgement of the right to vote. *Lee* v. *Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016) (quoting *Crawford*). Judge O'Scannlain, dissenting below, applied the same logic, criticizing the en banc majority for failing to explain "how or why the burden of voting in one's assigned precinct is severe or beyond that of the burdens traditionally associated with voting." JA 704.

The en banc majority was silent on how voting in the correct precinct or submitting a ballot without the help of unauthorized third parties compares to the usual burdens of voting. The district court, however, had already found that neither contested regulation represents more than the

"usual" and "ordinary burdens traditionally associated with voting." JA 279 (ballot harvesting), JA 305 (out-of-precinct). It is impossible to characterize that finding as clear error, and the Ninth Circuit did not reach Respondents' Fourteenth Amendment claims. JA 584. But while this maneuver avoids the impossible conclusion that the district court clearly erred, it leaves in place the district court's factual finding. All that remains is the legal question whether *Crawford*'s logic applies to Section 2 as well.

The scope of "usual burdens" should take guidance from practices in other States to create a safe harbor for policymakers. Both at the time of the Voting Rights Act's adoption and continuing to the present, most States require voters to cast ballots in their correct precinct. JA 729–30 & n.5 (Bybee, J., dissenting). Numerous States limit ballot harvesting, JA 739–42 (Bybee, J., dissenting), and all 50 of them include some regulation for the handling of absentee ballots, JA 768-830 (Bybee, J., dissenting). Some States require a justification for obtaining a mail-in ballot in the first place. All of these regulatory programs are "usual," and a State must be free to choose any of them—whether that choice represents an easing or tightening of rules for that particular jurisdiction. See Part I.B *infra*.

The Voting Rights Act does not purport to eliminate every burden around voting, however minor. "The Voting Rights Act of 1965 was enacted to remedy the systematic exclusion of blacks from the polls by the use of poll taxes, literacy tests, and similar devices." *Delgado* v. *Smith*, 861 F.2d 1489, 1492 (11th Cir. 1988). These wicked devices leveraged failures by the States (*e.g.,* to educate minorities or permit them to earn a living) in order to preclude high

percentages of racial minorities from voting. They also often included "grandfather clauses" and "good character" tests to extend the franchise to white citizens who would otherwise fail the test. See *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 220 (2009) (Thomas, J., concurring in part and dissenting in part). For a citizen whom the State has purposefully deprived of economic and educational opportunities, a poll tax or literacy test is a significant or even insuperable barrier to the franchise. Traditional burdens like voting in one's own precinct or returning one's no-justification-required early ballot during a month-long window, on the other hand, are unremarkable and represent features of orderly elections. Under *Crawford*, these requirements fall comfortably within the safe harbor for the "usual burdens of voting" and therefore do not amount to a denial or abridgement.

3. The en banc court eschewed Judge Ikuta's insistence on evidence "show[ing] that the state election practice has some material effect on elections and their outcomes." JA 400. Instead, it settled for anecdotal evidence that minority voters were "more likely" to give their ballots to third-party ballot collectors than were white voters, JA 597–98, and that minority voters were one half of one percentage point more likely to vote in the wrong precinct, JA 617. The statute favors Judge Ikuta's approach. It speaks in terms of minority voters' ability to "participate in the political process *and* to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). Those are the "results" that a "results test" must require.

Respondents' evidence of disparate utilization does not establish the disenfranchisement that Section 2 requires. On ballot harvesting, the district court found that "prior to

HB 2023's enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." 329 F. Supp. 3d at 870. This fact was insufficient in the opinion of the district court and the Ninth Circuit panel to establish a violation of Section 2. Applying the statutory language, those courts insisted on "a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." *Id.* at 871; see also 904 F.3d at 713. The en banc Ninth Circuit reversed, rejecting Section 2's focus on electoral outcomes to focus instead on the mere fact that racial groups use different voting procedures to different degrees. JA 659–62. In changing the statutory definition of a violation—which is the whole purpose of Section 2's second paragraph—the en banc court rewrote half of Section 2.

Regarding out-of-precinct voting, the district court found that 99% of minority voters and 99.5% of white voters cast their ballots in the correct precinct. JA 333. Applying the statutory command to consider the "totality of circumstances," the district court concluded that the minimal statistical disparity in out-of-precinct voting was not a violation of Section 2. JA 334–37. The en banc Ninth Circuit, however, never mentioned the actual percentages. Instead, it produced a new statistic to suit its desired outcome, dividing the percentages to find that minority voters cast out-of-precinct ballots at a "ratio of two to one." JA 618. Of course, the same "ratio of two to one" would exist if 99.999998% of minority voters and 99.999999% of white voters voted in the correct precinct. And in either case, the data reveals near parity in voters' ability to comply with the regulations at issue. The Seventh Circuit addressed exactly this "misuse of data" in an election case,

concluding that "[t]hat's why we don't divide percentages." *Frank* v. *Walker*, 768 F.3d 744, 752 n.3 (7th Cir. 2014).

These examples highlight Congress' wisdom in defining a Section 2 violation to encompass only "political processes" that "are not equally open to participation by members of a class of citizens protected by subsection (a) 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). This definition might be a mouthful, but its unmistakable focus is on elections as a whole. The Ninth Circuit erred in reducing it to a dubious calculation of relative impact, detached from the broader fact that voters of all races have little trouble complying with the law.

* * *

Whatever test this Court announces should rely on the language of Section 2. The current test employed by a number of circuits overlooks the statutory features discussed here; the Ninth Circuit's test is even more detached. It magnifies even the slightest discrepancy in *methods* of voting to create a violation, whereas the statute requires something like Judge Ikuta's insistence on a "material effect on elections and their outcomes." JA 400. At the very least, a safe harbor based on *Crawford*'s "usual burdens of voting" will allow States to continue regulating elections in search of the best "solutions to difficult legal problems." *AIRC*, 135 S. Ct. 2673.

B. The Ninth Circuit's Interpretation of Section 2 Creates a One-Way Ratchet that Cripples State Policymaking.

Because the Ninth Circuit requires only a (vanishingly small) burden to find a Section 2 violation, its results test amounts to a ban on any regulation that tightens election security. This one-way ratchet will chill policy experimentation as lawmakers realize that any step toward liberalization will be impossible to undo.

States experiment with various electoral regulations, knowing that future legislators can reverse course if the experiment proves less than successful or opens the door to fraud. Until now, courts have not viewed this policy dynamism with suspicion. In Ohio, for example, the legislature initially allowed 35 days for early voting, including a six-day "golden week" when individuals could register and vote on the same day. *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 623 (6th Cir. 2016). Four legislative terms later, policymakers eliminated the golden week to allow just 29 days for early voting. *Id.* at 624. This slight tightening of electoral regulations impacted African American voters more than other groups. *Id.* at 625. Nevertheless, the Sixth Circuit declined to construe the Voting Rights Act to "create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances." *Id.* at 623.

In the Ninth Circuit, however, Ohio's reconsideration of the golden week would violate Section 2, because African American voters were more likely to employ same-day registration and voting. *Id.* at 628. Add to that disparity

the fact that Ohio's history doubtless includes racially unjust chapters, see Part II *infra*, and the Ninth Circuit would have everything it needs to find a Section 2 violation. But if the Ninth Circuit's approach were the rule, Ohio likely would never have created the golden week in the first place—or experimented with early voting at all. The unintended consequence of forbidding any effort to tighten regulations is that States will not relax those regulations. If legislators face a one-way ratchet, the safest course is not to turn it.

An additional consequence is that one legislature can tie the hands of its successors. Lawmakers who might otherwise hesitate to enact policies that would be vulnerable to future repeal or revision—*i.e.*, those with limited public support or known downsides—would have every incentive to charge ahead, knowing that course correction is impossible, even as legislative majorities change.

The ability to change laws in response to changing circumstances and priorities is, of course, central to the work of every legislature in the country. As Chief Justice Warren observed five decades ago, "a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald*, 394 U.S. at 809 (quotation omitted). Amici know from experience that, with each policy experiment, lawmakers discover new "phase[s] of the problem." Some of those lessons require returning to former policies. The Ninth Circuit, however, has replaced the process of trial and error with an allowance for trials but no opportunity to admit even partial error.

The Ninth Circuit's hair-trigger test for racial discrimination under Section 2 will subvert the States' legislative process. It allows one legislature to bind the hands of future policymakers and discourages policy experimentation. Far from identifying bad legislative actors, the Ninth Circuit's version of the Voting Rights Act discourages lawmakers from doing what they should.

C. States Cannot Fulfill Their Work as Laboratories for Policy Experimentation under the Ninth Circuit's Test.

State policymakers like Amici lead "laboratories for devising solutions to difficult legal problems." *AIRC*, 135 S. Ct. at 2673 (quotation omitted). In the field of election law, the Ninth Circuit would make that work impossible. Both statutes at issue in this case respond to important concerns around the administration of elections. Other States may not respond in the same way, but "a single courageous State may, if its citizens choose, serve as a laboratory." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Innovative States like Arizona are operating laboratories within the laboratory. For example, Arizona law allows counties to choose whether to use a traditional precinct-based model or a vote-center model, in which a registered voter can vote at any polling place in the county. Ariz. Rev. Stat. § 16-411. For counties that choose the precinct-based system, out-of-precinct voting is undesirable for both practical and principled reasons. For starters, voting in the incorrect precinct undermines the democratic process by reducing participation in local elections. A voter who arrives at the wrong precinct but still within his congressional district, for example, may be able to vote in

statewide races and the congressional race but not in contests for county offices or the state legislature. And if, as Respondents hypothesize, out-of-precinct voting is slightly more common among minority voters, then the resulting exclusion from local races will disproportionately impact precisely the voters Respondents claim to represent. In Arizona's judgment, the better policy is to encourage in-precinct voting by disallowing out-of-precinct ballots.

The Ninth Circuit suggested several different (and occasionally confusing) policy options, including "counting or partially counting" out-of-precinct ballots. JA 584. "Partially counting" those ballots by identifying races for which the voter was entitled to vote might be a creative approach, but it is not required by Section 2. It belongs instead to the policy realm, where Amici and their counterparts in other States have worked for years to develop "solutions to difficult legal problems." *AIRC*, 135 S. Ct. at 2673.

On the other hand, "counting" out-of-precinct ballots implies that voters would cast ballots for offices for which they are not entitled to vote. JA 584, JA 707 n.7 (O'Scannlain, J., dissenting) (noting the absurdity of "counting or partially counting"). If election integrity means anything, it must prevent voters from choosing other people's representatives. Still, even the Ninth Circuit's ill-advised policy suggestion illustrates a useful point: flaws that might slip past the judiciary are more likely to be purged in the crucible of democratic policymaking.

The stifling effect of the Ninth Circuit's holding for state policymakers is difficult to overstate. If that decision

stands, any change in election laws is certain to bring litigation and impractical "solutions" imposed by a judiciary with no special expertise in administering elections. That is not the vision embodied in either America's federal structure or the Voting Rights Act.

II. The Ninth Circuit's Approach to Historical Discrimination and Legislative Intent Would Convict Every Current Legislature in the Nation.

Amici know from experience that divining legislative intent is nearly impossible. What drives one legislator is irrelevant to another and a drawback in the eyes of a third. Yet all three might eventually support the same bill. Compounding this divergence in motives are the incomplete records of legislative proceedings. Floor and committee transcripts may reveal areas of contention or uncertainty, but they cannot document each legislator's various motives or their relative importance.

If "legislative intent" is discoverable at all, the record in this case falls far short of establishing discriminatory intent behind HB 2023. The district court correctly rejected that contention, and the en banc Ninth Circuit had no basis for finding clear error. For the lawmakers who supported this legislation, erasing the Ninth Circuit's slander is of utmost importance.

1. Legislative intent entered this case through two theories: the "intent test" for Section 2, and the Fifteenth Amendment. JA 584. The district court rejected Respondents' theory of invidious legislative intent. JA 357–58. It concluded that the legislature acted on "a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting."

JA 357. While some legislators "also harbored partisan motives . . . in the end, the legislature acted *in spite of* opponents' concerns that the law would prohibit an effective [get-out-the-vote] strategy in low-efficacy minority communities, *not because* it intended to suppress those votes." JA 357–58 (emphasis added). As a result, the district court found "that H.B. 2023 was not enacted with a racially discriminatory purpose." JA 350.

2. "Legislative motivation or intent is a paradigmatic fact question." *Prejean* v. *Foster*, 227 F.3d 504, 509 (5th Cir. 2000) (citing *Hunt* v. *Cromartie*, 526 U.S. 541, 549 (1999)); *Pullman-Standard v. Swint*, 456 U.S. 273, 287–288 (1982) ("intent to discriminate on account of race . . . is a pure question of fact").

Here, the district court found after a 10-day bench trial that HB 2023 was enacted without discriminatory intent. The court heard testimony of "current and former lawmakers, elections officials, and law enforcement officials," including both supporters and opponents of the law. JA 258. Among those who testified was Representative Charlene Fernandez, the current Democratic Minority Leader of the Arizona House of Representatives. Rep. Fernandez opposed HB 2023 in 2016. But she testified at trial that she had "no reason to believe that H.B. 2023 was enacted with the intent to suppress Hispanic voting." JA 352. It was not, and the district court agreed. JA 350.

3. A bare majority of the en banc Ninth Circuit upended that finding based on "Arizona's long history of race-based voting discrimination," prior legislatures' efforts to limit third-party ballot collection, and a novel "cat's paw" theory under which the court imputed one senator's

supposedly race-based motives to all of his colleagues. JA 677–78, 680.[2] By both measures, the Ninth Circuit wrongly attributed to Amici and their many colleagues views and intentions that they do not hold.

a. The "long history" chronicled by the Ninth Circuit stretches back 172 years—that is, 64 years before Arizona entered the Union. Even assuming that historical account is accurate, the Ninth Circuit erred in faulting contemporary legislators based on distant history. See *Shelby County* v. *Holder*, 570 U.S. 529, 553 (2013) (rejecting the coverage formula in Section 4 of the Voting Rights Act because it rested on "decades-old data relevant to decades-old problems"). Every State has historical failures in racial equality. But neither the Fifteenth Amendment nor Section 2 disables current legislatures because their predecessors acted badly. Just as one legislature's laws cannot bind another, so future lawmakers cannot be bound to the moral defects of their forbearers. As this Court recently reaffirmed, "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980)).

b. The Ninth Circuit's reliance on prior legislatures' efforts to limit third-party ballot collection was misplaced for similar reasons. The district court correctly discounted those earlier efforts—Senate Bill 1412 (2011) and HB 2305 (2013)—because "they involve[d] different bills passed during different legislative sessions by a substantially

[2] Judge Watford did not join the "intent test" portion of the en banc panel's opinion. JA 692.

different composition of legislators." JA 354-55. Yet the en banc majority scoured those earlier "efforts to outlaw third-party ballot collection" for some evidence of sinister intent. JA 671.

Regarding SB 1412, for example, the court misleadingly quoted Arizona's former elections director, Amy Bjelland Chan, as "admit[ting] that the provision was 'targeted at voting practices in predominantly Hispanic areas.'" JA 603. But "[i]n context," as the district court earlier explained, the report "describes the 'practice' targeted by S.B. 1412 not as ballot collection, generally, but as voter fraud perpetrated through ballot collection, which Bjelland Chan believed was more prevalent along the border because of perceived 'corruption in the government and the voting process in Mexico,' and the fact that 'people who live close to the border are more impacted by that.'" Dist. Ct. Dkt. 204 at 13.

As for HB 2305, the Ninth Circuit darkly noted that the bill "was passed along nearly straight party lines in the waning hours of the legislative session." JA 604. Indeed, HB 2305 was the fourteenth of 34 bills voted on during a 14-hour legislative day, and it was one of several that day that broke along partisan lines. That is not suspicious or unusual—it describes *many* bills passed at the end of *every* legislative session. The court also noted that the legislature subsequently repealed the bill rather than face a citizen referendum. JA 605. But that says nothing about the intent of the legislators who voted for the bill itself.

Even the en banc majority could not go so far as to conclude that either SB 1412 or HB 2305 was enacted with discriminatory intent. But even if it had, "this is [not] a case in which a law originally enacted with discriminatory

intent [was] later reenacted by a different legislature," so "what matters . . . is the intent of the" legislature that enacted HB 2023. *Abbott*, 138 S. Ct. at 2325.

b. As for HB 2023, the Ninth Circuit adopted a "cat's paw" theory of legislative intent that is unsupported in law and unconnected to the realities of policymaking. The en banc court purported to "accept the district court's conclusion that some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed." JA 677; compare JA 357. But because that "sincere belief" was the product of a single legislator's "false allegations" and a "racially-tinged" video, the Ninth Circuit tortuously reasoned, "a discriminatory purpose" could be imputed to the 50 other legislators who "did not themselves have" a malign purpose, but were nonetheless duped into voting for the bill. JA 677.

No other court has adopted this demeaning "cat's paw" theory of legislative intent, and for good reason. It turns the presumption of legislative good faith on its head and is irreconcilable with this Court's commonsense observation that "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 217 (1983).

Indeed, the Ninth Circuit's "cat's paw" hypothesis bears no resemblance to the realities of policymaking. The Arizona Legislature consists of two chambers with 90 members—60 representatives and 30 senators. Typically, after a member introduces legislation, one or more committees hears the bill, including public testimony,

before the full chamber votes on it. If a majority of the first chamber approves the bill, then the process repeats itself in the second chamber. The bill may be amended several times along the way. And if it clears both chambers, then it must be signed by the governor before it becomes law. The process is cumbersome by design. And the notion that it could be controlled by a single legislator is farcical.[3]

Even if this level of manipulation were possible, adopting the Ninth Circuit's approach would cast suspicion on nearly all election-related policymaking. If a single legislator's undisclosed racist motives can be attributed to all his colleagues, then any elections bill he advocates or votes for may violate Section 2's intent test or the Fifteenth Amendment. No legislature can be put to the task of smoking out all its members' secret intentions before it can regulate elections.

4. The Ninth Circuit's conclusion regarding legislative intent rests on an additional error of fact and law. That court insisted repeatedly that "[t]here is no evidence of any fraud in the long history of third-party ballot collection in Arizona." JA 601; see also JA 689 ("there is a long history of third-party ballot collection with no evidence, ever, of any fraud").

That is false. Jim Drake, a former Assistant Secretary of State, testified at trial about his investigation of an individual who collected other people's ballots, opened them, and then disqualified them by "overvot[ing] them if things weren't going the right way." Dist. Ct. Dkt. 400 at

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[3] Ironically, the legislator whom the Ninth Circuit promoted to Svengali-like status was expelled from the Arizona House of Representatives in 2018 by a bipartisan supermajority of his colleagues.

213. While it was considering HB 2023, the House Elections Committee heard testimony from numerous witnesses, including "Michael Johnson, an African American who had served on the Phoenix City Council, [who] strongly favored H.B. 2023 and expressed concern about stories of ballot collectors misrepresenting themselves as election workers." JA 352; see also JA 412 (citing Sen. Steve Smith's testimony "that ballot fraud is 'certainly happening,'" and Sen. Sylvia Allen's floor speech "express[ing] concern that 'we do not know what happens between the time the ballots are collected and when they're finally delivered.'").

The Legislature also considered the Carter-Baker Report, which instructed that States "should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." JA 669. Other jurisdictions wrestled with the dangers of ballot harvesting in the years preceding HB 2023's enactment. And recent history provides an additional example in North Carolina's 2018 election. See JA 745.

Moreover, as a matter of law, the Ninth Circuit erred in concluding that "protect[ion] against potential voter fraud . . . is not necessary, or even appropriate." JA 689. That conclusion directly contravenes this Court's decision in *Crawford*, which reiterated that States can enact legislation to prevent election fraud even before it occurs. 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). Unlike here, the Indiana legislature in *Crawford* had no evidence of the particular misconduct that it legislated to prevent. *Id.* at

194. The same was true when Washington's lawmakers, in order to avoid voter confusion, required minor-party candidates to demonstrate support to qualify for the ballot. *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195 (1986). Here, in contrast, Arizona lawmakers had evidence of the fraud they sought to prevent. But even if they had not, their foresight would not have violated Section 2 or the Fifteenth Amendment.

5. The en banc majority found further proof of the Legislature's supposedly illicit motive in the district court's finding "that the legislature 'was aware' of the impact of H.B. 2023 on what [the district] court called 'low-efficacy minority communities.'" JA 679. But the Ninth Circuit ignored the district court's finding that "the legislature enacted H.B. 2023 *in spite of* its impact on minority [get-out-the-vote] efforts, not because of that impact." JA 356 (emphasis added). True, the district court found that "some individual legislators and proponents were motivated in part by partisan interests." *Ibid.* But the court determined that "partisan motives did not permeate the entire legislative process." *Ibid.* "Instead, many proponents acted to advance facially important interests in bringing early mail ballot security in line with in-person voting security[.]" *Ibid.*

Again, *Crawford* is instructive. The voter-identification law there was uniformly supported by Republican legislators and opposed by Democratic legislators, and so "[i]t is fair to infer that partisan considerations may have played a significant role." *Crawford*, 553 U.S. at 203. But where, as here, "a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have

provided one motivation for the votes of individual legislators." *Id.* at 204. In any event, partisan interests are not themselves illicit, whether in regulating elections or redistricting, both of which are constitutionally committed to the States. See *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2497 (2019) ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities.").

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL.,

PETITIONERS,

V.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

RESPONDENTS.

ARIZONA REPUBLICAN PARTY, ET AL.,

PETITIONERS,

V.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONS

LAW REVIEW ARTICLES

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

As part of its mission to defend fundamental rights, the Center works to protect election integrity and prevent the dilution of legal votes by illegal ballots. To that end, the Center recently litigated *Cook County Republican Party v. Pritzker*, 1:20-cv-04676 (N.D.Ill.), a challenge to vote-by-mail and ballot-harvesting in "a state as notorious for election fraud as Illinois." *See Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004).

SUMMARY OF ARGUMENT & INTRODUCTION

The law should make it easy to vote and hard to cheat.

That was the line the 45th Governor of Wisconsin, Scott Walker, used time and again when explaining his approach to election administration, including his support for a photo ID requirement. In two short phrases — easy to vote, hard to cheat — he encapsulated a view that the vast majority of Americans would agree on.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. Both Petitioners and Respondents submitted letters granting blanket consent for *amicus* briefs in support of either party.

It was that goal that led him to make a voter ID law a central plank of his 2010 election platform.[2] After his victory, the Wisconsin Legislature adopted that proposal in 2011, and he signed it into law as Act 23 of his tenure. The law made Wisconsin one of 34 states to require some form of voter ID, and one of 18 to require photo ID.[3]

Wisconsin, unlike some other states, has a long history of embracing African-Americans in its electoral process. And since Wisconsin enacted photo ID, the state's participation by African-Americans and other minorities in its electoral processes has continued to be strong.

Nevertheless, Act 23 was subject to prolonged litigation, as the law was volleyed like a ping-pong ball between the Eastern and Western Districts of Wisconsin and the U.S. Court of Appeals for the Seventh Circuit, leaving election administrators and voters in a constantly confused lurch.

Much of the reason for this confusion was because of the lack of clear precedent for lower-court judges to guide their interpretation of Section 2 of the Voting Rights Act. Despite a clear ruling from this Court upholding voter ID just a few terms earlier, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008),

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[2] Dave Umhoefer, "Sign legislation requiring photo ID to vote," Politifact (July 4, 2011), available at https://www.politifact.com/wisconsin/promises/walk-o-meter/promise/586/sign-legislation-requiring-photo-id-to-vote/.

[3] "Voter identification laws by state," Ballotpedia, available at https://ballotpedia.org/Voter_identification_laws_by_state.

the Act survived by the narrowest of margins through constant court battles.

Wisconsin's saga with Act 23 shows the need for this Court to clarify its Section 2 jurisprudence by setting a clear rule that binds lower court judges so that state executives and legislators can act with confidence when they update election administration codes.

ARGUMENT

I. Wisconsin historically has embraced African-Americans and other minorities in the political process.

Even before Wisconsin became a state, the African-American cook for early Milwaukeean Solomon Juneau participated in the city's first municipal election, in 1835.[4]

When the state was admitted to the union in 1848, "[t]he Wisconsin constitution allowed black citizens to vote, provided that the idea was 'submitted to the vote of the people at a general election, and approved by a majority of all the votes cast at such election.' When in 1849 Wisconsin residents voted on that question, African American voting rights were approved 5,265 to 4,075."[5] After a local canvassing board denied African-

[4] Isador S. Horwitz, "Early Milwaukeeans Active in Negro's Enfranchisement," Milw. J. (Feb. 12, 1922), available at https://www.wisconsinhistory.org/Records/Newspaper/BA10277.
[5] Wis. Historical Society, "The Wisconsin Supreme Court reaffirms black voting rights, 1866," available at https://www.wisconsinhistory.org/turningpoints/search.asp?id=1377.

Americans their access to the polls, the Wisconsin Supreme Court upheld their right to cast a vote. *Gillespie v. Palmer*, 20 Wis. 544 (1866). A few years later, Wisconsin was one of the first states to ratify the Fifteenth Amendment barring discrimination against voters based on race; the Legislature approved the motion 102 to 29.[6] Thus began a long and proud tradition of African-American participation in Wisconsin politics.

In the century and a half since its founding, the badger state has been led by statewide African-American constitutional officers, an African-American member of Congress, and numerous African-American legislators and local elected officials.[7] Wisconsin's first African-American legislator, a Republican, was elected in 1906.[8]

Wisconsin also has a consistent record of African-American participation at the polls, as evidenced by its most recent statewide elections. In fact, in the 2018 race for governor, with voter ID in effect, exit polling shows that African-American turnout as a percentage of the electorate *exceeded* the African-American percentage of the voting-age population. In other words, the *Atlantic* reports, "black voters significantly outperformed white voters."[9] Census data demonstrate the

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[6] Horwitz, *supra* note 3.

[7] Secretary of State Vel Phillips, 1979-1983; Wisconsin Supreme Court Justice Louis Butler, 2004-2008; Lt. Governor Mandela Barnes, 2019-present; State Superintendent of Public Instruction Carolyn Stanford Taylor, 2019-present; Congresswoman Gwen Moore, WI-4, 2005-present.

[8] "Lucian H. Palmer," Wis. Historical Society, available at https://www.wisconsinhistory.org/Records/Image/IM34888.

[9] Vann R. Newkirk II, "Did Minority Voters Dethrone Scott Walker?," The Atlantic (Nov. 14, 2018), available at

same was true in the 2012 election. *Frank v. Walker*, 768 F.3d 744, 753-54 (7th Cir. 2014) (in the 2012 election, African-American voters were registered to vote and voted in higher percentages than non-Hispanic white voters).

And in the most recent race for president, early news reports indicate that African-American and Hispanic voters turned out in record numbers. *See* Kenya Evelyn, "How young, Black voters lifted Biden's bid for the White House," The Guardian (Nov. 6, 2020) (reporting from Milwaukee)[10]; Shaun Gallagher, "Early reports show Wisconsin's Latino vote flipped state blue," WTMJ-4 (Nov. 7, 2020).[11]

In fact, Wisconsin's record of high voter participation is not limited to her minority populations. Among all fifty states, Wisconsin is consistently one of the top five for voter turnout among eligible adults.[12] Unofficial re-

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https://www.theatlantic.com/politics/archive/2018/11/black-and-latino-turnout-helped-defeat-scott-walker/575818/ ("The CNN exit poll of the state gubernatorial race calculates that black voters composed about 9 percent of the electorate, and Latino voters about 4 percent. According to the Census Bureau, black people only make up about 6 percent of the voting-age population in the state, and Hispanic people about 5 percent—although Hispanics compose a smaller percentage of registered voters, about 4 percent.").

[10] Available at https://www.theguardian.com/us-news/2020/nov/05/black-voters-wisconsin-joe-biden.

[11] Available at https://www.tmj4.com/news/election-2020/early-reports-show-wisconsins-latino-vote-flipped-state-blue.

[12] 2018: 61.4%, 3rd in the nation
2016: 69.5%, 5th in the nation
2014: 56.8%, 2nd in the nation
2012: 65.8%, 2nd in the nation

turns from the most recent presidential election indicate turnout among voting-age adults in Wisconsin was 72.67 percent, a full ten points higher than the national average of 62 percent.[13]

From the state's pioneering days thru to the present, Wisconsin has welcomed all of her citizens in the public square, as evidenced by the strong showing of African-American participation in her elections. It is a record of which any state could be proud.

II. Despite this history and recent record of strong minority turnout, Wisconsin's Act 23 was subjected to a long and bitter battle based on Section 2.

After Act 23 was signed into law, Wisconsin faced an onslaught of legal challenges. Three of them relate to the federal statute at the center of this case: Section 2 of the Voting Rights Act. *Frank v. Walker*, No. 11-CV-01128 (E.D. Wis.); *LULAC v. Deininger*, No. 12-C-0185 (E.D. Wis.) (eventually consolidated with *Frank*); *One Wis. Inst., Inc. v. Nichol*, No. 15-cv-324-jdp (W.D. Wis. 2016) (also eventually consolidated with *Frank*).

The District Court in *Frank*, evaluating the Section 2 claim after trial, set aside the nine factors identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and instead

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"Voter Turnout," FairVote, available at https://www.fairvote.org/voter_turnout#voter_turnout_101.

[13] Chris Mertes, "State voter turnout not quite a record," Sun Prairie Star (Nov. 10, 2020), available at https://www.hngnews.com/sun_prairie_star/news/article_34cbed16-bc9d-5d1f-958d-b4878e246241.html.

crafted its own definition of a "voting practice" that violates the law: "Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not." *Frank v. Walker*, 17 F. Supp. 3d 837, 870 (E.D. Wis. 2014). Based on the expert testimony of three plaintiffs' witnesses at trial, stating that a greater percentage of minorities lacked photo ID compared to whites, the Court issued a permanent injunction against the law. *Id*. at 880. Four months later, the District Court denied the State's request for a stay pending appeal. *Id*. at 900.

The Seventh Circuit acted expeditiously to hear an appeal, and stayed the District Court's order mere weeks before the November 2014 gubernatorial election. *Frank v. Walker*, 766 F.3d 755, 756 (7th Cir. 2014). A judge called for reconsideration of the stay *en banc*, which the Court declined on a tied 5-5 vote, with a dissent from Judge Williams. *Frank v. Walker*, 769 F.3d 494, 500 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing *en banc*).

The Seventh Circuit panel hearing the appeal on the merits fully reversed the District Court.[14] Evaluating the Section 2 claim, the Court held that "in Wisconsin

[14] The Seventh Circuit's reversal was hardly the only criticism directed at the District Court's first substantive opinion. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶40 n.9, 357 Wis. 2d 469, 490, 851 N.W.2d 262, 272 ("The district court's reasoning stands the *Anderson/Burdick* analysis on its head."); *N.C. State Conf. of the NAACP v. McCrory,* 997 F.Supp. 2d 322, 364 n.50 (M.D.N.C. 2014).

everyone has the same opportunity to get a qualifying photo ID." *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014). To read Section 2 as the District Court did would "sweep[] away almost all registration and voting rules. It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." *Id*. at 754.

Judge Posner proactively suggested *en banc* review, which was again denied by an equally divided vote. *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014). Judge Posner, for the five who would have taken the case, in 26 pages of opinion never discussed the Voting Rights Act in any detail. Instead, he discussed the different approaches of conservative vs. liberal states, concluding: "If photo ID laws increase minority voting, liberals should rejoice in the laws and conservatives deplore them. Yet it is conservatives who support them and liberals who oppose them. Unless conservatives and liberals are masochists, promoting laws that hurt them, these laws must suppress minority voting and the question then becomes whether there are offsetting social benefits . . ." *Id.* at 797 (Posner, J., dissenting from rehearing *en banc*).

This Court denied a petition for certiorari. *Frank v. Walker*, 575 U.S. 913, 135 S. Ct. 1551 (2015).

Yet that still did not end the saga, as the case was remanded back to the District Court. There it drags on still, including multiple additional trips to the Seventh Circuit. The second round centered on whether the District Court could issue a preliminary injunction re-

quiring the state to create an affidavit option for persons who could not obtain documents necessary to secure a photo ID. *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2015); *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016); *Frank v. Walker*, 196 F. Supp. 3d 893 (E.D. Wis. 2016); *Frank v. Walker*, No. 11-C-1128, 2016 U.S. Dist. LEXIS 102245 (E.D. Wis. July 29, 2016).

The Seventh Circuit, granting a stay pending appeal, said the District Court "issued an injunction that permits any registered voter to declare by affidavit that reasonable effort would not produce a photo ID — even if the voter has never tried to secure one, and even if by objective standards the effort needed would be reasonable (and would succeed)." *Frank v. Walker*, Nos. 16-3003, 16-3052, 2016 U.S. App. LEXIS 14917, at *3 (7th Cir. Aug. 10, 2016). "The injunction adds that state officials are forbidden to dispute or question any reason the registered voter gives." *Id.* at *4. The Seventh Circuit denied a request for initial hearing *en banc* on this round of *Frank*, which was consolidated with a separate voter ID challenge coming up from the Western District of Wisconsin. *Frank v. Walker*, 835 F.3d 649, 651 (7th Cir. 2016) (*per curiam*). *See One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). There, the Seventh Circuit noted that the Eastern and Western Districts of Wisconsin reached different conclusions in the separate cases challenging voter ID, where the Eastern District mandated the affidavit procedure while the Western District declined to order the affidavit process, but instead required reform to the state's ID petition process. *Frank*, 835 F.3d at 651.

The third round of litigation, still fought out with the same set of plaintiffs, though now consolidated with *One Wisconsin Now* from the Western District, continued on. In fact, the most recent iteration was decided just in June of 2020. *Luft v. Evers*, 963 F.3d 665, 668 (7th Cir. 2020). There the Seventh Circuit considered "more than a dozen of the provisions [of Wisconsin election law], each contested under a number of theories," *id.* at 670, including ongoing arguments about whether college student IDs qualify as voter ID. *Id.* at 677. There again the District Court had continued its incorrect approach to Section 2, using the two-part test for analyzing those claims adopted by the Fourth and Sixth Circuits, not the one set by the Seventh. *Id.* at 672.

The Seventh Circuit, again reversing the district court, pointed out that "[m]any of plaintiffs' arguments, and some of the district court's rulings, suppose that §2 forbids any change in state law that makes voting harder for any identifiable group. *Frank I* rejected that line of argument. 768 F.3d at 752-53. The Voting Rights Act does contain an anti-retrogression rule, but it is in §5(b), 52 U.S.C. §10304(b). Section 5 of the Act has never applied to Wisconsin. Section 2 must not be read as equivalent to §5(b)." *Id.* at 673.

Judge Easterbrook's opinion also offers an important reminder that alongside Wisconsin's efforts to protect ballot integrity are a number of laws that increase voting access: "Wisconsin has lots of rules that make voting easier," including easy absentee ballot access, large windows for in-person voting, time-off to vote, funding assistance to transport voters to the polls,

easy pre-election registration, and same-day registration. *Id.* at 672. "These rules make voting easier than do the rules of many other states. We observed in *Frank I* (citing a report by the Census Bureau) that the net effect of Wisconsin's rules had been a higher turnout rate than other states for voters of all races." *Id.* Wisconsin's goal remains the same: to make it easy to vote and hard to cheat.

Incidentally, the *Frank* cases still live on today before the District Court and remain a subject of active litigation, nearly a decade after Act 23 became law. *Luft v. Evers*, No. 11-cv-1128-jdp, 2020 U.S. Dist. LEXIS 152174, at *12 (E.D. Wis. Aug. 20, 2020).

III. Wisconsin's experience illustrates the need for a clear, easy-to-apply rule from this Court.

This Court must provide a clear, bright-line rule to guide legislators in crafting election laws and to cabin the discretion of judges hearing Section 2 claims. The Court's current jurisprudence is leading to confusion and inconsistency among the lower courts. As the *Frank* saga illustrates, the Seventh Circuit was deeply riven, twice dividing 5 to 5 on whether to hear the case *en banc*. And the district courts were similarly split, reaching conflicting conclusions not only with the Seventh Circuit's panel but with one another.

This sort of confusion is the consequence of a jurisprudence that functions as a "grand balancing test in which unweighted factors mysteriously are weighed." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135-36 (2020) (Roberts, C.J., concurring) (quoting *Marrs v. Motorola, Inc.*, 577 F. 3d 783, 788 (7th Cir.

2009)). "Under such tests, 'equality of treatment is impossible to achieve; predictability is destroyed; [and] judicial arbitrariness is facilitated. . . " *Id.* (quoting A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

Currently, some judges are reading the case law as authorizing an "'I know it when I see it test,' which is no test at all." *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320, 1327 (Fed. Cir. 2020) (quoting *Bell Supply Co., LLC v. United States*, 348 F. Supp. 3d 1281, 1295 (Ct. Int'l Trade 2018)). As Judge Easterbrook's repeated opinions for the Seventh Circuit accurately attest, many judges follow the precedent to a conclusion unmoored from the text of Section 2.

This case offers the opportunity provide a new, clear rule, based on the text of the statute, that allows the political branches to craft lawful election administration procedures. If the rule of law is a law of rules, then this Court must set forth a real rule to guide policymakers and the lower courts.

Such a rule can honor the statute's textual command to consider "the totality of circumstances" while first focusing on Section 2(a)'s command that the state law must actually "deny" or "abridge" the right to vote. 52 U.S.C. § 10301. *See Frank*, 768 F.3d at 753 ("Although these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter.").

"The reasons for drawing a bright line . . . are obvious and familiar. Bright lines provide clear notice . . . Such

clear rules are easy, cheap, and administrable — laudable qualities in the context of a vast and intricate program [like Medicaid]. . .” *Wos v. E.M.A.*, 568 U.S. 627, 653 (2013) (Roberts, C.J., dissenting). Election administration is also a vast and intricate machine, executed on election day by armies of volunteer poll workers, many overseen by municipal clerks who are not full-time focused on election issues, some of whom work part-time. These workers and clerks perform their essential service in neighborhood precincts and wards, which funnel up vote tallies and legal issues through succeeding levels of municipal, county, and state administration. For them, for the policymakers who shape the laws they administer, and ultimately for the voters themselves who need confidence in their elections, this Court should craft a clear rule.

CONCLUSION

Wisconsin is a state with high voter turnout, both before and after it adopted voter ID. This proud tradition of participation embraces the state’s minority communities, who have higher registration and turnout than white voters in some elections (including after the adoption of voter ID). Despite this, judges still strike down the state’s election laws under Section 2 using a non-textual approach that puts legitimate laws on hold through years of costly, protracted litigation, before ultimate vindication on appeal.

This Court should adopt a clear, bright-line rule based on the text of Section 2(a): states may not deny or abridge the right to vote by denying an equal opportunity to cast a ballot to any voter.

Respectfully submitted,

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December 7, 2020

Nos. 19-1257 & 1258

IN THE
SUPREME COURT OF THE UNITED STATES

MARK BRNOVICH, 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

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AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal Statutes

Other Authorities

IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

As part of its election integrity mission, Judicial Watch has a substantial interest in the proper enforcement of Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301(a) and (b). After this Court's decision in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), upholding Indiana's voter identification law, election integrity laws, like Arizona's laws here, have been increasingly subject to challenge under Section 2 of the VRA. It is important to Judicial Watch that in cases arising under Section 2, and specifically under Section 2's discriminatory results standard, that lower courts apply the proper legal standard.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this amici curiae brief.

based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici curiae have submitted several briefs before district courts, courts of appeals, and this Court, regarding the proper role of Section 2 in vote denial cases. *See* Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation, *Ohio Democratic Party v. Husted*, No. 16-3561, Dkt. Entry 43 (6th Cir.) (Section 2 challenge to Ohio's early voting policy); *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (No. 16-833) (Section 2 challenge to North Carolina election laws); Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation, *Greater Birmingham Ministries, et al. v. Secretary of State for the State of Ala.*, No. 18-10151 (11th Cir.) (Section 2 challenge to Alabama's voter ID law).

For the foregoing reasons, amici curiae respectfully request this Court reverse the judgment in *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc) and enter a written opinion that clarifies the need, in cases brought under the VRA's Section 2 results standard, for plaintiffs to prove that the challenged voting procedure causes minority voters not to be able to participate equally in the political process and to elect representatives of their choice.

SUMMARY OF ARGUMENT

In this brief, the arguments presented are focused upon Respondents' statutory claims under the Voting Rights Act (VRA) that arise under Section 2's discriminatory results standard.

Respondents challenged two of Arizona's facially race-neutral regulations designed to protect the integrity of its elections: restrictions on "out-of-precinct" (OOP) voting and on third-party collection and delivery of early ballots. Respondents alleged a host of violations of federal statutory and constitutional provisions, including violations of both the discriminatory results and intent standards of Section 2 of the VRA. After a 10-day bench trial in which seven expert witnesses and thirty-three lay witnesses were heard, the district court ruled in favor of Arizona on all claims. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 833-38 (D. Ariz. 2018). The Ninth Circuit panel affirmed. *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686 (9th Cir. 2018).

But the Ninth Circuit en banc reversed. In a sharply divided decision, it found that Arizona's OOP and third-party ballot collection laws were enacted with a discriminatory purpose and had discriminatory results, in violation of Section 2. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc) (hereinafter "*Hobbs*"). [2] Instead of analyzing whether Arizona's election laws *caused* minority voters to have less opportunity to

[2] *Certiorari* was granted in this case on October 2, 2020.

participate in the political process and to elect candidates of their choice, the Ninth Circuit adopted the faulty argument that disparate impact plus historical discrimination and socio-economic disparities (Senate Factor evidence) is sufficient to show a Section 2 violation.

In applying Section 2's results standard in vote denial cases, courts have developed a two-step analysis. First, courts ask whether the evidence indicates that the challenged voting procedures have *caused* minority voters to have less opportunity to participate in the political process and to elect representatives of their choice. Respondents utterly failed to adduce any evidence that satisfied this step one requirement of causation, *i.e.*, that the challenged voting procedure *caused* minorities to have less opportunity to participate in the political process and to elect representatives of their choice.

Instead, Respondents showed Arizona's laws had a disparate impact upon minority voters in comparison to white voters. That is to say, the evidence showed that more minorities than whites voted OOP and whites relied less on third parties to collect and deliver their early ballots than non-whites. But in a Section 2 results case, disparate impact alone is *not* sufficient to show a violation.[3] Without proof of causation, Respondents have not satisfied step one. A showing of causation is a

[3] Indeed, construing Section 2 in that fashion would convert this law from a statute that demands equality of opportunity to one that requires equality of outcome.

prerequisite to proving a violation of Section 2's racial results standard. Because of this failure, Respondents' Section 2 discriminatory results claims must fail.

The Ninth Circuit erred when it proceeded to the next step of the Section 2 analysis, determining whether the Senate Factors provide evidence of discriminatory results. In a Section 2 results case where a "totality of the circumstances" must be considered, courts may only look to the Senate Factors if they first find causation. But *Hobbs* strayed far from this two-step process by inquiring whether there was a relationship between the challenged procedures and the social and historical conditions that are described in the Senate Factors without first finding causation. In doing so, the en banc majority in *Hobbs* determined that the Senate Factors weighed in favor of the Respondents, and then held that the evidence of disparate impact of the challenged procedures *plus* the Senate Factor evidence proved that the challenged voting procedures violated Section 2's results standard.

On the issues of what is a plaintiff's burden of showing a violation of Section 2's results standard and when evidence of past racial discrimination and present-day socio-economic disparities [*i.e.*, Senate Factor evidence] may be appropriately used, the decisions in the courts of appeals are in conflict both among the circuits and within certain circuits.

This Court should reverse the judgment of the en banc majority in *Hobbs* and adopt the appropriate two-step causation analysis, as required by the textual language of the 1982 amendment to Section 2 of the VRA. Namely, this Court should make it clear that to prove a Section 2 results claim, challengers of racially-neutral electoral integrity laws must establish that the enforcement of those voting procedures *cause* minority voters to have less opportunity to participate in the political process and to elect candidates of their choice. If plaintiffs fail to establish this necessary causation element, their Section 2 results claim fails.

ARGUMENT

THE NINTH CIRCUIT ERRED BECAUSE ITS FINDINGS OF DISCRIMINATORY RESULTS UNDER SECTION 2 OF THE VRA WERE NOT SUPPORTED BY EVIDENCE THAT THE CHALLENGED VOTING PROCEDURES CAUSED RACIAL MINORITIES TO HAVE LESS OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE.

I. Courts Have Used a Two-Step Framework That Includes a Causation Requirement in Analyzing Whether a Section 2 Results Claim Has Been Proven.

In determining whether a voting procedure violates Section 2's results standard, a number of courts of appeals have developed a two-step analysis.

Hobbs, 948 F.3d at 1012 (collecting cases). "[T]he first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-38 (6th Cir. 2016); *see also*, *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). This step requires plaintiffs to show a causal connection between the challenged voting practice and a prohibited discriminatory result. *Hobbs*, 948 F.3d at 1012. Then, and only then, does the court inquire into whether the discriminatory result is linked to "social and historic conditions," set forth in the Senate Factors, (S. Rep. No. 97-417) at 28-29 (1982). *Hobbs*, 948 F.3d at 1012-14. If plaintiffs do not carry their burden in showing causation, courts need *not* proceed to analyze the Senate Factor evidence. *Id.* *See also*, *Husted*, 834 F.3d at 638 ("If this first element is met, the second step comes into play.")

In this case the en banc Ninth Circuit erred in not correctly applying this two-step approach. *Hobbs*, 948 F.3d at 1012. *Hobbs* rightly noted the first step is to ask whether "as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.*, quoting *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).[4] If it is determined that the challenged

[4] It is important to note that the above-cited textual language from Section 2(b) uses the conjunctive "and" so that the

practice causes a lack of equal opportunity for minority voters and results in them not being able to elect their preferred candidates, courts then proceed to step two and inquire into "social and historical conditions," as described in the Senate Factors. *Hobbs*, 948 F.3d at 1012-14; *see also* (S. Rep. No. 97-417) at 28-29 (1982).

While acknowledging the two-step analysis, *Hobbs* failed, however, to require in step one specific, causal evidence showing that minorities, as a result of the challenged procedures, had "less opportunity to participate" and "elect representatives of their choice." *Id.* at 1012-14, 1043. *Hobbs* thus proceeded to analyze "social and historical conditions" in the Senate Factors without the legal predicate for doing so. As Judge O'Scannlain noted in his dissenting opinion, "[t]hese [Senate] factors—and the majority's lengthy history lesson … simply have no bearing on this case. Indeed, … [these portions] of the majority's opinion may properly be ignored as irrelevant" because Plaintiffs did not satisfy step one. *Hobbs*, 948 F.3d at 1057.

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text requires both the denial of opportunity to participate equally and the inability to elect representatives of their choice. The challenged procedure must cause the denial of opportunity in both of these closely related areas to establish a Section 2 results violation. *See Chisom*, 501 U.S. at 396-97; *see also id.* at 397 ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.")

II. There Are Substantial Conflicts Within and Among the Circuits Regarding the Appropriate Way to Determine Whether the Causation Requirement of Step One Has Been Satisfied.

In the seminal case of *Thornburg v. Gingles*,[5] this Court made clear that to prevail in a discriminatory results claim under Section 2, it is necessary for plaintiffs to prove that because of the challenged voting procedure, minority voters are "experienc[ing] substantial difficulty electing representatives of their choice." 478 U.S. at 48 n.15. The Ninth Circuit in *Hobbs* strayed drastically from the standard provided in *Gingles*.

The Sixth Circuit, by contrast, applied the proper evidentiary requirement in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). There, the plaintiffs challenged Ohio's rule reducing early voting days and eliminating same day registration. *Id.* at 624. African Americans voted during the earlier voting days and used same day registration "at a rate higher than other voters." *Id.* at 627-28. The Sixth Circuit noted, however, that Section 2 requires "proof that the challenged standard or

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[5] Amici curiae believe the central question in this appeal—what is the proper construction of Section 2's results standard in vote denial cases—makes this the most important Section 2 results case since the *Gingles* ruling in 1986. Just as *Gingles* established the framework for bringing vote dilution claims under Section 2's discriminatory results standard, this Court should do the same here for vote denial cases brought under that standard.

practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate." *Id.* at 637-38. Then it ruled that the challenged procedures in *Husted* did not "caus[e] racial inequality in the opportunity to vote." *Id.* at 638, citing *Gingles*, 478 U.S. at 43-47. Without there being a difference in "opportunity," the "existence of a disparate impact" in the rate at which minority and white voters vote cannot "establish the sort of injury that is cognizable and remediable under Section 2." *Husted*, 834 F.3d at 637 (citation omitted).

The Sixth Circuit in *Husted* made abundantly clear what is *not* required for a Section 2 results analysis. The 2016 *Husted* court was critical of the Section 2 analysis in the vacated 2014 *Husted* decision relied on by *Hobbs*.[6] *Husted*, 834 F.3d at 638-40. More specifically, it noted that the 2014 *Husted* opinion's use of the Senate Factors

[6] To be clear, *Hobbs* relied on the earlier decision reported at *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014). The injunction obtained there was stayed by this Court. *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014). It was then vacated in *Ohio State Conference of NAACP v. Husted*, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014). This vacated case was cited numerous times in *Hobbs* as precedent for how to determine whether the Section 2 results test has been satisfied. *See*, 948 F.3d at 1012, 1013-14, 1017, 1033. However, the controlling law in the Sixth Circuit, as now set out in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016), is not referenced at all in *Hobbs*. But it is the case upon which amici curiae rely.

> could be erroneously misunderstood to mean that an alleged disparate impact that is linked to social and historical conditions make out a Section 2 violation … [I]f the second step is divorced from the first step requirement of causal contribution by the challenged standard or practice itself, it is incompatible with the text of Section 2 and incongruous with Supreme Court precedent.

Id. at 638. In light of this warning by the 2016 *Husted* court, it is particularly troubling that *Hobbs* relied exclusively upon the 2014 vacated *Husted* opinion while neglecting to mention the 2016 *Husted* opinion at all.

The Seventh Circuit applied the same causation requirement in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). The court there found that plaintiffs failed to prove that Wisconsin's voter ID law had a discriminatory result. *Id.* at 752. The court in *Frank* reasoned that the fact that minorities "do not get photo IDs at the same frequency as whites" does not show unequal voter *opportunity*, only unequal outcomes. *Id.* at 753. The court noted that the Section 2 results standard "does not condemn a voting practice just because it has a disparate effect." *Id.*

The Seventh Circuit in *Luft v. Evers*, 963 F.3d 665, 668-69, 672-73 (7th Cir. 2020) followed *Frank*. There plaintiffs challenged various Wisconsin voting rules, including a requirement that voters present

"[p]hotographic identification … for in-person voting," as violations of Section 2's discriminatory results standard, asking the court to overrule *Frank*. *Id.* at 669, 672. The Seventh Circuit refused. Judge Easterbrook, writing for the *Luft* court, observed that Section 2's results standard "is an equal-treatment requirement, not an equal-outcome command." *Id.* at 672, citing *Frank*, 768 F.3d at 754. He agreed with *Frank* in rejecting the argument that Section 2's results standard does not alone "forbid[] any change in state law that makes voting harder for any identifiable group." *Id.* at 673.[7]

Before *Hobbs*, the Ninth Circuit required a showing of causation in Section 2 results claims. In *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), the court addressed whether Arizona's Proposition 200, which required proof of U.S. citizenship in order to register to vote, violated Section 2's results standard. In ruling against the plaintiffs, the Ninth Circuit stated, "a § 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Id.* at 405, citing *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997) (emphasis added); *see also*, *Ruiz v. City of Santa Maria*, 160 F.3d

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[7] In this regard *Luft* noted that Section 2 of the VRA does not have an anti-retrogression standard, as does Section 5 of that Act. "Section 2 must not be read as equivalent to §5(b)." *Id.* at 673.

543, 557 (9th Cir. 1998) (per curiam) ("proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial.") (citation omitted).

In *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202 (11th Cir. 2020) (hereinafter "*GBM*"), plaintiffs challenged Alabama's "voter ID law and its implementation" as a violation of Section 2's results standard. *Id.* at 1231-32. The Eleventh Circuit noted that, "[d]espite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect." *GBM*, 966 F.3d at 1233, quoting *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) (internal quotations omitted). *GBM* held that a Section 2 violation is shown if the enforcement of challenged voting procedures is proved to "deprive[] minority voters of an equal opportunity to participate in the electoral process *and* to elect representatives of their choice." *Id.* at 1233.

GBM went on to require that the challenged voter ID law must "have caused the denial or abridgment of the right to vote on account of race." *Id.* at 1233. Given that 99 percent of white voters and 98 percent of minority voters possessed a compliant photo ID, *GBM* determined that the voter ID requirement had not caused a denial or abridgment of the right to vote within the meaning of the Section 2 results standard. *Id.* at 1233, 1238. *GBM* cited *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) from the Fourth Circuit, *Husted*

from the Sixth Circuit, *Frank* from the Seventh Circuit, and *Gonzalez* and *Salt River Project* from the Ninth Circuit, discussed *supra*, for the proposition that causation is a required element of a Section 2 results vote denial claim. *See GBM*, 966 F.3d at 1234 (collecting cases).

Although *GBM* concluded that disparate treatment plus Senate Factor evidence is not sufficient to prove a Section 2 results claim, the court did not employ the two-step analysis used by other circuits, where causation is established before discussing Senate Factors. Relying on Judge Tjoflat's concurrence in *Johnson*, 405 F.3d at 1238, which demanded a "showing that racial bias in the relevant community *caused* the alleged vote-denial," the court required that any abridgment in violation of Section 2 be "on account of race." *GBM*, 966 F.3d at 1233.[8] Amici curiae respectfully submit that the two-step analysis used by various courts of appeals outlined herein, whose first step asks specifically *whether* the challenged voting procedure causes minority voters a denial of an equal opportunity to participate and to elect candidates of their choice, and not the modified

[8] Judge Tjoflat's concurrence in *Johnson* and *GBM*'s reliance thereon; 966 F.3d at 1233, that "racial bias in the relevant community *caused*" the vote denial could be read to suggest that racially discriminatory *intent* must be shown to prove a Section 2 results violation. However, prior precedent of this Court clearly holds that proof of discriminatory intent is not required in a Section 2 results claim. *See Chisom*, 501 U.S. at 403-04 ("Congress amended the Act [Section 2 of the VRA] in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent.").

analysis used by the Eleventh Circuit in *GBM*, should be the standard analysis used in determining whether challenged procedures in fact cause racially discriminatory results within the meaning of Section 2.

In *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (hereinafter "*LWV*"), the Fourth Circuit seemed to reject a causation requirement. Plaintiffs there challenged North Carolina's prohibition against counting OOP ballots on the grounds that it violated the Section 2 results standard. *Id.* at 245. In reversing the district court's denial of plaintiffs' motion for a preliminary injunction, the Fourth Circuit did *not* require proof that North Carolina's OOP policy caused minorities to have "less opportunity to participate" and "to elect representatives of their choice." *Id.* at 245, 248-49. Instead, the court applied a disparate impact analysis, in conjunction with the Senate Factor evidence, to support a Section 2 results claim. *Id.* at 243, 245.[9] This approach is the same analysis used by the en banc majority in *Hobbs* (*i.e.*, disparate

[9] Importantly, *Hobbs* understood *LWV* to strike "down a state statute that would have prevented the counting of OOP ballots . . . *without inquiring into whether the number of affected ballots was likely to affect election outcomes.*" *Hobbs*, 948 F.3d at 1043 (emphasis added). *Hobbs*' reference to this language in *LWV* as the standard in Section 2 results cases and *Hobbs*' reliance upon *LWV* clearly show it *did not require* Respondents in this case to prove that the challenged procedures, including the OOP rule, caused minority voters not to be able to participate equally and elect representatives of choice. *Id.* at 1043. Such a failure of proof was fatal to Respondents' case.

impact plus proof of Senate Factors equals discriminatory results). 948 F.3d at 1012-14, 1043.

But two years after *LWV*, the Fourth Circuit went the other way, creating an apparent intra-circuit conflict on this point. In *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), the court upheld Virginia's voter ID law on the grounds that all Virginia voters were "afforded an equal opportunity to obtain a free voter ID." *Id.* at 600. The fact that "a lower percentage of minorities ha[d] qualifying photo IDs" (*i.e.*, disparate impact) was not deemed to be sufficient to establish a discriminatory result under Section 2. *Id.* *Lee* held the plaintiffs "simply failed" to prove that the challenged voter ID law caused minorities "less opportunity than others to" vote (*id.* at 598, 600) falling in line with precedents from the Sixth, Seventh, Ninth (before *Hobbs*) and Eleventh Circuits. *See also*, *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (upholding the challenged procedure where the evidence "cast considerable doubt on … a causal link between the appointive system and Black underrepresentation").

The Fifth Circuit does not require a showing of causation. In *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), a divided court found that the challenged Texas voter ID law "disparately impact[ed]" minority voters. *Id.* at 251, 252. But rather than asking whether the challenged practice *caused* plaintiffs less opportunity to participate and to elect candidates of their choice, the *Veasey* court next examined the "social and historical conditions"

of minorities in Texas which, of course, is Senate Factor evidence, and concluded that the Texas voter ID law violated Section 2's results standard. *Id.* at 245. In other words, *Veasey* incorrectly held that disparate impact plus Senate Factor evidence establishes a violation of Section 2's results standard. *See id.* at 313 (Jones, J., concurring in part and dissenting in part) ("The majority's opinion fundamentally turns on a statistical disparity in ID possession among different races. . . .").

The Ninth Circuit's decision in *Hobbs* squarely conflicts with its prior decisions in *Salt River Project*, *Ruiz* and *Gonzalez*. One would have thought that, after these three cases, it was clear in the Ninth Circuit that plaintiffs in a Section 2 results case had to prove that the challenged voting procedures caused racial minorities to have less opportunity to participate and to elect representatives of their choice. While paying lip service to Section 2's statutory language and its own circuit precedents, *Hobbs*, in fact, chose *not* to follow the existing precedent for Section 2's results cases, as set forth in the Fourth [*i.e.*, *Lee*], Sixth [*i.e.*, *Husted*] and Seventh Circuits [*i.e.*, *Frank*], as well as the aforementioned pre-*Hobbs* precedents in the Ninth Circuit.

Instead, *Hobbs* followed the reasoning of the Fifth Circuit in *Veasey* and the Fourth Circuit's earlier decision in *LWV* in holding that disparate impact plus Senate Factor evidence is sufficient to prove a Section 2 discriminatory results claim. *Hobbs*, 948 F.3d at 1016, 1032, and 1043. *See also*, *supra* at 16 n. 9, where it is clearly shown that *Hobbs*

read *LWV* to allow for the finding of a Section 2 results violation without even inquiring into whether the challenged procedure "affect[ed] election outcomes." 948 F.3d at 1043. To enforce the Section 2 results standard in this manner is, in effect, to read out of Section 2 the statutory language that prohibits a voting procedure which "results in a denial or abridgement of the right … to vote on account of race or color" in that minorities "have less opportunity … to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301 (a) and (b). Disparate impact plus Senate Factor evidence does *not* show causation. To hold otherwise would be indisputably inconsistent with Section 2's clear textual language.

For jurisdictions that have past histories of racial discrimination in voting and present-day, race-based socio-economic disparities, this statutory construction would convert Section 2 into a federal prohibition against state and local voting laws that have only disparate effects. As Judge Branch stated in *GBM*, "we also reiterate our caution against allowing the old, outdated intentions of previous generations to taint Alabama's ability to enact voting legislation." 966 F.3d at 1236. *See also*, *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion) ("But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."); *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013) ("The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future.").

If Congress in amending Section 2 in 1982 had intended to create a federal prohibition against any voting procedure that could be shown to have a disparate impact, even where the procedure cannot be shown to have caused any denial of the right to vote, it most certainly would have used statutory language different from the language found in Section 2. *See* 52 U.S.C. § 10301 (a) and (b). Indeed, Congress did so in 1965 when it enacted a discriminatory effect standard applicable to the federal preclearance requirements of Section 5 of the VRA, 52 U.S.C. § 10304(a) (providing that changes in voting standards, practices and procedures of covered jurisdictions shall not be federally precleared if they "will have the effect of denying or abridging the right to vote on account of race or color").[10] Any request that the Court convert Section 2's discriminatory results standard into a new Section 5-like "discriminatory effects test" by judicial fiat should be rejected.

Failure to focus upon the statutory text of Section 2 is an open invitation to inconsistent constructions of this portion of the Act. These varying constructions are noted in the conflicting cases cited in this brief. The correct approach in such rulings as *Lee*, *Husted*, *Frank*, *Luft*, *Gonzalez*, *Salt River Project*, and *Ruiz*, requires parties to actually produce evidence that the challenged procedure "results in" minorities having less opportunity "to participate in the political process and to elect

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[10] In *Shelby County*, this Court held that Section 4 of the VRA's coverage formula applicable to federal preclearance determinations under Section 5 was unconstitutional, rendering Section 5 unenforceable at present. 570 U.S. at 556-57.

representatives of their choice," as the textual language of Section 2(a) and (b) of the VRA mandates.

The other approach, which is *not* based upon the text of the statute, requires only a showing of "disparate impact" or "disparate burden," to satisfy step one. This is clear from *Hobbs*, 948 F.3d at 1016, where the court stated that the Respondents only had to show that the OOP rule had a "disparate burden on minority voters." In the same vein, *Hobbs* described its analysis of the third-party ballot collection issue with a sub-heading entitled "Step One: Disparate Burden," and then went on to indicate that the "question at step one is whether H.B. 2023 results in a disparate burden on a protected class." *Id.* at 1032. It is abundantly clear that *Hobbs* did not require Respondents to show that either the OOP rule or third-party ballot collection procedure caused or resulted in minority voters not being able to elect candidates of their choice. *Hobbs*, along with *LWV* and *Veasey*, fundamentally erred in not requiring this requisite causation evidence in step one. This Court should correct this error.

III. Respondents Failed to Prove That Arizona's Out-of-Precinct Rule Caused Minority Voters to Have Less Opportunity to Participate in the Political Process and to Elect Representatives of Their Choice.

The Arizona law restricting OOP voting is the majority rule in this country. Thirty American

jurisdictions (*i.e.*, twenty-six states, the District of Columbia, and three U.S. territories) have rules that wholly disregard OOP ballots, while twenty-two jurisdictions (*i.e.*, twenty states and two territories) partially count the votes in OOP ballots if the voter is entitled to vote in certain races on the ballot. *Hobbs*, 948 F.3d at 1064 (Bybee, J., dissenting).

Furthermore, the OOP rule affects a very small group of Arizona voters. For example, in 2016 "of those casting in-person ballots on election day, approximately 99% of minority voters and 99.5% of non-minority voters cast their ballots in their assigned precincts." *Hobbs*, 948 F.3d at 1051 (O'Scannlain, J., dissenting). As noted by *Hobbs*, one in one hundred minority voters voted OOP, while one in two hundred white voters voted OOP. *Id.* at 1004-05, 1014. Of the very small number of OOP voters, minority voters, according to *Hobbs*, "were twice as likely as white voters to vote out-of-precinct and not have their votes counted."[11] *Id.* at 1014 (citation omitted).

[11] *GBM* characterized the labeling of miniscule percent differences as a "misuse of data" that "mask[s] the fact that the populations were almost identical." 966 F.3d at 733, citing *Frank*, 768 F.3d at 753 n. 3. In labeling the difference between minority voters (99 percent of whom voted in the correct precinct) and white voters (99.5 percent of whom voted in the correct precinct) as representing that minorities were "twice as likely … to vote out-of-precinct," the *Hobbs* court was similarly misusing data.

The fundamental flaw in the *Hobbs*' conclusion that the OOP rule had a racial result is that the record here contains *no* statistical or nonstatistical evidence showing: (1) which candidates in local and state races in Arizona elections were preferred by minority voters;[12] (2) the vote margins by which those minority preferred candidates were defeated; and (3) whether the number of minority-cast OOP votes, if counted, was sufficient to have caused the election to go in favor of the minority preferred candidates. Without this type of specific evidence, Respondents utterly failed to carry their burden of showing that minority preferred candidates were defeated because of the rejection of minority cast OOP ballots.

Hobbs unsuccessfully attempted to fill this vacuum in Respondents' evidence by pointing to numerous other types of evidence, all irrelevant to showing causation. 948 F.3d at 1013-16, 1017-31. None of this evidence is a substitute for the nonexistent causation evidence showing that the OOP rule caused minority voters to have less opportunity to participate and to elect representatives of their choice. First, the *Hobbs* majority pointed to the fact that "[v]oting in Arizona is racially polarized." *Id.* at

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[12] In *Gingles*, this Court stated that in identifying the minority preferred candidates, it was "crucial to that inquiry" to consider "the correlation between race of voter and the selection of certain candidates." 478 U.S. at 63. Moreover, according to this Court, use of bivariate statistical analysis is appropriate in Section 2 results cases to identify candidates preferred by minority voters. *Id.* at 61, 63.

1026.[13] Although admissible in step two as Senate Factor evidence, evidence of racially polarized voting does not prove that the enforcement of the OOP ballot-rejection rule caused minority voters' preferred candidates to be defeated. Those two issues—racially polarized voting and causation—are separate and distinct issues. The *Hobbs* majority incorrectly believed that the existence of polarized voting helped answer the causation question, which it does not.

Second, the *Hobbs* majority "assumed" the number of OOP ballots that were cast but not counted in the 2016 election [3,709 statewide] were not a de minimis number, reasoning that minority voters cast twice the number of OOP ballots as white voters. 948 F.3d at 1015. If the *Hobbs* majority's assumptions are correct, that would mean that in the 2016 election 2,475 minority OOP ballots and 1,234 white OOP ballots were rejected in an election in which 2,661,497 total ballots were cast. *See Reagan*, 329 F. Supp. 3d. at 856. But whether the minority-cast portion of the discarded ballots is deemed de minimis or not misses the point. Even if the minority-cast portion of the

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[13] In support thereof, *Hobbs* pointed to the district court's finding of polarized voting, *Reagan*, 329 F. Supp. 3d at 876, and to twelve elections in 2008 and 2010 found by an unidentified entity to have been racially polarized. *Hobbs*, 948 F.3d at 1027. Furthermore, the majority also noted that election polls taken at the time of the 2016 general election indicated racial polarization and that the Arizona Independent Redistricting Commission had found racially polarized voting in one of nine of Arizona's congressional districts and in five of its thirty state legislative districts. *Id.*

3,709 OOP ballots is more than de minimis, such evidence does not suggest, much less prove, that enforcement of the OOP policy caused minorities less opportunity to elect candidates of their choice. Quite simply, even if the adverse impact of the challenged procedure were more than de minimis and the more than de minimis impact was shown to be connected to social and historical conditions (Senate Factor evidence), this would not be a substitute for the missing causation evidence.

Third, instead of analyzing how OOP ballot rejections affected Arizona's elections, the en banc majority in *Hobbs* referred to the 2000 presidential election in Florida. 948 F.3d at 1016. This election was the only close election (537 votes) referenced by the majority. *Id.* Clearly, what happened in Florida two decades ago has no bearing on Arizona's elections or the two voting procedures challenged in this case. Nothing in this Florida election in any way addresses whether the use of the OOP rule in Arizona elections causes minority voters to have less opportunity to participate and to elect representatives of their choice.

Fourth, the en banc majority in *Hobbs* pointed to the fact that "minorities make up 44% of Arizona's total population, but they hold 25% of Arizona's elected offices," noting that "it is undisputed that American Indian, Hispanic, and African American citizens are underrepresented in public office in Arizona." 948 F.3d at 1029. The fact that racial minorities are "underrepresented" in holding Arizona public offices does not aid Respondents in carrying

their burden of proving causation, and certainly does not show whether the OOP rule has caused minority-preferred candidates to lose. It would be strange, indeed, if a statute, such as Section 2, with a specific anti-proportional representation proviso, 52 U.S.C. § 10301(b), were construed to mean that underrepresentation of minorities in elected positions could serve as a substitute for the critical causation evidence required to show a Section 2 violation. *See Gingles*, 478 U.S. at 43.

Clearly, the *Hobbs* court's conclusion that the Arizona OOP rule had a racially discriminatory result was based upon a misunderstanding of the prohibitions of Section 2. Accordingly, this judgment in *Hobbs* should be reversed.

IV. Respondents Failed to Prove That Arizona's H.B. 2023 Procedure That Restricts Ballot Collection and Delivery by Third Parties Caused Minority Voters to Have Less Opportunity to Participate in The Political Process and to Elect Representatives of Their Choice.

Prior to 2016, an unknown number of Arizona's minority voters used the assistance of third parties to collect their early ballots and deliver them to election officials more than white voters did. *Hobbs*, 948 F.3d at 1005, 1006. In 2016, Arizona enacted legislation known as H.B. 2023, which limited third party collection and delivery of early

ballots [14] to a "family member, house member, caregiver, United States postal service worker" or other authorized officials. *Id.* at 1048 (O'Scannlain, J., dissenting).

Respondents' attempts to prove that this Arizona procedure restricting collection and delivery of early ballots caused minority-preferred candidates to lose were even less persuasive than their showing regarding the OOP policy. Respondents' evidence on this point consisted almost entirely of testimony that, prior to the enactment of H.B. 2023, "third parties collected a large and disproportionate number of early ballots from minority voters." *Hobbs*, 948 F.3d at 1032. Witnesses "testified ... to having personally collected, or to having personally witnessed the collection of, thousands of early ballots from minority voters." *Id.* at 1032. But Respondents provided no evidence of specific numbers of ballots cast with the type of assistance proscribed by H.B. 2023. *Id.* at 1005-06. Importantly, *no* individual voter testified that these ballot-collection and delivery restrictions made it "significantly more difficult to vote." *Id.* at 1055 (O'Scannlain, J., dissenting). "[A]necdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in

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[14] The practice of third parties collecting ballots from voters and delivering those ballots to postal or election officials, in lieu of voters themselves mailing or delivering the ballot to election officials is commonly referred to as "ballot harvesting." This is particularly the case where the third parties collecting and delivering the ballots are political operatives acting on behalf of partisan political parties or candidates for public office.

other ways or would be burdened by having to do so." *Id.*

Hobbs pointed to no testimonial or documentary evidence comparing the number of early ballots delivered to election officials by third parties before and after enactment of H.B. 2023. The majority in *Hobbs*, citing only testimonial evidence of a "large and disproportionate number of" assisted early ballots from minority voters, then "found that "[n]o better evidence was required." 948 F.3d at 1033. *Hobbs* then went on to hold that "H.B. 2023 results in a disparate burden on minority voters," and that Respondents had "succeeded at step one of the results test." *Id.* at 1033.

In addition, Respondents made no showing concerning whether the enforcement of the challenged H.B. 2023 restrictions caused minority-preferred candidates to lose elections, an error fatal to Respondents' Section 2 results claim. As Judge O'Scannlain stated in his dissent, quoting *Gingles*, at 48 n.15,[15] "It is obvious that unless minority group members experience *substantial difficulty* electing representatives of their choice, they cannot prove

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[15] *Hobbs*' attempts to diminish the impact of this language in *Gingles* by pointing out that *Gingles* was a vote dilution case under Section 2, and not a vote denial case, such as here. *Hobbs*, 948 F.3d at 1043-44. However, legal precedents in the Ninth Circuit stand for the proposition that the standards for proving a discriminatory result claim under Section 2 are very similar regardless of whether the case involves a vote denial or a vote dilution claim. *See e.g.*, *Salt River Project*, 109 F.3d at 596 n. 8; and *Gonzalez*, 677 F.3d at 405 n. 32.

that a challenged electoral mechanism impairs their ability 'to elect.'" *Hobbs*, 948 F.3d at 1051. Clearly, Respondents in this case did not prove the causation element. They did not show that the ballot-collection policy caused the defeat of any minority-preferred candidates.

By way of example, a persuasive showing that the restrictions of H.B. 2023 were causing minority voters "substantial difficulty" electing their preferred candidates might have included evidence: (1) identifying minority preferred candidates who ran and lost in Arizona elections since the 2016 enactment of H.B. 2023; (2) showing how many minority voters who were entitled to vote in those elections did not vote because of restrictions on third-party assistance; and (3) showing at least by statistical methods testimony that, if this number of minority voters had cast ballots for the minority-preferred candidates, those votes would have likely caused those preferred candidates to win. Without a showing of this kind, plaintiffs in Section 2 results claims cannot carry their burden of proving causation in step one.

In the clear language of Section 2, Respondents were required to prove that the restrictions on third-party assistance resulted in denying minority voters an opportunity to participate *and* to elect representatives of their choice. However, in explaining why it found that Respondent had satisfied its burden of proof, *Hobbs* did not point to any elections in which minority preferred candidates were defeated because of the restrictions in the

ballot-collection policy. 948 F.3d at 1032-33. *See also*, *id.* at 1056 ("Thus, from the record, we do not know either the extent to which voters may be burdened by the ballot-collection policy or how many minority voters may be so burdened.") (O'Scannlain, J., dissenting).

Importantly, *Hobbs* stated that a "particular connection to statewide office does not exist between H.B. 2023 and election of minorities."[16] 948 F.3d at 1035. However, *Hobbs* went on to opine that H.B. 2023 is "likely to have a pronounced effect in rural counties with significant" racial minority populations. *Id.* *Hobbs* further opined that discriminatory results under Section 2 would more likely occur in counties that "lack reliable" mail and transportation services, "and where a smaller number of votes can have a significant impact on election outcomes." *Id.* Such observations by *Hobbs* are not supported by evidence in the record. Respondents' failures of proof concerning the alleged discriminatory results of H.B. 2023's restrictions cannot be corrected by appellate court conjecture. Accordingly, the *Hobbs* majority's speculation about what may occur in smaller counties does not cure Respondents' failure of proof. Indeed, Respondents' failure to offer any such evidence regarding the

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[16] *Hobbs*' conclusion that H.B. 2023's restrictions do not have a discriminatory result in Arizona's statewide elections has important ramifications for this case. It would mean that, even though the ballot-collection and delivery restrictions are not violative of the Section 2 results standard in statewide elections, Arizona would nevertheless be enjoined from enforcing the restrictions in such elections as well as in local elections.

impact of H.B. 2023 in Arizona's smaller counties calls into question whether this claim challenging H.B. 2023 was even ripe for adjudication.

Moreover, in its inquiry concerning the legality of H.B. 2023, *Hobbs* gave great weight to the fact that "no one has ever found a case of voter fraud connected to third-party ballot collection in Arizona." 948 F.3d at 1035. But this misses the mark. In *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195-96 (2008), this Court rejected a challenge to an Indiana law that required voters to provide a photo ID if voting at the polls. *Id.* In doing so it also rejected the argument that actual evidence of voter fraud was needed to justify a state's decision to enact prophylactic laws aimed at preventing voter fraud:

> The record contains no evidence of any such [in-person voter] fraud actually occurring in Indiana at any time in its history. … It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, … demonstrate[ing] that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Id. at 194-96 (footnotes omitted).

Crawford went on to recognize that while protecting public confidence in the "legitimacy of

representative government" is "closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance." *Id.* at 197. Unregulated collection of third-party ballots can undermine public confidence in the integrity of elections. This is demonstrated by the ballot collection fraud that recently occurred in North Carolina in 2018.[17]

Arizona's interest in preventing voter fraud and protecting public confidence in the electoral process provided two legitimate bases for enacting anti-fraud election regulations, such as H.B. 2023, without any direct evidence that ballot-collection fraud had been committed in the State. *Hobbs*' failure to "even mention *Crawford*" in its opinion may indicate that it overlooked *Crawford* and did not "grapple with its consequences on this case." *Hobbs*, 948 F.3d at 1059 (O'Scannlain, J., dissenting). The majority failed to recognize that *Crawford* clearly indicated that states do not have to have evidence of voter fraud to enact prophylactic statutes against fraud. That failure caused the majority in *Hobbs* to place undue importance on the lack of such evidence in this case. The majority erred in believing that the lack of voter fraud evidence weighed in favor of Respondents' Section 2 results claims. Certainly, a lack of voter fraud evidence does not replace the

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[17] *See* "Election Fraud in North Carolina Leads to New Charges for Republican Operative," *The New York Times*, available at https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html.

required evidence that is missing—proof of causation.

Therefore, the ruling in *Hobbs* by the en banc Ninth Circuit that restrictions on ballot collection and delivery, as provided in H.B. 2023, violated Section 2's discriminatory results standard is manifest error.[18]

[18] Petitioners argue in their briefs that to construe Section 2's results standard as requiring only a showing of disparate racial impact plus Senate Factor evidence, rather than a showing of causality as well, raises serious concerns about the constitutionality of the Section 2 results standard. *Brief for State Petitioners*, Nos. 19-1257 at pp. 24-30; and *Brief for Private Petitioners*, Nos. 19-1257 and 1258 at pp. 39-42. Amici Curiae believe that those constitutional concerns are further legitimate reasons for not adopting the expansive reading Respondents are seeking for the Section 2 results standard in this case.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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No. 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 Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE AUTHORITIES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Republican Governors Public Policy Committee ("RGPPC") is a Section 501(c)(4) social welfare organization incorporated in the District of Columbia. It represents all 27 Republican State Governors as well as two Republican Territorial Governors. The RGPPC's mission includes promoting social welfare and efficient and responsible government practices; advocating public policies that reduce the tax burdens on United States citizens, strengthen families, promote economic growth and prosperity, and improve education; and encouraging citizen participation in shaping laws and regulations relating to such policies.

The RGPPC possesses has a significant interest in this important case because it possesses expertise in the policy matters surrounding election administration. RGPPC's filing will assist the Court in understanding the modern history of Arizona's election procedures, along with an understanding of the importance of the precinct-based election system and prohibition on unlimited third-party ballot harvesting. The RGPPC urges the Court to reverse the Ninth Circuit's en banc opinion.

[1] Pursuant to Supreme Court Rule 37, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The en banc opinion of the Ninth Circuit is as troubling as it is divided. By casting Arizona's reasonable and commonplace election regulations as discriminatory, the majority opinion threatens states' ability to pass commonsense laws and properly administer elections. If allowed to stand, the opinion would cast doubt on even the most neutral election regulations.

Contrary to the en banc opinion, Arizona's modern election practices demonstrate that Arizona has almost exclusively expanded access to the franchise of voting. In fact, over the last four decades, Arizona has been a leader among the states in making it easier to register and vote, while taking appropriate non-discriminatory steps to ensure integrity in its elections. The en banc opinion disregards this modern history and fails to account for the necessity and commonsense nature of the kind of election regulations at issue.

The election regulations at issue in the present case are both important to the administration of Arizona's elections and commonplace across the states. Arizona's precinct-based voting method is among the procedures that Arizona, 25 other states, the District of Columbia, and three United States territories have historically implemented to orderly administer elections and preserve ballot secrecy. *See* JA 730 (Bybee, J., dissenting). Arizona's out-of-precinct policy, which requires election administrators to only count ballots cast by voters in their assigned precincts, is important to the State's precinct-based voting

system. Arizona's limit on third-party ballot harvesting—which prevents anyone other than the elector, election officials, mail carriers, family or household members, or caregivers from collecting or possessing an elector's early voted ballot—is a commonsense means of protecting election integrity used by a majority of other states. *See* JA 739-742 (Bybee, J., dissenting) (collecting statutes). Nevertheless, the en banc majority focused narrowly on slight disparate results and Arizona's ancient history of racial discrimination in order to determine that the practices violate Section 2 of the Voting Rights Act.

The en banc opinion conflicts with multiple decisions from this Court, as well as those from various circuit courts of appeal, by focusing the analysis both too narrowly and too broadly. The opinion focuses almost entirely on Arizona's bygone history between the 1840s and the 1980s, giving short shrift to any expansion of the franchise within the last four decades. Specifically, the en banc opinion places too much weight on decades-old evidence of discrimination, fails to properly consider current conditions, and misapplies the "totality of circumstances" for Section 2 purposes, *see* 52 U.S.C. 10301(b). The en banc opinion also improperly imputed unlawful racial animus onto the entire legislature based on the subjective interpretation of statements from just a single legislator.

Arizona's expansion of voting access over the last 40 years has created abundant opportunities for Arizonans to vote. Arizonans are no longer required to plan in-person trips to voting offices months before an election, fill out a paper voter registration application, physically travel to a polling place on

Election Day, or wait to vote. Arizona now embraces early voting, no excuse voting by mail, online paperless voter registration, motor voter registration, and more. It is currently easier to vote in Arizona than at any time in its history. Rather than acknowledge these advances, the en banc panel cherry-picked ancient history and extrapolated subjective motivations from the actions of individual legislators to determine the 'intent' of the legislature. Such cherry-picking and incorrect analysis should doom the en banc decision.

ARGUMENT

In order to find a violation of Section 2 of the Voting Rights Act ("VRA"), a court must establish, "based on the totality of circumstances," that a state's "political processes" are "not equally open to participation by members" of a protected class, "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). Any Section 2 analysis must examine the "totality" of the state's election system, including historical conditions. *Id.*; *see also Thornburg* v. *Gingles*, 478 U.S. 30, 44-47 (1986). Another factor in determining whether a challenged policy violates Section 2 is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.* at 37 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982)).

I. THE SCOPE OF ANY VRA ANALYSIS NECESSARILY MUST BE TEMPORALLY LIMITED.

The consideration of discriminatory practices in electoral history must necessarily be limited in temporal scope and cannot be too disconnected from current conditions given the history of race in this country. Indeed, if one were to look far enough back in nearly any jurisdiction, such effort would undoubtedly yield examples of pervasive discriminatory practices. But surely not every jurisdiction will possess unconstitutionally discriminatory election laws *today*. Consistent with this principle, courts have temporally circumscribed the scope of VRA analyses.

In *Northwest Austin Municipal Utility District Number One* v. *Holder*, this Court noted that Section 5 of the VRA raised federalism concerns due to the scope of its historical analysis. 557 U.S. 193, 203-206 (2009). Specifically, the Court stated that the VRA "imposes current burdens [on states] and *must be justified by current needs*," concluding that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203 (emphasis added). Furthermore, the Court stated that Section 5 was troubling because it differentiated between states in ways that may no longer have been justified. *Id.* at 203-204. Ultimately, however, this Court invoked the canon of constitutional avoidance and did not rule on the constitutionality of Section 5. *Id.* at 206.

In the seminal case *Shelby County* v. *Holder*, this Court invalidated the preclearance requirements of Section 4 of the VRA due to its historical relevance. 570 U.S. 529, 557 (2013). Specifically, the Court so ruled because the preclearance requirements were no longer justified by the same concerns that were relevant a half-century earlier, when the VRA was passed. *Id*. The preclearance coverage formula of Section 4 was "based on decades-old data and eradicated practices." *Id.* at 551. The Court held that the Fifteenth Amendment "is not designed to punish for the past; its purpose is to ensure a better future," and if the VRA is to govern the states, it must do so "on a basis that *makes sense in light of current conditions. It cannot rely simply on the past*." *Id.* at 553 (emphasis added). This is especially true in circumstances where the VRA "authorizes federal intrusion into sensitive areas of state and local policymaking." *Id.* at 545 (quoting *Lopez* v. *Monterey Cty*., 525 U.S. 266, 282 (1999)). These circumstances are clearly present in the case at hand.

The rationale of *Northwest Austin* and *Shelby County,* that current burdens imposed on states must be justified by current needs or conditions, applies across VRA and constitutional analyses. *See, e.g.*, *Veasey* v. *Abbott*, 830 F.3d 216, 328 (5th Cir. 2016) (Elrod, J., concurring in part and dissenting in part) (applying the "current needs" reasoning of *Northwest Austin* to a Section 2 VRA claim), cert. denied, 137 S. Ct. 612 (2017); *Smith* v. *School Bd. of Concordia Par.*, 906 F.3d 327, 338 (5th Cir. 2018) (Ho, J., concurring) (applying *Shelby County*'s "current conditions" rationale to challenge a racial balancing consent decree); *United States* v. *Cannon*,

750 F.3d 492, 510-11 (5th Cir. 2014) (Elrod, J., concurring) (applying the "current conditions" reasoning of *Shelby County* and *Northwest Austin* to a Thirteenth Amendment claim), cert. denied, 574 U.S. 1029 (2014); *Mance* v. *Sessions*, 896 F.3d 699, 706 (5th Cir. 2018) (per curiam) (observing that, in a Second Amendment case, "current burdens on constitutional rights 'must be justified by current needs'") (quoting *Shelby Cty*., 570 U.S. at 536); *Mayhew* v. *Burwell*, 772 F.3d 80, 96-97 (1st Cir. 2014) (holding that a statute requiring a state to maintain Medicaid coverage of low-income 19- and 20-year-olds for nine years did not violate the spending clause, U.S. Const. Art. I, § 8, Cl. 1, because in part it was sufficiently justified by "current conditions" under *Shelby County*) (quoting *Shelby Cty*., 570 U.S. at 553), cert. denied, 576 U.S. 1004 (2015).

Consistent with *Shelby County* and its progeny, examination of discriminatory practices in electoral history under Section 2 must be reasonably limited to examining the current conditions of a particular state, rather than punishing a state for its distant past – including actions taken before becoming a state. In other words, the examination must be of recent history, relevant to the law or regulation in question. Undertaking an unlimited examination of past wrongs reaching back to before statehood without balanced consideration of modern electoral advances, deprives states and municipalities of the ability to move on from the errors of previous generations. Failing to limit the examination, as the en banc Ninth Circuit did in the present case, casts a shadow over nearly all election laws in nearly all states, especially if this Court

grants credence to the opinion. Casting aside reasonable, neutral, and justified election administration efforts threatens the very core of democracy. Such "inflammatory and unsupportable charges of racist motivation poison the political atmosphere." *Veasey*, 830 F.3d at 281-82 (Jones, J., dissenting).

II. THE TOTALITY OF CIRCUMSTANCES IN ARIZONA DEMONSTRATES A CONTINUED COMMITMENT TO EXPANDING ACCESS TO VOTING RATHER THAN DISCRIMINATION.

A. The En Banc Majority Based Its Section 2 Analysis On The Actions Of Bygone Eras.

Ignoring this Court's precedents in *Northwest Austin* and *Shelby County*, the majority of the en banc Ninth Circuit panel below based its historical analysis on ancient history without any temporal limit whatsoever. That court devoted large swaths of its opinion—17 pages in total—to analyzing examples of racial discrimination starting over 170 years ago with only sporadic and tenuous examples since the 1960s. The en banc majority's discussion includes Arizona's territorial period, before Arizona attained statehood, including the "manifest destiny" beliefs of "[e]arly territorial politicians," the 1871 Camp Grant Massacre, and the "Indian Wars" of the 1880s. JA 625-626. Also discussed is the racial composition of Arizona's 1910 constitutional convention and provisions of that constitution which failed to include dual-language provisions. JA 627-

628. The en banc majority continues on, discussing the literacy tests, disenfranchisement, and intimidation of Hispanics and American Indians in the early 20th Century. JA 628-635. Then, the en banc majority engages in a prolonged discussion of Arizona's history of VRA litigation from the 1960s through the 1990s. JA 635-642.

In stark contrast to the 17 pages discussing Arizona's first 150 years, the en banc majority cites only four examples of alleged discrimination in the past 20 years, most of which are tenuous at best. JA 642-643. These include a one-time change in the number of Maricopa County polling places for the 2016 Presidential Preference Election and isolated mistranslation in some Spanish-language voting materials by Maricopa County in 2012 and 2016. *Id*. This recent history is disconnected from the complained of disparities and is of dubious relevance to the present case. The recent events discussed by the en banc majority are also idiosyncratic examples of the issues that naturally arise when human beings administer elections. None of the recent alleged discriminatory actions were the result of any intentional discrimination on the part of election workers or government officials whatsoever and the examples do nothing to highlight any recent history of discrimination in Arizona under Section 2.

Simply stated, the opinion's discussion of Arizona's history of discriminatory practices, nearly all of which occurred prior to 30 or 40 years ago, is protracted, unnecessary, and irrelevant under *Northwest Austin* and *Shelby County*. Arizona's modern history of election administration tells a much different story—namely that Arizona has continually expanded access to the franchise and

made it easier and safer to vote. The decision below, which failed to consider this contemporary history, should be reversed in light of Section 2's totality of circumstances provisions.

The en banc's protracted discussion of Arizona's history of discrimination also conflicts with the District Court's findings of Fact and Conclusions of Law, which noted that although Arizona does have a history of discrimination, that history "has not been linear." JA 341. For example, the District Court found that during the entire time Arizona was under preclearance requirements (1975-2013), the Department of Justice did not issue a single objection to any of Arizona's statewide procedures for registration or voting. *Id.* The District Court also found that Arizona acted to avoid the politics of racially discriminatory redistricting by forming the Arizona Independent Redistricting Commission ("AIRC") in 2000. *Id.* Ultimately, the District Court found that in Arizona:

> discriminatory action has been more pronounced in some periods of state history than others and each party (not just one party) has led the charge in discriminating against minorities over the years. Sometimes, however, partisan objectives are the motivating factor in decisions to take actions detrimental to the voting rights of minorities. Much of the discrimination that has been evidenced may well have in fact been the unintended consequence of a political culture that simply ignores the needs of minorities.

JA 342 (cleaned up) (internal citations and quotation marks omitted). In sum, the District Court found that Arizona's recent history is a "mixed bag", but credited Arizona's many advancements. *Id*. The en banc majority thumbed its nose at the true fact finder, the District Court, and engaged in its own fact-finding mission, finding new "facts" outside of the District Court's findings and ignoring the facts of the District Court that were simply inconvenient to the en banc majority's analysis. *See also* JA 715 (O'Scannlain, J., dissenting) ("the majority's lengthy history lesson on past election abuses in Arizona—simply ha[s] no bearing on this case. Indeed, pages 47 to 81 of the majority's opinion may properly be ignored as irrelevant.").

B. Arizona's Modern History Demonstrates A Continued Effort To Expand Voting Access While Ensuring Election Integrity.

Contrary to the en banc majority's efforts to impose current burdens on Arizona for past conditions, the last 40 years demonstrate that Arizona has continually expanded access to the franchise of voting while taking steps to protect election integrity. Any examination of Arizona's modern history must begin with a review of ,the state's recent changes in population. Over the previous 40 years, Arizona has grappled with an explosive rate of population growth. The 1980 Census showed that Arizona had a population of

approximately 2.7 million people.[2] Ten years later, in 1990, Arizona had approximately 3.6 million residents.[3] By 2000, Arizona had a population of approximately 5.1 million people.[4] By the 2010 Census, Arizona had approximately 6.4 million residents.[5] Current 2020 Census estimates put the State's population at 7.2 million people.[6]

In response to its rapid population growth, Arizona enacted numerous voting advancements to make registering to vote secure and accessible and to make the act of voting itself easier. Arizona's modern advancements in electoral mechanics have only made voting easier, not harder, and more secure. Far from the incendiary story told by the en banc majority below, the reality is that the current conditions, *see Shelby Cty.*, 570 U.S. at 553, in Arizona do not demonstrate any significant racial discrimination in election administration sufficient to justify relief under Section 2.

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[2] U.S. Dep't of Commerce, Bureau of the Census, PC80-1-B1, 1980 Census of Population U.S. Summary 1-124 tbl.61 (1983), https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8011u_bw.pdf.

[3] U.S. Dep't of Commerce, Bureau of Census, 1990 CP-1-4, 1990 Census of Population Arizona 1 tbl.1 (1992), https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-4.pdf.

[4] U.S. Dep't of Commerce, Bureau of Census, PHC-1-4, 2000 Census of Population Arizona 2 tbl.1 (2002), https://www.census.gov/prod/cen2000/phc-1-4.pdf.

[5] U.S. Dep't of Commerce, Bureau of Census, CPH-1-4, 2010 Census of Population Arizona 2 tbl.1 (2012), https://www2.census.gov/library/publications/2012/dec/cph-1-4.pdf.

[6] U.S. Census Bureau, *QuickFacts: Arizona* (last accessed December 5, 2020), https://www.census.gov/quickfacts/AZ.

1. Arizona's Motor Voter Law.

In 1982, Arizona enacted a Motor Voter law providing for voter registration when residents apply for a driver's license. *See* Ariz. Rev. Stat. §§ 16-111 and 16-112. Arizona's Motor Voter provisions were approved by initiative petition during the 1982 general election, predating by 11 years the National Voter Registration Act of 1993 enacted by Congress. *Id.* The measure was intended to increase Arizona's voter registration and voting rates.[7] Voting rates were reportedly low at that time due to a high proportion of recently arrived residents and senior citizens who had difficulty registering to vote. *See* Argument "For" Proposition 202, *supra* note 7, at 42. Arizona's Motor Voter provisions aimed to increase the State's registration rates with appropriate verification of eligibility and in turn increase voter participation rates. *Id.* And it worked. In the following four years, the number of Arizona's registered voters increased by over 40%.[8] In the years following 1982, the Arizona Secretary of State and the Director of the Transportation Department met annually to discuss additional ways to securely improve voter registration through Arizona's Motor Voter provisions.[9]

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[7] Argument "For" Proposition 202, Arizona Initiative and Referendum Publicity Pamphlet General Election 1982 at 42, available at https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10849.

[8] *See* Ariz. Sec'y of State, *Historical Election Results & Information* (last accessed December 5, 2020), https://azsos.gov/elections/voter-registration-historical-election-data/historical-election-results-information.

[9] Matt A. Barreto et al., Online Voter Registration (OLVR) Systems in Arizona and Washington 82 (2010),

2. Online Voter Registration in Arizona.

As a result of continued work by Arizona's leaders, the state made access to voting even easier in 2002 when it became the first state in the country to provide for secure online voter registration. *See* Barreto et al., *supra* note 9 at 37. Arizona's efforts predated all other states in online voter registration by *five years*. *See id.* at 100. Arizonans now have the ability and the option to securely register to vote online, in person, or by mail. Online voter registration not only conserves resources that election administrators can now use to better educate voters, but the online voter registration system can also be easily used by non-English speakers because Spanish translation is readily available. *Id.* at 67. Arizona's online voter registration quickly became the most popular way to register to vote. *Id.* at 73.

3. Voting By Mail in Arizona.

Over the last 40 years, Arizona has also continuously made voting itself easier in the state by making it easier to securely vote by mail. In 1984, Arizona began providing a mechanism whereby voters could request absentee ballots for both a primary and general election with a single request. *See* H.R. 2040, 36th Leg., 2d Reg. Sess., 1984 Ariz. Sess. Laws 984 (Ariz. 1984) (codified at Ariz. Rev. Stat. §§ 16-542, 544, 547-8, 584). This change made it much easier to vote absentee because voters need

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https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/ 2010/onlinevoterregpdf.pdf.

only submit one absentee ballot request for two elections rather than the previous method requiring separate absentee ballot requests for each election. *Id.* However, voters were still required to submit an absentee ballot request 90 days before the Saturday preceding an election, and voters were still required to provide an excuse to vote absentee. *Id.* at 1984 Ariz. Sess. Laws 984-85.

In 1997 Arizona again increased access to voting by mail, changing its absentee voting procedures to encompass early voting. H.R. 2040, 36th Leg., 2d Reg. Sess., 1984 Ariz. Sess. Laws 985 (Ariz. 1984). Arizona removed any requirement that voters have an excuse to vote by mail and transformed absentee voting into early voting. S. 1003, 43rd Leg., 2d Spec. Sess., 1997 Ariz. Sess. Laws 3063, 3071-3072 (Ariz. 1997) (relevant changes codified at Ariz. Rev. Stat. §§ 16-541 and 542). Voters no longer need to have a justification to vote early or by mail, and can now do so for any reason or no reason at all. These changes also expanded the time period during which to file vote-by-mail requests, which, after verification, allow voters to file requests for mail-in ballots up until 11 days prior to an election. *Id.* Early voting is now "the most popular method of voting" in Arizona, "accounting for approximately 80 percent of all ballots cast in the 2016 election." JA 259.

In 2007 Arizona created a permanent early voting list, making it even easier to vote by mail. H.R. 2106, 48th Leg., 1st Reg. Sess., 2007 Ariz. Sess. Laws 641, 644 (Ariz. 2007) (relevant changes codified at Ariz. Rev. Stat. § 16-544). Arizona's permanent early voting list eliminated the need for voters to request vote-by-mail ballots year after year.

A voter need only ask to be placed on the permanent early voting list once, and that voter automatically receives an early voting ballot prior to each election. *Id.* Additionally, any voter may vote early in person at any early voting location up until 5:00 p.m. on the Friday preceding the election. Ariz. Rev. Stat. § 16-542(E). Arizona's early voting provisions make it substantially easier for Arizonans to vote, greatly increasing the likelihood that they will vote.

C. Arizona's Actions To Increase Access To The Franchise Of Voting Have Worked.

Arizona's efforts to make voting easier have worked. Even though Arizona has experienced an unprecedented explosion in population growth over the last four decades, its voter engagement has increased at an even greater rate. This is a credit to Arizona's efforts, because such a quick explosion in population growth and residential mobility would ordinarily result in lower voter registration and turnout.[10] Such a reduction in voter engagement rates could be due to a number of circumstances such as difficulty or delay in registering to vote after becoming a new resident.

However, through its steadfast efforts to increase secure access to the franchise of voting, Arizona has overcome this trend. In 1980, while the state had a population of approximately 2.7 million

[10] *See* Squire, P., Wolfinger, R., & Glass, D. (1987). Residential Mobility and Voter Turnout. *American Political Science Review, 81*(1), 45-65. doi:10.2307/1960778; *see also* Jaume Magre et al., *Moving to Suburbia? Effects of Residential Mobility on Community Engagement*, 53 Urb. Stud. 17 (2016).

people,[11] it had only 1.1 million registered voters,[12] with 898,193 turning out to vote during that year's presidential election.[13] That translates to a 41% overall voter registration rate, not accounting for voting age, citizenship, or other eligibility criteria and an 80% voter turnout rate during a presidential election. Ten years later, Arizona had over 3.6 million residents,[14] over 1.8 million registered voters,[15] and over 1 million turning out to vote during the 1992 presidential election.[16] Arizona's overall voter registration rate was by this point over 50%, accounting for an increase of about 9% in ten years and presidential election year turnout of nearly 77%. By 2000, Arizona had a population of over 5.1 million people,[17] voter registration over 2.1 million,[18] and over 1.5 million turning out to vote

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[11] U.S. Dep't of Commerce, Bureau of the Census, PC80-1-B1, 1980 Census of Population U.S. Summary 1-124 tbl.61 (1983), https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8011u_bw.pdf.

[12] Ariz. Sec'y of State, *1980 Voter Registration*, https://apps.azsos.gov/election/VoterReg/History/Year/1980.pdf.

[13] Ariz. Sec'y of State, *1980 General Election Canvass*, https://azsos.gov/sites/default/files/canvass1980ge.pdf.

[14] U.S. Dep't of Commerce, Bureau of Census, 1990 CP-1-4, 1990 Census of Population Arizona 1 tbl.1 (1992), https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-4.pdf.

[15] Ariz. Sec'y of State, *1990 Voter Registration* https://apps.azsos.gov/election/VoterReg/History/Year/1990.pdf

[16] Ariz. Sec'y of State, *1992 General Election Canvass*, https://azsos.gov/sites/default/files/canvass1992ge.pdf.

[17] U.S. Dep't of Commerce, Bureau of Census, PHC-1-4, 2000 Census of Population Arizona 2 tbl.1 (2002), https://www.census.gov/prod/cen2000/phc-1-4.pdf.

[18] Ariz. Sec'y of State, *State of Arizona Registration Report: 2000 General Election*, https://apps.azsos.gov/election/voterreg/2000-11-01.pdf.

during that year's presidential election.[19] Arizona's overall voter registration rate by 2000 was over 42%, slightly lagging behind the staggering increase in population during the 1990's, and a voter turnout of over 71%. Ten years later, Arizona had approximately 6.4 million residents,[20] with 3.1 million registered voters,[21] and 2.3 million voters turning out during the 2012 presidential election.[22] Arizona's overall voter registration rate by 2010 was approximately 49%, and increasing voter turnout during the 2012 presidential election to over 74%. This year, estimates place the State's population at 7.2 million people,[23] with nearly 4.3 million registered voters, and over 3.4 million voters turning out in last month's presidential election.[24] Arizona's total voter registration rate is now at nearly 59%--the most in history—with voter turnout during the 2020 election at nearly 80%. What these figures demonstrate is that Arizona's efforts to increase access to the franchise, and to make voting secure

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[19] Ariz. Sec'y of State, *State of Arizona Official Canvass: 2000 General Election*, https://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf.

[20] U.S. Dep't of Commerce, Bureau of Census, CPH-1-4, 2010 Census of Population Arizona 2 tbl.1 (2012), https://www2.census.gov/library/publications/2012/dec/cph-1-4.pdf.

[21] Ariz. Sec'y of State, *State of Arizona Registration Report: 2012 General Election*, https://apps.azsos.gov/election/voterreg/2012-10-30.pdf.

[22] Ariz. Sec'y of State, *State of Arizona Official Canvass: 2012 General Election*, https://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf.

[23] *QuickFacts: Arizona*, U.S. Census Bureau (last accessed May 30, 2020), https://www.census.gov/quickfacts/AZ.

[24] Ariz. Sec'y of State, *State of Arizona Official Canvass: 2020 General Election*, https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf.

and easier, have worked. Recent voter participation in Arizona has kept up with, and even outpaced, the incredible population growth the state has seen over the last 40 years.

Unfortunately, not one of the preceding examples were mentioned by the en banc majority below when analyzing the totality of the circumstances. Yet these examples demonstrate that when viewing Arizona's electoral background through the lens of modern rather than ancient history, it is obvious that the state has provided nearly every opportunity within reason to expand access to the franchise. And those provisions have worked. Therefore, when the proper totality of the circumstances analysis is conducted, it becomes clear that Arizona is not impermissibly discriminating in access to voting—indeed, the process is as open as it has ever been.

III. ARIZONA'S PRECINCT-BASED VOTING SYSTEM AND PROHIBITION ON UNLIMITED THIRD-PARTY BALLOT HARVESTING ARE STRONGLY JUSTIFIED.

Prohibiting unlimited out-of-precinct voting and unlimited third-party ballot harvesting is strongly justified by Arizona's interests in administering efficient and secure elections. *Cf.* JA 656 ("The only plausible justification for Arizona's [out-of-precinct] policy would be the delay and expense entailed in counting [out-of-precinct] ballots."); *Cf.* JA 666-670. These justifications more than make up for any minor inconvenience voters experience by way of the policy.

Arizona has an undeniable interest in the orderly administration of its elections, including the need to prevent fraud and irregularities, to quickly and efficiently report election results, and to promote faith and certainty in election results. *See Nader* v. *Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2008). The 2020 General Election has only reinforced that these interests are at the very least compelling, if not imperative. *See also Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 225 (2008) (Souter, J., dissenting) ("There is no denying the abstract importance, the compelling nature, of combating voter fraud."); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *Miracle* v. *Hobbs*, No. 19-17513, 808 Fed. Appx. 470, 473 (9th Cir. May 1, 2020) ("[T]he public also wants guarantees of a fair and fraud-free election, and a state 'indisputably has a compelling interest in preserving the integrity of its election process.'") (citing *Eu* v. *S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

A. Arizona's Interests In Its Out-Of-Precinct Policy.

Arizona's prohibition on out-of-precinct voting makes voting more convenient. It permits election administrators to account for the numbers of voters who can vote in the same location. *See Sandusky Cty. Democratic Party* v. *Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004); Pet. 16-17. Too many voters utilizing a single polling place could lead to long wait

times, overwhelmed election administrators, and disenfranchised voters. Secondly, it makes each polling place responsible for listing only those elections relevant to the voters in that precinct. *Blackwell*, 387 F.3d at 569. This makes ballots less confusing, streamlines information for local elections officials, and encourages voting in local elections. *See* JA 727-728 (Bybee, J., dissenting).

Arizona is also justified in preventing out-of-precinct voting in order to ensure more secure and legitimate elections, and to prevent the potential for fraud, impropriety, or the appearance thereof. First, as discussed above, preventing out-of-precinct voting essentially caps the number of voters for which each precinct-level election official is responsible for assisting and managing. This makes it easier for election administrators to "monitor votes and prevent election fraud." *Blackwell*, 387 F.3d at 569. Second, prohibiting out-of-precinct voting also helps increase the secrecy and privacy of the ballot. In submitting a ballot directly to an election official in a voter's precinct, rather than to one who could be stationed hundreds of miles away from her county, the possibility that others might view, record, or tamper with her ballot is significantly reduced. *See Miller* v. *Picacho Elementary Sch. Dist. No. 33*, 877 P.2d 277, 279 (Ariz. 1994).

If Arizona counties are forced to accept out-of-precinct votes, they, and the out-of-precinct voters, will not only encounter difficulties with voting wait times, but also problems with ballot security and privacy. For example, if an out-of-precinct ballot is accepted, the polling place will have to identify the voter and determine which out-of-precinct elections the voter is eligible to vote in before recording the

voter's vote for those eligible offices. *See* JA 656-657. This identification would threaten the secrecy of the out-of-precinct voter's ballot. Further, that ballot would have to be transmitted from the distant precinct to the voter's home precinct, which could be in a completely different county. Through what mechanism and in what timeframe must these out-of-precinct ballots be transmitted or transported to the correct precincts, while maintaining privacy and security? There are currently no approved mechanisms, processes, statutes or regulations in place for doing so while preserving chain-of-custody. To develop such a mechanism would be incredibly time intensive, costly, and far from foolproof.

Alternatively, given the challenges associated with transporting or transmitting ballots to the proper precinct under the en banc majority's opinion, out-of-precinct voters may only be able to vote for statewide races in that foreign precinct, or for races relevant to both the home and distant precincts. That regime creates disenfranchisement as well, because it would prevent people from voting in local elections. It could also result in election results marred by human error, as election administrators would be responsible for determining whether that voter is eligible or registered to vote in another precinct, and whether that voter has already voted elsewhere. Further, that regime would raise serious questions as to how those out-of-precinct ballots should be tabulated for election result and turnout data. It might even result in more ballots being cast in a precinct than people who live there. This occurrence would only increase the public's mistrust and skepticism of the electoral system, a growing problem highlighted during the 2020 election cycle.

B. Arizona's Interests In Its Limits On Ballot Harvesting.

Similarly, prohibiting unlimited third-party ballot harvesting in Arizona makes voting there more secure and helps ensure election integrity. *See* Pet. 17-19, 25-26; Br. of State Petitioners at 47-49. The State's existing electoral framework is sufficiently broad to allow ample opportunity for electors to easily vote, without opening the door to the insecurity created by unlimited ballot harvesting. *See supra*. Indeed, fraud in ballot harvesting has been documented in other parts of the country and by other courts. *See* JA 531-575 (North Carolina State Board of Elections Order requiring a special election for the 9th Congressional District due to ballot harvesting fraud); *Pabey* v. *Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (ordering a special election due to ballot harvesting fraud); *see also Crawford*, 553 U.S. at 195 n.12 (plurality opinion) ("much of the fraud was actually absentee ballot fraud"). Courts across the nation have upheld similar prohibitions in the name of election integrity. *See, e.g.*, *Ray* v. *Texas*, No. 2-06-CV-385 (TJW), 2008 U.S. Dist. LEXIS 59852 (E.D. Tex. Aug. 7, 2008) (rejecting challenge to Texas statute criminalizing signing as a witness for more than one early voting ballot application)*; see also Qualkinbush* v. *Skubisz*, 826 N.E.2d 1181 (Ill. App. Ct. 2004) (holding that a statute restricting who is eligible to return an absentee ballot did not conflict with the Voting Rights Act); *DiPietrae* v. *City of Phila.*, 666 A.2d 1132 (Pa. Commw. Ct. 1995) (upholding a Pennsylvania statute limiting agent-delivery for absentee ballot applications and absentee ballots).

See also DCCC v. *Ziriax*, 2020 U.S. Dist. LEXIS 170427, at *36-43, *62-67 (N.D. Okla. 2020) (discussing Oklahoma's interest in preventing fraud and upholding that state's ballot harvesting prohibition); *Crossey* v. *Boockvar*, 2020 Pa. LEXIS 4868 (Pa. 2020) (upholding Pennsylvania's prohibition on ballot harvesting); Troy Closson, *New Local Election Ordered in N.J. After Mail-In Voter Fraud Charges*, N.Y. Times (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/nyregion/nj-election-mail-voting-fraud.html (discussing invalidation of Paterson, New Jersey election due to widespread fraud and corruption stemming from ballot harvesting).

Arizona's justifications for its out-of-precinct voting and ballot harvesting policies are also balanced with the fact that, in making it easier to vote, Arizona and its counties provide a litany of more secure ways for individuals to vote. Some of these methods, such as early voting by mail, do not even require the voter to be present in their home precinct at the time they cast their vote. Accordingly, the "need" for voters to be able to cast out-of-precinct ballots at any polling place is hardly persuasive, and raises substantial risk that such court ordered actions could undermine confidence in the electoral system.

IV. LEGISLATION SHOULD NOT BE INVALIDATED BECAUSE OF COURTS' SUBJECTIVE INTERPRETATIONS OF THE ACTIONS OF A SINGLE LEGISLATOR.

Rather than impute worthy motivation upon the Arizona Legislature for its decades of successful efforts to increase access to the franchise, the en banc majority of the Ninth Circuit imputed unlawful racial animus to the entire body based on statements from just a single legislator. JA 677. As an initial matter, that particular legislator clearly lacked significant influence over the legislature. His lack of meaningful influence is plainly evidenced by his 2018 expulsion from the Arizona House of Representatives by a 56-3 vote.[25] Nevertheless, even if the circumstances of that particular legislator were different, it is inappropriate to invalidate a statute, especially one concerning such a " sensitive area[] of state and local policymaking", *Shelby Cty.*, 570 U.S. at 545 (quoting *Lopez*, 525 U.S. at 282), in light of the subjective interpretations of statements by one legislator, or even a small group of legislators.

"[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite." *Edwards v. Aguillard*, 482 U. S. 578, 636-37 (Scalia, J., dissenting). Furthermore, courts "cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a

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[25] *See* Ariz. Legislature, *Bill History for HR2003*, https://apps.azleg.gov/BillStatus/BillOverview/70748.

particular legislator's preenactment floor or committee statement" let alone staff-prepared committee reports they might have read, postenactment statements, or media coverage. *Id*. Then comes the question of how many legislators must have supposedly harbored malevolent perspectives in order to impute improper motivation? *See id*. at 638-39. Is, as was the instance in this case, one enough?

In *United States* v. *O'Brien*, this Court refused to strike down a statutory amendment due to the alleged motivation of a subset of members of Congress. 391 U.S. 367, 382-84 (1968). The Court said: "Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id*. at 383-84. And it declined to void the amendment at issue "essentially on the ground that it is unwise legislation . . . and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id*.

Further, the presumption of legislative good faith is a strong one to overcome, especially through the actions of a single legislator. In *Abbott* v. *Perez*, a three-judge panel found that the 2013 Texas Legislature had acted with discriminatory intent in passing a new redistricting plan after its 2011 plan was denied preclearance under the Voting Rights Act. 138 S. Ct. 2305, 2318 (2018). The panel first stated that the burden was on the challengers but then flipped it based on who passed the 2013 law: a Legislature with "substantially similar" membership

and the "same leadership" that passed the flawed 2011 plan. *Perez* v. *Abbott*, 274 F. Supp. 3d 624, 645–46, 648 n.37 (W.D. Tex. 2017). Because the entity that passed both plans remained the same, the court "flip[ped] the evidentiary burden on its head," requiring Texas to show that the 2013 Legislature had "purged the 'taint'" of the unlawful 2011 plan. *Abbott*, 138 S. Ct. at 2324–25. This Court reversed the panel's "fundamentally flawed" analysis. *Id.* at 2326. The panel had erred because it had "reversed the burden of proof [and] [] imposed on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart.'" *Id.* at 2325 (quoting *Perez*, 274 F. Supp. 3d at 649). Its finding of discriminatory intent had "relied overwhelmingly on what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor." *Id.* at 2326 n.18. What was relevant was "the intent of the 2013 Legislature." *Id.* at 2327. And that legislature was to be afforded "the presumption of legislative good faith" and not condemned based on prior bad acts. *Id.* at 2324. This Court made it clear that "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Id.* Any history of discrimination must be weighed "with any other direct and circumstantial evidence of th[e] Legislature's intent." *Id.* at 2327. *See also N.C. State Conference of the NAACP* v. *Raymond*, No. 20-1092, 2020 U.S. App. LEXIS 10972 (4th Cir. Apr. 7, 2020) (accord).

The weight of one singular legislator, especially one whose actions are attenuated, at best, to the resultant policies, is hardly enough to outweigh the Arizona Legislature's presumption of

good faith. Accordingly, the answer to the question of whether the discriminatory intent of one legislator—even assuming that legislator's intent can be discerned at all—is sufficient or even relevant for Section 2 purposes must be answered in the negative. The en banc majority of the Ninth Circuit erred in doing just that.

V. IF ARIZONA'S NEUTRAL AND REASONABLE ELECTION REGULATIONS ARE "DISCRIMINATORY," NEARLY ALL STATE ELECTION LAWS ARE IN DANGER.

Indeed, given Arizona's successful efforts to increase election security and access to the franchise of voting, and also in light of the complete neutrality of the laws at issue, nearly any election law in any state is threatened if the en banc majority's opinion is left to stand. Under the en banc majority opinion, even the most mundane and neutral election laws are vulnerable to challenge under Section 2 if some microscopic statistical discrepancy exists in voting, if discrimination occurred in that state at some point in its history, or if some legislator who supported the law says something that is subjectively decided to have racist undertones. Indeed, that is exactly what happened in the present case. Such threats are very real, especially considering that an examination of the history of nearly any jurisdiction will yield examples of racial discrimination at one point or another.

Furthermore, there is nothing novel about Arizona's out of precinct policy or its limits on third-party ballot harvesting. JA 729-730 (Bybee, J.,

dissenting). Besides Arizona, twenty-five states, the District of Columbia, and three United States territories disqualify ballots cast in the wrong precinct. *Id*. The states with such policies represent every region of the country and transcend party lines, with some led by Republicans, some led by Democrats, and some led by both. *Id*. A majority of states also place limits on the harvesting of ballots. *See* JA 739-742 (Bybee, J., dissenting) (collecting statutes). Simply put, the provisions invalidated by the en banc majority are widely-implemented election regulations.

Because of the large number of states that possess substantially similar election regulations to Arizona, and because nearly every state has some unfortunate history of discrimination based on race, nearly every state of the union will suddenly possess potentially illegal election regulations overnight if this Court condones the en banc majority's opinion. Operating under the constant threat of VRA litigation would devastate states and their election administration efforts. The threat of needless VRA litigation would have the primary effect of making election administration incredibly expensive and damage the public's confidence in election administrators. Secondly, such needless and constant litigation would waste valuable judicial resources and inundate dockets nationwide.

With so much at stake and with only facially neutral laws at issue, the opinion of the en banc majority of the Ninth Circuit should not and cannot stand.

CONCLUSION

For the aforementioned reasons, amicus curiae respectfully requests this Court grant Petitioners' requested relief.

Respectfully submitted,

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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.,
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DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE HELEN PURCELL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF AMICUS CURIAE

Helen Purcell is a private citizen residing in Maricopa County, Arizona. She was elected Maricopa County Recorder in 1988, was re-elected six times, served a total of 28 years, and left office on December 31, 2016. The office of Maricopa County Recorder administers voter registrations and elections in Maricopa County, by far Arizona's largest county. Because of her 28 years of service, Ms. Purcell has historical knowledge related to voting registration and elections in Arizona that may prove useful to the Court.[1] Ms. Purcell was the plaintiff in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), from which the eponymous "Purcell Principle" derived, which makes a presumption against last-minute changes of elections procedures.

[1] Pursuant to Rule 37.6, *amicus* certifies that no party's counsel authored the brief in whole or in part, no party and no party's counsel made a monetary contribution intended to fund the preparation of the brief, but the Arizona Attorney General has paid or will pay the printer's charges for printing and serving the brief. Pursuant to Rule 37.3(a), *amicus* certifies that the parties, as reflected on the Clerk's electronic docket sheet, granted blanket consent to the filing of *amicus* briefs at the merits stage.

SUMMARY OF ARGUMENT

The Court should reverse the *en banc* decision of the Ninth Circuit in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (2020), and reinstate the judgment of the District Court in *Democratic National Committee v. Reagan*, 329 F.Supp.3d 824 (D.Ariz. 2018), as to both ballot-harvesting and the precinct-based voting system.

During Ms. Purcell's 28 years of service to the citizens of Maricopa County, Arizona, a combination of technological advances and legislative innovations has made it easier than ever for Arizona's citizens to register to vote and to cast a ballot.

In addition to the traditional means of signing a voting affidavit at the County Recorder's office, or before a deputy registrar, an Arizona citizen can register to vote online, while obtaining a driver's license, or when applying for government assistance. Voter Registration page, Arizona Department of Transportation ("ADOT") web page, accessible at: https://azdot.gov/motor-vehicles/driver-services/driver-license-information/voter-registration.

Early voting and mail-in ballots came to Arizona more than 20 years ago. Arizona maintains a permanent early voting list, and Arizona's county recorders mail out ballots to all persons who have asked to be placed on the list, as well as to voters who specially request a mail-in ballot. Arizona Secretary of State's voting by mail page, accessible at: https://azsos.gov/votebymail. Voters who are not on the permanent list can request a mail-in ballot online or by regular mail, email, or telephone. *Id.* The use of vote

centers, in lieu of the old precinct voting, is now permitted by Arizona law and occurs throughout Arizona.

Against this background, it is fair to say that Arizona is a leader among the 50 states in making it simple and easy for its citizens to register to vote and to cast a ballot.

Yet it remains a compelling state interest for Arizona to maintain the integrity of its voting process. To that end, the precinct-voting rule has been in place for at least 50 years in Arizona, and possibly longer. Under this rule, an Arizonan who chooses to go to the polls on election day must show up at the polling place designated for the precinct in which the voter resides, and ballots cast in the wrong precinct will not be counted for any office. Arizona Citizens Clean Elections Commission, Polling Place page, accessible at: https://www.azcleanelections.gov/how-to-vote/election-day/polling-place. The precinct-voting rule is an historical legacy of the days before computer technology expanded and made the use of vote centers feasible. It is neutral on its face, is neutral in its administration, and has served Arizona fairly over generations. Its use should not violate Section 2 of the Voting Rights Act.

As further means of protecting the integrity of Arizona elections, and of preserving the rights of Arizona voters to cast their ballots in secrecy and without coercion, the Arizona Legislature outlawed the practice of ballot harvesting in ARIZ. REV. STAT. § 16-1005(H), with exceptions provided in ARIZ. REV. STAT. § 16-1005(I) relating to a voter's family member, caregiver, or household member. For similar reasons,

the ballot harvesting law should not violate Section 2. It also is neutral on its face, is neutrally administered, and serves the compelling state interest of protecting Arizona voters against any attempt by ballot harvesters to coerce voters, especially the elderly, infirm, disabled, or otherwise vulnerable.

ARGUMENT

I. Arizona' Steady Expansion of Voter Registration.

Arizona's recent history shows a steady expansion of the means of voter registration available to its citizens. To illustrate, at the 1982 general election, Arizona voters approved Proposition 202, a "motor-voter" law that allowed Arizonans to register to vote when they applied for a driver's license. *See* Arizona Secretary of State's 1982 General Election Official Canvass, accessible at: https://azsos.gov/sites/default/files/canvass1982ge.pdf. This motor-voter law is now codified at ARIZ. REV. STAT. §§ 16-111 and 16-112. It preceded similar action at the federal level by nine years. Congress waited until 1993 to pass the National Voter Registration Act, which instituted federal motor-voter registration procedures.

In 1994, Arizona amended its motor-voter law to provide for online voter registration, administered by ADOT. 1994 ARIZ. SESS. LAWS Ch. 378, § 1 (41st Ariz. Leg., 2d Reg. Sess.), codified at ARIZ. REV. STAT. § 16-112(B)(4). Arizona currently implements this requirement by means of its EZ Voter program. ARIZONA SECRETARY OF STATE'S 2019 ELECTION PROCEDURES MANUAL, at 23 (December 2019)

("ELECTIONS MANUAL").[2] EZ Voter came into use in Arizona in 2002, and it pioneered online voter registration among the 50 states. *See* Matt A. Barreto *et al.*, *Online Voter Registration (OLVR) Systems in Arizona and Washington*, at 1 (2010).[3]

To keep its motor-voter and online registration procedures current, the Legislature has required the ADOT Director and the Secretary of State to "consult at least every two years regarding voter registration at driver license offices." ARIZ. REV. STAT. § 16-112(B). It further requires both to consult with the county recorders to implement the motor-voter system. *Id.*

Apart from motor-voter and online registration, the Legislature, in 1994, required all Arizona public assistance agencies to provide voter registration opportunities to applicants at the time they register for benefits. 1994 ARIZ. SESS. LAWS Ch. 378, § 8 (41st Ariz. Leg., 2d Reg. Sess.), codified at ARIZ. REV. STAT. § 16-140.

Besides these three innovations, Arizona provides multiple, traditional means of voter registration, set forth in ARIZ. REV. STAT. § 16-131:

> A. The county recorder, a justice of the peace or a deputy registrar shall supply, without charge,

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[2] Accessible at: https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES _MANUAL_APPROVED.pdf.

[3] Accessible at: https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/onlinevoterregpdf.pdf.

a registration form to any qualified person requesting registration information.

B. The county recorder shall distribute state mail in registration forms at locations throughout the county such as government offices, fire stations, public libraries and other locations open to the general public.

C. Information regarding the qualifications necessary to register to vote, registration deadlines for qualifying to vote at an election, penalties for false registration and locations where additional voter registration information may be obtained shall be attached to or distributed with the state mail in registration form.

D. A county recorder may appoint deputy registrars to assist in distributing registration forms, to assist in registering voters and to accept completed registration forms. A deputy registrar shall be a qualified elector and shall serve without pay.

E. The county recorder may provide voter registration forms in quantity to groups and individuals that request forms for conducting voter registration drives.

II. Arizona Has Steadily Made It Easier to Vote.

As it has made it easier and simpler for Arizonans to register to vote, Arizona also has made it easier for its citizens to cast their ballots. In 1984, the

Legislature allowed Arizona voters to request an absentee ballot at the same time for both the primary and general elections. 1984 ARIZ. SESS. LAWS Ch. 254 (36th Leg., 2d Reg. Sess.), now codified at ARIZ. REV. STAT. § 16-542.

Early voting came to Arizona in 1997. *See* 1997 ARIZ. SESS. LAWS Ch. 5, § 3 (43d Leg., 2d Spec. Sess.), now codified at ARIZ. REV. STAT. §§ 16-541 through 16-552. Arizona provides for one-time early ballot requests, a permanent early voting list, and on-site early voting. ELECTIONS MANUAL at Ch. 2. Early ballots can be returned by mail, by drop-off at specified collection locations, or in person on election day. *Id.* The Legislature passed the permanent-early-voting-list law in 2007. *See* 2007 ARIZ. SESS. LAWS Ch. 183, § 5 (48th Leg., 1st Reg. Sess.), now codified at ARIZ. REV. STAT. § 16-544.

Arizona also allows in-person early voting at a county recorder's office, or at designated vote centers, up to 5:00 p.m., the Friday before election day. ELECTIONS MANUAL at 63.

Arizona makes special provisions for accommodating voters with disabilities, including the use of elections boards to go out to the voter. ELECTIONS MANUAL at Ch. 2.

It also provides for emergency voting. Some basic rules regarding emergency voting include the following: An emergency "means any unforeseen circumstance that would prevent the voter from voting at the polls." *Id.* at 65. "Qualified electors who experience an emergency between 5:00 p.m. on the Friday preceding

the election and 5:00 p.m. on the Monday preceding the election may request to vote at an emergency voting center in the manner prescribed by the Board of Supervisors of their respective county." *Id.*

In ARIZ. REV. STAT. § 16-411(A), the Legislature authorized the Boards of Supervisors of Arizona's 15 counties to designate voting precincts (the traditional means of voting) or the use of designated vote centers or both. To the extent a Board of Supervisors elects to designate voting precincts, it must publish the list of precincts and their boundaries no later than October 1st of the year preceding the general election. *Id.* Maricopa County designated both and provided for 107 voting centers throughout the county. Az Family.com News Staff, *FAQs: Everything you need to know for Election Day 2020*.[4]

III. Arizona's Precinct-Voting and Section 2 of the Voting Rights Act.

Ms. Purcell fully supports the Voting Rights Act and at all times tried to comply with its requirements in the administration of her election responsibilities. It is beyond the scope of her Brief to re-weigh and re-analyze the application to this case of the factors summarized in the Report of the Senate Judiciary Committee accompanying the 1982 amendments to the Voting Rights Act, quoted in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986).

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[4] Accessible at: https://www.azfamily.com/news/politics/election_headquarters/voter_resources/faqs-everything-you-need-to-know-for-election-day-2020/article_523ac728-ff38-11ea-9aee-eb33bd4d4be6.html.

Yet, for several reasons, her view is that the precinct-voting rule in use in Arizona does not violate Section 2's totality-of-the-circumstances test. *Id.* at 50-51. First, the rule is neutral on its face and is neutral in its administration. Second, it is long-standing in Arizona. Third, it serves the goals of efficiency and policing against election fraud. Thus, it falls outside the factor, quoted in *Gingles*, relating to "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." 478 U.S. at 37.

IV. Arizona's Anti-Ballot Harvesting Law and Section 2.

The ballot harvesting law, ARIZ. REV. STAT. § 16-1005(H), makes it illegal, with specified exceptions, for someone to return another person's ballot. The exceptions include a voter's family member, caregiver, or household member. ARIZ. REV. STAT. § 16-1005(I). Ms. Purcell has a similar view of this law. It is neutral on its face, is administered neutrally, and promotes compelling state interests.

As the history recounted above demonstrates, Arizona has vastly expanded opportunities to register and to vote over the last 40 years. It has authored special provisions for accommodating persons with disabilities and for emergency voting. Yet, Arizona retains its interest in preserving the integrity of its voting process. When considered in this context, the ballot harvesting law makes a sensible means of protecting Arizona voters against any attempt by ballot

harvesters to coerce voters, especially the elderly, infirm, disabled, or otherwise vulnerable.

CONCLUSION

The foregoing historical review of voting over the last 30 years gives additional perspective to the Ninth Circuit's *en banc* opinion and details a record of steady innovation and technological evolution that makes voting in Arizona simpler, easier, and more convenient, and that allows more voting access to Arizona citizens, than ever before. The Court accordingly should reverse the *en banc* decision of the Ninth Circuit, and reinstate the judgment of the District Court as to both ballot-harvesting and the precinct-based voting system.

DATED on December 7, 2020.

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Nos. 19-1257 and 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

ARIZONA REPUBLICAN PARTY, ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Arizona allows all eligible voters to vote in a variety of ways, including traditional in-person voting on election day as well as voting early—either in person, by mail, or by delivering a completed ballot to a polling place or other designated location. This case concerns two measures that Arizona enacted to promote the orderly administration and integrity of its elections. First, under its out-of-precinct policy, Arizona declines to count the ballots of voters who choose to vote in person on election day but vote in an incorrect precinct. Second, Arizona's ballot-collection restriction makes it unlawful for a third party to collect a voter's completed early ballot if the third party is not an election official, a postal worker, a member of the voter's family or household, or a caregiver of the voter.

The district court found that neither the out-of-precinct policy nor the ballot-collection restriction caused a racially discriminatory result in violation of Section 2 of the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (52 U.S.C. 10301), and that the ballot-collection restriction did not violate Section 2 or the Fifteenth Amendment on the ground that it was intentionally discriminatory. The en banc court of appeals reversed, holding that both measures violated Section 2's results test and that the ballot-collection restriction was intentionally discriminatory. The questions presented are as follows:

1. Whether Arizona's out-of-precinct policy or ballot-collection restriction violates the results test of Section 2 of the VRA.

2. Whether the court of appeals erred in overturning the district court's finding that the ballot-collection restriction is not intentionally discriminatory.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 19-1257

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL., PETITIONERS

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

This case presents important questions regarding Section 2 of the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (52 U.S.C. 10301), and the Fifteenth Amendment, which the VRA implements. The Department of Justice is charged with enforcing the VRA. *E.g.*, 52 U.S.C. 10308(d). The United States thus has a substantial interest in the proper interpretation of Section 2 and the Fifteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," U.S. Const. Amend. XV, § 1, and authorizes Congress "to enforce" that prohibition "by appropriate legislation," Amend. XV, § 2. A Fifteenth Amendment violation requires proof of "discriminatory purpose." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997).

In 1965, Congress enacted the VRA "to enforce the fifteenth amendment." *Chisom* v. *Roemer*, 501 U.S. 380, 383 (1991) (quoting VRA Pmbl., 79 Stat. 437) (brackets omitted). Section 2 of the VRA originally provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), the plurality concluded that Section 2 "simply restated" the Fifteenth Amendment and thus required proof of "purposeful discrimination." *Id.* at 61, 63.

In 1982, Congress amended Section 2 to provide that no state or local government may "impose[] or appl[y]" any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * in a manner which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of

race or color [or language-minority status], as provided in subsection (b)." 52 U.S.C. 10301(a) (emphasis added). Subsection (b) states in relevant part:

> A violation of subsection (a) 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 protected by subsection (a) 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). Thus, "proof of intent is no longer required to prove a § 2 violation." *Chisom*, 501 U.S. at 394. Instead, Section 2(a) "adopts a results test," and Section 2(b) "provides guidance about how the results test is to be applied." *Id.* at 395.

2. a. Arizona provides registered voters with multiple ways to vote. In addition to voting in person on election day, qualified voters also may vote up to 27 days early—either in person, by mail, or by delivering a completed ballot to any polling place or other designated location by 7 p.m. on election day. J.A. 259-260, 279-280. Voters who cannot travel to a polling place due to illness or disability may request that a ballot be delivered to them in person. J.A. 279-280.

Early voting by mail is by far "the most popular method of voting" in Arizona. J.A. 259. Voters may vote by mail in one election or request to do so in all elections (and may make that request online). *Ibid.*

b. This case concerns two measures that Arizona enacted to promote the orderly administration and integrity of its elections.

Out-of-precinct policy. Arizona has long required in-person election-day voters "to cast their ballots in [an] assigned precinct." J.A. 261; see J.A. 262 & n.5, 307-308. "The advantages of the precinct system are significant and numerous." *Sandusky Cnty. Democratic Party* v. *Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (per curiam). Precinct voting "caps the number of voters attempting to vote in the same place on election day"; "allows each precinct ballot to list all of the votes," and "only those votes," that a particular "citizen may cast, making ballots less confusing"; "makes it easier for election officials to monitor votes and prevent election fraud"; and enables "put[ting] polling places in closer proximity to voter residences." *Ibid.* Arizona enforces the precinct requirement (in counties using it) through an out-of-precinct policy. J.A. 261-262; see J.A. 729-730, 750-767 (Bybee, J., dissenting).[1] For votes cast in-person on election day, election officials "count[] only those ballots cast in the correct precinct." J.A. 261-262. If a voter appears at a polling place and is not listed in the precinct register, he may cast a provisional ballot, which will be counted if he is registered and resides in that precinct. J.A. 262. If the voter voted in an incorrect precinct, no portion of the ballot is counted. *Ibid.*

Ballot-collection restriction. Since 1997, Arizona has prohibited anyone besides a voter to possess the voter's not-yet-completed early ballot. J.A. 260-261. In 2016, the Arizona legislature enacted H.B. 2023, 52d

[1] Since 2011, Arizona has allowed counties to opt out of the precinct system and instead to use a "vote center system," under which "voters may cast their ballots at any vote center in the county in which they reside." J.A. 263. The out-of-precinct policy "ha[s] no impact" in counties using the vote-center system. *Ibid.*

Leg., 2d Sess., which forbids a third party to possess a completed early ballot unless the third party is a member of the voter's family or household, a voter's caregiver, or a postal-service worker or election official engaged in official duties. J.A. 260-261. That prohibition "follows precisely the recommendation of the bi-partisan Carter-Baker Commission on Federal Election Reform" as a means of "'reduc[ing] the risks of fraud and abuse in absentee voting.'" J.A. 742-743 (Bybee, J., dissenting) (citation omitted).

3. The Democratic National Committee and certain affiliates (respondents) brought this suit challenging Arizona's out-of-precinct policy and ballot-collection restriction. J.A. 242-244. They alleged (as relevant) that both measures "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," in violation of Section 2's results test, and that H.B. 2023 "was enacted with discriminatory intent," in violation of Section 2 and the Fifteenth Amendment. J.A. 583. The district court denied respondents' motion to preliminarily enjoin both measures. J.A. 372. The en banc court of appeals enjoined the ballot-collection restriction pending appeal, J.A. 372-373, but this Court stayed the injunction, 137 S. Ct. 446.

4. Following a ten-day bench trial, J.A. 244, 246-258, the district court made extensive factual findings and rejected respondents' claims, J.A. 242-359.

a. The district court found that Arizona's out-of-precinct policy does not impose a discriminatory burden. J.A. 331-337. Although the court noted that "minorities are over-represented among the small number of voters casting [out-of-precinct] ballots," J.A. 332, it found that out-of-precinct in-person ballots constitute "such a small and ever-decreasing fraction of the overall

votes cast in any given election" that Arizona's policy "has no meaningfully disparate impact on the opportunities of minority voters" to vote, J.A. 334. It also found that respondents failed to prove that Arizona's enforcement of its precinct rule "causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts." J.A. 336.

The district court additionally found that Arizona's ballot-collection restriction does not impose a discriminatory burden. J.A. 321-331. The court first emphasized that respondents had "provided no quantitative or statistical evidence" showing how many voters "relied on now-prohibited third parties to collect and return their early mail ballots" or "the proportion that is minority versus non-minority." J.A. 321. Instead, respondents relied on "circumstantial and anecdotal evidence," including testimony of individual voters who had previously "used ballot collection services." J.A. 280, 324.

The district court found such evidence unpersuasive for multiple reasons. J.A. 325-331. The court found that, although "minorities generically were more likely than non-minorities" before H.B. 2023 "to return their early ballots with the assistance of third parties," respondents had not shown that H.B. 2023 "cause[s] a meaningful inequality in the electoral opportunities of minorities." J.A. 330-331. It found that "the vast majority of voters who choose to vote early by mail d[id] not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions," and the few "who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways."

J.A. 272, 278. The court noted that none of the individual-voter witnesses testified that H.B. 2023 "would make it significantly more difficult to vote." J.A. 331. The court concluded that "H.B. 2023 might have eliminated a preferred or convenient way of returning an early mail ballot," but it neither "impose[s] burdens beyond those traditionally associated with voting" nor "den[ies] minority voters meaningful access to the political process." J.A. 284, 331.

b. The district court also found that Arizona's ballot-collection restriction was not enacted with a "racially discriminatory purpose." J.A. 350; see J.A. 348-358. It found that, although "some individual legislators and proponents of limitations on ballot collection harbored partisan motives"—"perhaps implicitly informed by racial biases"—"the legislature as a whole enacted H.B. 2023 in spite of," "not because of," its "potential effect" on minority voters. J.A. 350.

The district court explained that "H.B. 2023 emerged in the context of racially polarized voting, increased use of ballot collection as a Democratic [get-out-the-vote] strategy in low-efficacy minority communities, and on the heels of several prior efforts to restrict ballot collection." J.A. 350-351. Some of those efforts "were spearheaded by former Arizona State Senator Don Shooter," whose district exhibited a "high degree of racial polarization." J.A. 351. The court found that, although "Shooter's efforts to limit ballot collection were marked by unfounded and often farfetched allegations of ballot collection fraud," his allegations "spurred a larger debate in the legislature about the security of early mail voting as compared to in-person voting." *Ibid.*

That debate was further fueled by a widely shared video created by Maricopa County Republican Party

chair, A.J. LaFaro, "show[ing] surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots." J.A. 344. Although the man depicted was "not obviously violating any law," the video included "'racially tinged and inaccurate commentary'" by LaFaro stating or implying that "the man was acting to stuff the ballot box," "was a thug," and might be an "illegal alien." J.A. 344-345 (citation omitted).

The district court found that, "[a]lthough no direct evidence of ballot collection fraud was presented," "Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting." J.A. 352. The court found that H.B. 2023's supporters "were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." J.A. 350; see J.A. 351-352. The court determined that "the legislature that enacted H.B. 2023 was not motivated by a desire to suppress minority voters," but instead "by a misinformed belief that ballot collection fraud was occurring" and "a sincere belief that mail-in ballots lacked adequate prophylactic safeguards." J.A. 357; see J.A. 350, 358.

5. A divided panel of the court of appeals affirmed. J.A. 360-440. Writing for the majority, Judge Ikuta concluded that neither challenged practice violates Section 2's results test, J.A. 404-409, 434-439, and that the district court did not clearly err in finding that the ballot-collection restriction was not enacted with discriminatory intent, J.A. 409-423. Chief Judge Thomas dissented. J.A. 441-492.

6. The court of appeals granted rehearing en banc, and the en banc court reversed, J.A. 576-691, but stayed its mandate, J.A. 832.

a. i. The en banc majority held that the out-of-precinct policy and the ballot-collection restriction violate Section 2's results test. J.A. 617-622. The majority applied a two-step test, asking (1) whether the challenged practice "results in a disparate burden on members of [a] protected class"; and (2) if so, "whether, under the 'totality of the circumstances,'" a "legally significant relationship" exists between that burden "and the social and historical conditions affecting them," including the "Senate factors"—a nonexhaustive list of nine factors this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), had derived from the Senate report that accompanied the 1982 amendments to the VRA. J.A. 612-613, 616.

At the first step, the en banc majority concluded that the out-of-precinct policy "result[s] in a disparate burden on minority voters" because such voters are more likely than white voters to vote out-of-precinct and have their ballots not counted. J.A. 622; see J.A. 618. It similarly held that the ballot-collection restriction "results in a disparate burden on minority voters" because, before H.B. 2023, "third parties collected a large and disproportionate number of early ballots from minority voters." J.A. 659, 662; see J.A. 659-662. The majority held that the district court erred by comparing the small number of out-of-precinct ballots, and the small number of early ballots collected from minority voters by third parties, to the total ballots cast by all voting methods. J.A. 618-622, 661-662.

At the second step, the en banc majority held that the burdens it attributed to both measures are "in part

caused by or linked to" the Senate factors. J.A. 659; see J.A. 623-659, 662-671. The majority cited (among other things) historical race-based discrimination in Arizona dating to its territorial period, current socioeconomic disparities and racially polarized voting patterns, and racial appeals in campaigns. See *ibid.*

ii. The en banc majority also held that the district court clearly erred in finding that the ballot-collection restriction was not enacted with discriminatory intent. J.A. 673-681. The majority purported to "accept" the district court's finding that most of H.B. 2023's proponents "had a sincere, though mistaken, non-race-based belief" that the measure was necessary to address potential fraud. J.A. 677. But it held that those "well meaning legislators were used as 'cat's paws' * * * to serve the discriminatory purposes of" Shooter, LaFaro, "and their allies," and that their "sincere belief" was "fraudulently created by Senator Shooter's false allegations and the 'racially-tinged' LaFaro video." J.A. 677-678.

b. Judge Watford concurred with respect to the Section 2 results test but not the en banc majority's discussion of discriminatory intent. J.A. 692.

c. Judge O'Scannlain dissented, joined by Judges Clifton, Bybee, and Callahan. J.A. 692-721. He "reject[ed] the suggestion implicit in the majority opinion that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory" under Section 2. J.A. 709. He also disagreed with the majority's conclusion that the district court clearly erred in finding no discriminatory intent, explaining that the majority improperly conflated "*racial* motives" with "*partisan* motives" and wrongly deemed H.B. 2023

"pretextual" merely because the legislature had "no direct evidence of voter fraud." J.A. 717-718.

d. Judge Bybee also dissented, joined by Judges O'Scannlain, Clifton, and Callahan. J.A. 721-830. Among other things, he noted that Arizona's ballot-collection restriction followed the recommendation of the Carter-Baker Commission. J.A. 742 & n.13; see also J.A. 739-744, 768-830 (noting that both measures resembled laws in numerous other jurisdictions).

SUMMARY OF ARGUMENT

I. Arizona's out-of-precinct policy and its ballot-collection restriction do not violate Section 2's results test.

A. Section 2 prohibits voting practices that "result[] in a denial or abridgment of the right * * * to vote on account of race or color [or language-minority status]," and it states that such a result "is established" if a jurisdiction's "political processes * * * are not equally open" to members of such a group "in that [they] have less opportunity * * * to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301. That text must be construed in light of Section 2's constitutional context, as an exercise of Congress's authority to enforce the Fifteenth Amendment's ban on intentional discrimination.

So construed, Section 2's results test imposes at least three requirements on vote-denial claims. First, members of a protected group must have less ability to vote than other voters in light of the burdens imposed by the challenged practice and readily available alternative voting methods. Second, the challenged practice must be responsible for that lesser ability, rather than other external factors not fairly attributed to the practice.

Third, courts must take account of the totality of circumstances, including the justifications for the practice.

B. Construed in that way, neither Arizona's out-of-precinct policy nor its ballot-collection restriction violates Section 2's results test. Respondents failed to prove that minority voters have less ability to vote under Arizona's out-of-precinct policy, especially taking account of other accessible voting methods, let alone that Arizona's enforcement of its precinct system is responsible for any such lesser ability. Similarly, respondents failed to prove that minority voters are less able to vote by means other than the restricted third-party ballot collectors, much less that Arizona's voting practices are responsible. The strong race-neutral justifications for both policies confirm that they do not violate Section 2.

The en banc majority erroneously held both practices invalid by asking the wrong question. It concluded that the practices violate Section 2's results test based on evidence of voters' behavior, but that evidence does not show either that minority voters have less ability to vote or that either practice is responsible for that lesser ability. The majority also gave short shrift to Arizona's race-neutral justifications for each policy. And it compounded its error by invoking the vote-dilution framework in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and Section 2's legislative history to justify considering a range of factors that shed no light on the proper inquiry under the results test in a vote-denial case.

II. The en banc majority also erred by overturning the district court's factual finding that the ballot-collection restriction was not adopted with discriminatory intent. That finding was reviewable only for clear error, and the

en banc majority improperly second-guessed it. The majority mistakenly relied on an inapposite employment-law analogy to impute assertedly race-based motives of certain proponents of H.B. 2023 to the legislature. And it improperly conflated evidence of those proponents' permissible partisan motives with racial ones.

ARGUMENT

I. NEITHER ARIZONA'S OUT-OF-PRECINCT POLICY NOR ITS BALLOT-COLLECTION RESTRICTION VIOLATES SECTION 2'S RESULTS TEST

Section 2 of the VRA prohibits state and local governments from "impos[ing] or appl[ying]" any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or language-minority status. 52 U.S.C. 10301(a); see 52 U.S.C. 10310(c)(1) (defining "vote" and "voting"). This "results" test, enacted in 1982, operates prophylactically to prohibit some voting practices absent a finding of intentional discrimination.

In prior cases, the Court has addressed the application of Section 2's results test to practices that were alleged to "dilut[e]" the efficacy of ballots cast by minority voters and thus to deny them an equal opportunity to elect representatives of their choice (known as vote-dilution cases). *Bartlett* v. *Strickland*, 556 U.S. 1, 11 (2009) (plurality opinion); see, *e.g.*, *id.* at 10-26; *Thornburg* v. *Gingles*, 478 U.S. 30, 42-61, 77-80 (1986). This case is the first in which the Court is asked to apply Section 2's results test to practices that allegedly erect barriers to the ability to vote that disproportionately burden minority voters and thus deny or abridge their equal opportunity to participate in the political process

(often called vote-denial cases). This Court should adopt a vote-denial standard that focuses on Section 2's statutory text and its constitutional context.

Properly construed, Section 2 prohibits a voting practice absent a showing of discriminatory intent only if the burdens it imposes are responsible for a protected group having less ability to vote than other voters, taking into account the totality of circumstances—including, among other factors, the specific justifications for the challenged practice. So interpreted, Section 2 does not prohibit either Arizona's out-of-precinct policy or its ballot-collection restriction.[2]

A. Section 2's Results Test Prohibits Voting Practices That Are Responsible For Members Of One Race Having Less Ability To Vote In The Totality Of Circumstances

1. Congress enacted the VRA "to enforce the fifteenth amendment." *Chisom* v. *Roemer*, 501 U.S. 380, 383 (1991) (brackets and citation omitted). That Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1. Like the Fourteenth Amendment, the Fifteenth Amendment bars only action taken "with a discriminatory purpose." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997).

Section 2's text originally tracked the Fifteenth Amendment, stating that "[n]o voting qualification or

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[2] Although the government has previously filed briefs in lower courts, and in this Court at the certiorari stage, addressing the application of Section 2 in the vote-denial context, this brief represents this Office's first comprehensive consideration of the question at the merits stage in this Court.

prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by" a state or local government "to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. A plurality of this Court concluded in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), that Section 2 "simply restated" the Fifteenth Amendment and accordingly barred only "purposeful discrimination." *Id.* at 61, 63.

In 1982, Congress made two significant changes to Section 2 relevant here. First, Congress "str[uck] out 'to deny or abridge'" and in its place "substitut[ed] 'in a manner which *results* in a denial or abridgment of.'" *Chisom*, 501 U.S. at 393 (citation omitted). Second, Congress added subsection (b), which elaborates the kind of "result[]" that subsection (a) covers. *Id.* at 394. Subsection (b) clarifies that "[a] violation of [Section 2(a)] 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" persons of a particular race, color, or language-minority group. 52 U.S.C. 10301(b). It defines "not equally open" to mean that persons of a particular race, color, or language-minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Ibid.*

2. "Under the amended statute, proof of intent is no longer required to prove a § 2 violation." *Chisom*, 501 U.S. at 394. Section 2's text, though, still must be construed in its context of enforcing a constitutional prohibition limited to intentional discrimination. Section 2 does not reflexively invalidate any voting practice

with a racially disparate impact on minority voting; instead, the statute prohibits only the sorts of discriminatory results that are properly reached by prophylactic enforcement legislation under the Fifteenth Amendment.

First, because Section 2 is an exercise of Congress's "power to enforce" the Fifteenth Amendment's bar on purposeful discrimination "by appropriate legislation," U.S. Const. Amend. XV, § 2, it must be construed so that it "appropriate[ly]" "enforce[s]" (*ibid.*) that bar. "[T]he power 'to enforce'" is "not the power to determine what constitutes a constitutional violation." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). "[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," but "the distinction exists and must be observed." *Id.* at 519-520.

A statute that bans discriminatory effects is an "appropriate method" to enforce the Fifteenth Amendment's ban on intentional discrimination if it targets a "risk of purposeful discrimination," *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980)—"to 'smoke out,' as it were, disparate treatment," *Ricci* v. *DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). "Disparate-impact" rules can "play[] a role in uncovering discriminatory intent" by identifying subtle or implicit discrimination that "escape[s] easy classification as disparate treatment." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 540 (2015). But construing a disparate-impact rule to impose liability "based *solely* on a showing of a statistical disparity" would raise "serious constitutional questions." *Ibid.* (emphasis added). Those

concerns can be "avoid[ed]" by giving defendants "leeway to state and explain the valid interest served by their policies." *Id.* at 540-541. Considering such interests as part of the totality of the circumstances helps to focus liability on the types of "'artificial, arbitrary, and unnecessary barriers'" imposed on minority voters, *id.* at 544 (citation omitted), that are most likely to reflect discriminatory intent despite their facial neutrality, see *Ricci*, 557 U.S. at 695 (Scalia, J., concurring).

Second, "interpreting disparate-impact liability * * * expansive[ly]" risks encouraging defendants to "use[] and consider[]" race "in a pervasive and explicit manner," raising additional "serious constitutional questions." *Inclusive Communities*, 576 U.S. at 543. If a "statistical disparity" alone established disparate-impact liability, defendants would be forced to subordinate legitimate governmental interests and to gerrymander practices to achieve racial proportionality, including by adopting measures to achieve "'numerical quotas'" that "tend to perpetuate race-based considerations rather than move beyond them." *Id.* at 542-543 (citation omitted). This Court's Section 2 vote-dilution cases also have expressed concerns about construing the statute to require excessive consideration of race in ways that undermine its purpose. See, *e.g.*, *Strickland*, 556 U.S. at 18, 21 (plurality opinion); *Johnson* v. *De Grandy*, 512 U.S. 997, 1016-1017 (1994). To "avoid" those questions in other contexts, the Court has imposed "[a] robust causality requirement." *Inclusive Communities*, 576 U.S. at 542. A plaintiff cannot prevail simply by identifying a "statistical disparity" but must "point to a defendant's policy or policies causing that disparity." *Ibid.*

3. The text of Section 2's results test should be read in light of its constitutional context. Section 2(a) bars voting practices that "result[] in a denial or abridgement of the right * * * to vote on account of" race, color, or language-minority status, which Section 2(b) defines to include practices that cause persons of one such group to have "less opportunity than other" voters "to participate in the political process and to elect representatives of their choice," in light of "the totality of circumstances." 52 U.S.C. 10301. Properly construed, Section 2's results test imposes at least three requirements for vote-denial claims: first, members of a protected group must have less ability to vote than other voters in light of the burdens imposed by the challenged practice and readily available alternative voting methods; second, the challenged practice must be responsible for that lesser ability, rather than other external factors not fairly attributed to the practice; and third, courts must take account of the totality of circumstances, including, among other things, the specific justifications for the challenged practice. Applying those requirements calls for an "'intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79.

a. Section 2 prohibits only practices that impose burdens causing a particular racial group to have "less opportunity"—*i.e.*, less *ability*—to vote, relative to other members of the electorate. 52 U.S.C. 10301(b). In the context of vote-denial (rather than vote-dilution) claims, the "opportunity * * * to participate in the political process" is synonymous with the opportunity to vote, and "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process" by voting "inevitably impairs their ability to

influence the outcome of an election." *Chisom*, 501 U.S. at 397. "[O]pportunity" in Section 2 is best understood as one's ability to vote—not whether one *actually* votes. An "opportunity" means a "[c]hance" to do something—a "[f]it or convenient time," or "a time or place favorable for executing a purpose"—whether or not the chance is taken. *Webster's New International Dictionary* 1709 (2d ed. 1949); see 10 *The Oxford English Dictionary* 866 (2d ed. 1989) (similar).

That ordinary meaning of "less opportunity" is particularly appropriate here given the terms in Section 2 that this language defines. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004). "[L]ess opportunity" in Section 2(b) defines what it means for "political processes" to be "not equally open" to persons of a particular race. 52 U.S.C. 10301(b). And the phrase "equally open" connotes that equal *access* to the political process, not equal exercise of that process, is the touchstone. Moreover, Section 2(b) defines a violation of Section 2(a), which prohibits only practices that "result[] in a denial or abridgment" of the right to vote. 52 U.S.C. 10301(a). Such a result does not occur where certain voters simply choose not to vote using means equally accessible to all.

Section 2's history reinforces this reading. In 1982, Congress considered but rejected language that "would prohibit all discriminatory 'effects' of voting practices," which some feared would mandate "proportional representation." *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting). Instead, Congress adopted the "equally open" and "less opportunity" phrasing in Section 2(b) as a "compromise," borrowing language from a prior opinion of this Court that the compromise's sponsor and "many

supporters of [it]" understood to require only "equal 'access' to the political process." *Id.* at 1010-1011 (citing *White* v. *Regester*, 412 U.S. 755, 766 (1973)); cf. 52 U.S.C. 10301(b) (providing that "nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). The Court should give effect to the "compromise" Congress enacted, *Obduskey* v. *McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1038 (2019), not to an alternative Congress "ha[d] earlier discarded," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (citation omitted).

Thus, to violate Section 2's results test, a plaintiff must show that members of one racial group are less able than others to vote by whatever methods state or local law allows. For example, if a jurisdiction situated its polling places disproportionately in predominantly white neighborhoods—causing much longer travel times for minority voters—a court could conclude that minority voters are less able to vote. See *Holder* v. *Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring in the judgment). In contrast, a rule requiring all mail-in ballots to be returned in sealed envelopes would be extremely unlikely to violate Section 2, even if statistics showed that members of one racial group failed to seal their return envelopes more frequently than other voters. Such evidence alone would not demonstrate that members of the group are less able to comply with the sealing requirement, and it is difficult to imagine additional circumstances that could alter that conclusion provided that fair notice of the rule were equally provided to all.

In addition, because the ultimate inquiry is whether voters of one race have less ability *to vote*, courts considering limitations on one voting method must account

for available alternative methods. A rule that leaves all voters readily able to vote and simply eliminates a method some prefer does not abridge anyone's ability to vote and keeps the voting process equally open. For example, even if members of one race would prefer to vote by mail, Section 2's results test does not require a State to adopt no-excuse absentee voting if persons of all races are otherwise readily and equally able to vote in person. Cf. *Holder*, 512 U.S. at 880 (plurality opinion) (Section 2 inquiry requires court to identify "a reasonable alternative practice as a benchmark against which to measure the existing voting practice").

b. Even where members of one racial group have less ability to vote than others, Section 2's results test further requires that the challenged practice is properly deemed responsible for that lesser ability. The meaning of Section 2(b)'s definition of a prohibited "result[]" under Section 2(a) is informed by Section 2(a) itself. See *Leocal*, 543 U.S. at 11. Section 2(a) prohibits only practices that "*result[] in* a denial or abridgement of" the right to vote "*on account of* race or color [or language-minority status]." 52 U.S.C. 10301(a) (emphases added). And the statutory "context" here reveals that the challenged practice must be not only a but-for cause, but the "proximate cause" of minority voters' lesser ability to vote. See *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018).

A results-focused test like Section 2 compels defendants to alter their facially neutral practices in order to avoid certain racially disparate impacts that occur because of how the practices interact with external factors (*e.g.*, poverty), even where defendants have not been shown to have intended those impacts. Especially un-

der a statute that is prophylactically enforcing a constitutional prohibition limited to intentional discrimination, holding a defendant liable in such circumstances is appropriate only if the disparate impact stems from factors that the defendant can fairly be compelled to account for in adopting the challenged practice. Cf. *Inclusive Communities*, 576 U.S. at 542 (emphasizing the need for "[a] robust causality requirement" under another disparate-impact regime in order to "protect[] defendants from being held liable for racial disparities they did not create"). And in the Section 2 context, proximate cause is an appropriate means of differentiating between two categories: the disproportionate burdens on racial minorities' ability to vote that a jurisdiction may be required to eliminate by modifying its practice, and the burdens that a jurisdiction is permitted to tolerate despite (though not because of) their racially disproportionate impact. Cf. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (proximate cause "limit[s] a person's responsibility for the consequences of that person's own acts" based on "what justice demands" and "what is administratively possible").

For example, in the early 1980s, many States offered only limited methods for voting—typically in-person voting on election day and limited-excuse absentee voting. See Paul Gronke & Eva Galanes-Rosenbaum, *The Growth of Early and Nonprecinct Place Balloting: When, Why, and Prospects for the Future*, in *America Votes! A Guide to Election Law and Voting Rights* 261, 267-269 (Benjamin E. Griffith ed. 2008). And minority voters in some of those jurisdictions may well have had less ability to vote under those limited methods as a result of various socioeconomic disadvantages. But it

would be contrary to both logic and history to conclude that Congress's adoption of Section 2's results test in 1982 required all such jurisdictions to abandon those traditional practices absent any further showing.

Constitutional concerns confirm this construction. A voting practice that disproportionately impairs the ability of minorities to vote only because of factors not fairly attributable to the government is relatively unlikely to be the product of hidden or subtle discriminatory intent that the Fifteenth Amendment prohibits. Indeed, if "less opportunity" to vote were established based on that showing alone, many commonplace voting practices would be in danger. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system," *Frank* v. *Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (Easterbrook, J.), cert. denied, 575 U.S. 913 (2015), and any differential ability to comply with ordinary voting practices may stem from socioeconomic and other factors rather than a jurisdiction's voting practices. Deeming a jurisdiction liable for such results without any further showing would require excessive race-conscious steps to equalize participation rates. Cf. *Strickland*, 556 U.S. at 18, 21 (plurality opinion). Taken to its logical endpoint, that interpretation would compel the government to take every affirmative step possible (such as collecting votes door to door) to ensure *proportionate* minority-voter participation. Cf. *De Grandy*, 512 U.S. at 1016-1017.

Reading Section 2 to require proximate causation avoids these constitutional concerns. Under that approach, voting-behavior data may be relevant, but only to the extent they provide indirect evidence of an unequal burden on the ability to vote for which the govern-

ment is properly deemed responsible. While "States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA," *Cooper* v. *Harris*, 137 S. Ct. 1455, 1472 (2017), a diluted causation test risks requiring disparate-impact defendants to "use[] and consider[] [race] in a pervasive way" that raises "serious constitutional questions," *Inclusive Communities*, 576 U.S. at 542. A Section 2 plaintiff thus must "point to a defendant's policy or policies" that may be fairly deemed to be "causing" voters of one race to have less ability to vote than others. *Ibid.*

c. Finally, in determining whether the challenged practice is responsible for members of a particular racial group having less ability to vote, a court must consider the "totality of circumstances." 52 U.S.C. 10301(b). "[T]he State's interest" in its challenged practice "is a legitimate factor to be considered." *Houston Lawyers' Ass'n* v. *Attorney Gen.*, 501 U.S. 419, 426 (1991). Although a valid governmental interest "does not automatically" defeat a Section 2 results claim, *id.* at 427, it may show that a practice is not the type of "'artificial, arbitrary, and unnecessary barrier[]'" that is the focus of disparate-impact liability, *Inclusive Communities*, 576 U.S. at 540 (citation omitted). Indeed, Congress borrowed Section 2(b)'s "not equally open" language from this Court's decision in *Regester*, which had applied the pre-1982 version of Section 2 that proscribed only intentional discrimination. See pp. 19-20, *supra*.

Again, construing Section 2 to preclude considering such justifications would raise "serious constitutional questions." *Inclusive Communities*, 576 U.S. at 540-542. Forcing courts applying Section 2 to disregard a com-

pelling race-neutral justification for a challenged practice would make it more difficult to characterize Section 2 as enforcing the Fifteenth Amendment's ban on intentional discrimination, cf. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring), and could lead to excessive subordination of race-neutral interests to achieve racial balancing, cf. *Strickland*, 556 U.S. at 18, 21 (plurality opinion).

* * * * *

Taken together, these three requirements ensure that Section 2's text is not stretched far beyond its constitutional context. By prohibiting results where (1) voters of one racial group have less ability to vote, and (2) the challenged practice is fairly deemed responsible, after (3) taking into account the government's justifications and all other relevant circumstances, Section 2 targets the types of disguised discrimination and arbitrary barriers to voting on account of race that are appropriate enforcement targets under the Fifteenth Amendment. At the same time, that interpretation avoids invalidating countless commonplace voting procedures, such as voter registration.

B. The Challenged Practices Do Not Cause The Result Prohibited By Section 2

1. Arizona's out-of-precinct policy and its ballot-collection restriction do not violate Section 2's results test.

a. At the outset, respondents failed to show that minority voters have less ability to vote under Arizona's out-of-precinct policy. Respondents offered statistical and other evidence indicating that minority voters more frequently vote outside the correct precinct, J.A. 331-333, and evidence suggesting reasons why out-of-precinct voting may be more common among minority

voters in Arizona, such as "higher rates of residential mobility." J.A. 335. But they did not demonstrate that minority voters are less able to identify and appear at the proper precinct—any more than minority mail-in voters would be less able to comply with a hypothetical requirement to seal their ballots before mailing, see p. 20, *supra*—let alone that they are less able to vote once the multiple other accessible (and much more popular) voting methods Arizona affords are considered. See J.A. 334-335.

Moreover, even if minorities were less able to vote in the correct precinct *and* less able to vote by other means, respondents did not demonstrate that Arizona's challenged practices are responsible. As the district court found, respondents offered no evidence showing that Arizona's enforcement of its precinct requirement makes it more difficult for minorities to vote in the correct precinct. J.A. 335-336. They "d[id] not challenge the manner in which Arizona counties allocate and assign polling places" or its "requirement that voters re-register to vote when they move." J.A. 336. They "offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while non-minority voters were given correct information." *Ibid.* Nor did they "show[] that precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters." *Ibid.* Whatever external factors not fairly attributable to the State might explain any disparate ability to vote in the correct precinct, Section 2 does not require Arizona to restructure its precinct system to eliminate the disparity for that reason alone—any more than it would require Arizona to abandon its voter-

registration requirement if minority voters registered less frequently simply due to socioeconomic disadvantages.

Finally, this conclusion is confirmed by the strong race-neutral justifications supporting Arizona's out-of-precinct policy. Precinct requirements serve "significant and numerous" race-neutral goals—including avoiding overcrowding at polling places, enabling each ballot to list all of (and only) the appropriate contests, locating polling places closer to voters' residences, and enhancing detection and prevention of fraud. J.A. 728 (Bybee, J., dissenting) (citation omitted). Arizona's approach of enforcing that "'well established practice'" by not counting out-of-precinct ballots is a "standard feature of American democracy" that helps to ensure the precinct system operates as intended. J.A. 727, 729 (citation omitted); see J.A. 729-737.

b. Respondents' challenge to Arizona's ballot-collection restriction likewise fails at the threshold because they did not demonstrate that minority voters are less able to vote by means other than third-party ballot collectors. Respondents offered only "circumstantial and anecdotal evidence" showing that "minorities generically were more likely" to use third-party collectors than other voters. J.A. 324, 330. And the district court found that those "voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways," not because they are less able to vote by other means. J.A. 278; see J.A. 324-331.

In addition, to the extent any minority voters are less able to vote in light of Arizona's modest restriction on

third-party ballot collection, respondents did not demonstrate that the State's voting practices can fairly be deemed responsible. None of respondents' individual-voter witnesses "testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." J.A. 331; see J.A. 278-284. Respondents presented evidence that slightly fewer Hispanics (80%) and many fewer Native Americans (18%) have home mail service compared to non-Hispanic whites (86%). J.A. 252. But as the district court explained, lack of mail access "does not necessarily mean that" a voter "uses or relies on a ballot collector to vote, let alone a ballot collector who does not fall into one of H.B. 2023's exceptions." *Ibid.*

Even if respondents had shown that minority voters have less ability to vote as a result of Arizona's third-party ballot-collection restriction, the race-neutral justifications for such limits on third-party ballot collection—which tracks the bipartisan Carter-Baker Commission's recommendation—would counsel strongly against construing Section 2 to invalidate that practice. J.A. 744 (Bybee, J., dissenting). At the time of the Commission's report, absentee voting "remain[ed] the largest source of potential voter fraud" and was "vulnerable to abuse," including through "[v]ote buying schemes," which "are far more difficult to detect when citizens vote by mail." J.A. 742-743 (citation omitted).

2. a. The en banc majority reached the wrong conclusion because it asked the wrong question. The majority concluded that both the out-of-precinct policy and the ballot-collection restriction caused disparate burdens on minority voters based solely on evidence of their voting *behavior*. J.A. 618-622, 659-662. The majority deemed it sufficient that minority voters

"are overrepresented among [out-of-precinct] voters," and that "third parties collected a large and disproportionate number of early ballots from minority voters." J.A. 618, 659. But what matters under Section 2 is whether a challenged practice causes voters of one race to have less *ability* to vote. The evidence the majority cited indicating that minority voters were more likely than others to appear at the wrong precinct, and to use third-party ballot collectors before H.B. 2023, does not show they have less ability to vote today, including by other authorized methods.

The en banc majority criticized the district court for considering the small fraction of ballots cast out of precinct, or collected by now-prohibited third parties, relative to the total number of ballots cast by all allowed methods. J.A. 618-620, 661-662. To the extent the majority held that a practice can violate Section 2 even if it affects only a small number of voters, J.A. 620, that is correct. A single polling-place clerk violates Section 2 by turning away only minority voters whether or not their votes would swing the election. See *Chisom*, 501 U.S. at 397 & n.24. But the fact that a facially neutral practice adversely affects very few minority voters—including because other voting methods remain readily available—may bear on whether the practice actually deprives them of equal ability to vote. It may be that voters' behavior, preferences, or inexperience—not a state-erected barrier—is the cause of the statistical disparity in voting behavior.

The en banc majority also gave short shrift to the strong, race-neutral justifications for both practices. J.A. 654-657, 666-670. It could envision no "plausible justification" for the out-of-precinct policy besides avoiding additional "delay and expense." J.A. 656. But

avoiding unnecessary delay and expense in elections is undoubtedly an important, non-discriminatory aim. Moreover, the policy also serves other objectives, including encouraging compliance with the precinct system, which in turn brings numerous benefits. J.A. 733-735. The majority also discounted the value of ballot-collection restrictions in preventing fraud because it found no evidence of actual fraud. J.A. 667-669. But it never addressed the inherent difficulty of detecting such fraud, which the Carter-Baker Commission explained supports prophylactic restrictions on third-party collection. J.A. 742-745 (Bybee, J., dissenting).

b. After an erroneous analysis of disparate effects, the en banc majority addressed at length whether those effects are "in part caused by or linked to" the Senate factors this Court discussed in *Thornburg* v. *Gingles*, *supra*. J.A. 659; see J.A. 623-659, 662-771. The majority's approach was fundamentally misguided.

In *Gingles*, a vote-dilution case, the Court relied extensively on the 1982 Senate report to shed light on the totality-of-circumstances inquiry called for by amended Section 2(b). 478 U.S. at 43-46. The Court derived from that report a non-exhaustive list of nine considerations—such as a jurisdiction's history of voting-related discrimination and racially polarized voting—that the committee anticipated "typically may be relevant to a § 2 claim," especially in "vote dilution" cases. *Id.* at 44-45. The report "stresse[d]" that its list "[wa]s neither comprehensive nor exclusive." *Id.* at 45. This Court likewise underscored that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Ibid.* (citation omitted).

To the extent any of the Senate factors bear on the proper Section 2 inquiry in a particular case, courts may consider them among the "totality of circumstances," 52 U.S.C. 10301(b). Although the factors appear principally directed to vote-dilution cases, some of them conceivably could be relevant in adjudicating a vote-denial claim. Whether or not a jurisdiction has a history of voting-related discrimination, for example, might be material in assessing causation. See, *e.g.*, *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594-596 (9th Cir. 1997). And whether or not "the policy underlying" the challenged practice "is tenuous," *Gingles*, 478 U.S. at 37 (citation omitted), is also relevant. See pp. 24-25, *supra*. But where the Senate factors do not help courts determine whether a challenged practice is fairly deemed responsible for voters of one racial group having less ability to vote, they have no place in a proper Section 2 analysis. The Court in *Gingles* intended those factors to help courts apply the test Section 2 establishes, see *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 426 (2006), not to supplant the statutory text and context with a free-standing inquiry.

Here, the en banc majority canvassed a variety of irrelevant circumstances—such as the State's level of spending on public-health programs and conduct by territorial officials in the 19th century long before statehood. J.A. 625-628, 653-654. The majority should have focused on Section 2's text and context, which directed it to ask the question whether Arizona's out-of-precinct policy and ballot-collection restriction are responsible for voters of a protected group having less ability to vote, considering all relevant circumstances. Because the answer is no, the Section 2 results claim fails.

II. THE COURT OF APPEALS ERRED IN REJECTING THE DISTRICT COURT'S FACTUAL FINDING THAT H.B. 2023 WAS NOT MOTIVATED BY DISCRIMINATORY INTENT

The en banc majority separately erred by overturning the district court's determination that discriminatory intent was not a motivating factor in the enactment of Arizona's ballot-collection restriction. Under clear-error review, the majority had no basis to second-guess the district court's factual findings, and the grounds it articulated for doing so were seriously flawed.

A. "[A] finding of intentional discrimination is a finding of fact." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). "[A]ssessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Bossier Parish*, 520 U.S. at 488 (quoting *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

A district court's "findings of fact" on discriminatory intent "are subject to review only for clear error." *Harris*, 137 S. Ct. at 1465 (citation omitted). Under that standard, an appellate court "may not reverse just because [it] 'would have decided the matter differently'"; instead, any "finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Ibid.* (brackets and citation omitted).

B. The en banc majority "overstep[ped] the bounds" of its review. *Anderson*, 470 U.S. at 573. Respondents bore the burden of proving that racial discrimination was "a motivating factor" behind H.B. 2023. *Arlington Heights*, 429 U.S. at 266. The majority improperly second-guessed the district court's finding that respondents had not met their burden.

After examining the ballot-collection restriction's history, the district court "f[ound] that H.B. 2023 was not enacted with a racially discriminatory purpose." J.A. 350. It explained that, although "some individual legislators and proponents" of H.B. 2023 and similar measures "harbored partisan motives," "perhaps implicitly informed by racial biases," "the legislature as a whole enacted H.B. 2023 *in spite of* opponents' concerns about its potential effect on [get-out-the-vote] efforts in minority communities, not *because of* that effect." *Ibid.* (emphases added). The court found that "the majority of H.B. 2023's proponents were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure" to safeguard "early mail ballot security." *Ibid.*; see J.A. 357.

The en banc majority rejected that finding, J.A. 674, but it identified nothing in the record that rendered the finding "[im]plausible," *Anderson*, 470 U.S. at 574. The majority did not question the district court's determination that most supporters of H.B. 2023 in the legislature "had a sincere, though mistaken, non-race-based" reason for supporting it. J.A. 677. Instead, the majority imputed what it viewed as Senator Shooter's and LaFaro's race-based motives to other, "well meaning legislators," stating that those other legislators were "used as 'cat's paws.'" J.A. 678. As Judge O'Scannlain explained, the majority's reliance on that "employment discrimination doctrine [wa]s misplaced." J.A. 719.

In employment law, "cat's-paw liability" permits imputing a supervisor's discriminatory motive to an employer because the "supervisor is an agent of the employer." *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 421

(2011). When the supervisor "causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action.'" *Ibid.* No similar agency relationship generally exists among members of a legislative body. See *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968).

The appropriate analogy would be to an employer that is considering an applicant and receives feedback about the applicant from the applicant's former supervisor at another company. If the former supervisor provides a false negative evaluation based on his own racial bias, and the prospective employer (unaware of that bias) relies on that evaluation to reject the applicant, the prospective employer has not discriminated based on race. The former supervisor's intent cannot be imputed to the prospective employer because he is not its agent. So too, unless other members of a legislature have "delegated" to a particular member authority to act on behalf of the body, *Staub*, 562 U.S. at 421 (citation omitted), discriminatory motives of one legislator cannot reflexively be imputed to the whole chamber, regardless of his own motives for supplying false information that the body believes to be true.

Moreover, the en banc majority failed to support its premise that Senator Shooter and others who advocated the ballot-collection restriction were motivated by race. The majority conflated "*partisan* motives" with "*racial* motives" by finding discriminatory intent based solely on Shooter's partisan aims of eliminating a get-out-the-vote strategy used by his opponents, coupled with the fact that voting in his district was racially polarized. J.A. 717 (O'Scannlain, J., dissenting). The

district court, in contrast, properly recognized the difference, explaining that "partisan motives are not necessarily racial in nature, even though racially polarized voting can sometimes blur the lines." J.A. 357. The district court's finding that the restriction was not the product of racial considerations was not clearly erroneous, and the en banc majority erred in overturning that factual finding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2020

APPENDIX

1. U.S. Const. Amend. XV provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

2. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, provides in pertinent part:

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965".

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

* * * * *

3. 52 U.S.C. 10301 provides:

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) 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 protected by subsection (a) 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 extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, 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.

No. 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 Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports common-sense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

SUMMARY OF THE ARGUMENT

Renowned scientist and Nobel Laureate Ernest Rutherford once said, "If your experiment needs a statistician, you need a better experiment."[2] Said differently in the legal context, "if your legal standard relies primarily on statistics, you need a new legal standard." Just as a talented musician can play any requested tune depending on what the listener desires, so can a talented statistician similarly find data to support most desired conclusions. Such is where courts currently find themselves in the quandary of confusing and

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents for the filing of briefs of *Amicus Cur*iae at the merits stage in this matter.

[2] *See* Sukhminder et al., *The Ten Essential "T's" Imparting Impetus to Research in Anaesthesiology*, Indian J. of Anaesthesia (July 1, 2020), https://tinyurl.com/y5xyngpz.

conflicting jurisprudential arguments and outcomes surrounding §2 of the Voting Rights Act ("§2").

When courts that apply the same legal standard to identical factual scenarios arrive at completely differing opinions, there is really no legal standard at all. Legal standards and tests exist to provide an objective method against which courts view facts and make decisions. Due to the lack of clarity from this Court, confusion reigns supreme. Different courts are applying the same §2 legal standards and arriving at drastically different conclusions. Statisticians are not the problem here—the problem exists in the fact that the same legal standards can be viewed in such a way as to lead to strikingly divergent conclusions.

Statistics can be informative and certainly have a place in the legal world to aid in better understanding the application of certain laws. However, depending on the context and manner in which they are selectively presented, statistics and numbers can be misleading and equally supportive of both sides of complex legal arguments. Therefore, legal outcomes that disproportionally rely on statistical data for determinations of compliance with legislation designed to enforce civil rights are ripe for conflicting and diverging views. This is why, when deciding cases under §2, circuit panels often disagree with district courts, and en banc circuit courts disagree with circuit panels—such was the case with the District Court below and the Ninth Circuit in the present matter. Because infinite statistical data points can be mined from a particular factual situation and massaged to support a wide range of claims, different judges and courts,

when disproportionally relying on said data for support, can arrive at infinitely diverging conclusions. A clearer and more objective legal standard is needed.

Under the framework and analysis established by the Ninth Circuit in the challenged en banc opinion, virtually *any* commonplace election regulation *could* be struck down under a similar §2 analysis. As such, a "safe harbor" standard, similar to the standard established in the *Anderson/Burdick* line of cases—i.e., a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory voting restrictions—is needed. Here, Arizona passed reasonable, nondiscriminatory voting regulations pertaining to precinct voting and who can return a voter's absentee ballot (the "Challenged Provisions")—nearly identical laws exist in states across the Country. Both Challenged Provisions would easily pass muster under the *Anderson/Burdick* standard. Consistency within the §2 context is needed. Otherwise, future plaintiffs will simply bring claims under §2, as opposed to challenges under the First and Fourteenth Amendments, and achieve their desired outcomes through data purporting to show disparate impacts on the basis of race.

When a state legislature cannot pass a reasonable, nondiscriminatory election regulation without those laws being challenged under §2, it is time for more clarity from this Court. A "safe harbor" would reestablish an environment wherein state legislatures can perform their Constitutional duty and govern the times, places, and manner of elections in their respective states without fear of a

§2 racial challenge. Given the Constitutional delegation of establishing the "Times, Places and Manner" of elections to state legislatures, U.S. Const. Art I, § 4, cl. 1, it is incumbent upon this Court to lay out the boundaries of §2. Otherwise, legislatures risk having their hands tied behind their backs through court opinions that endlessly expand the interpretation of §2, and that effectively amend the Constitution and allows courts to usurp the regulation of the times, places, and manner of elections.

ARGUMENT

I. The Application of Current Section 2 Jurisprudence Leads to Diverging and Confusing Views Among District and Circuit Courts.

A. The Legal Standard.

A stable legal standard leads to predicable outcomes and provides state legislatures with guidance as to when they might stray outside the lines. The legal standard at issue here is when a state violates §2 of the Voting Rights Act. A law is in violation of §2 when it is passed with discriminatory "intent," [3] or when the law "results" in a discriminatory outcome. JA 610.

[3] While the Ninth Circuit found that Arizona's law prohibiting certain types of absentee ballot collection, H.B. 2023, was passed with discriminatory intent, this brief will not focus on that flawed finding, but will instead focus on the "results" test.

Section 2 of the Voting Rights Act prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a). In explaining when a law results in vote denial or abridgment, Congress stated that a violation exists when, "based on the totality of circumstances," racial minorities "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). Drawing on the language of §2, several circuits have adopted the two-part §2 "results" test used in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

The first part of the "results" test asks, "whether the challenged standard practice or procedure results in a disparate burden on members of the protected class." JA 612. Said differently, the first prong asks whether, "as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." JA 612-613 (quoting *Gingles*, 478 U.S. at 44). "The mere existence—or bare statistical showing—of a disparate impact on a racial minority, in and of itself, is not sufficient." JA 613 (citation omitted).

Second, if the first prong is met, a court, looking at the "totality of the circumstances," then asks if "there is a relationship between the challenged 'standard, practice, or procedure' on the one hand,

and 'social and historical conditions' on the other.[4] JA 613.

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[4] The second prong does nothing to ameliorate the constitutional flaws of §2's results test. In fact, the "social and historical conditions" prong does not appear to do any work *at all*. Nearly every case *Amicus* identified that found the first prong of the results test satisfied—including this case—also found that the second prong was met. *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1037 (9th Cir. 2020); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 668-69 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216, 256-64 (5th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245-47 (4th Cir. 2014); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 556-57 (6th Cir. 2014), *vacated and remanded,* No. 14-3877, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-cv-896, 2016 U.S. Dist. LEXIS 74121, at *49-53 (S.D. Ohio June 7, 2016), *aff'd in part and rev'd in part*, 837 F.3d 612 (6th Cir. 2016); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 759-62 (S.D. Ohio 2016), *rev'd sub nom. Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 957-60 (W.D. Wis. 2016), *aff'd in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *Frank v. Walker*, 17 F. Supp. 3d 837, 877-79 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

Amicus identified only a single lower court decision that found a statistical disparity but concluded that it was not connected to "social and historical conditions" in the state. *See N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 344-46, 354 (M.D.N.C. 2014), *aff'd in part, rev'd in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (finding a disparity but also finding that there was no violation of §2 of the VRA). However, the Fourth Circuit later reversed that holding, concluding that the district court "clearly erred in holding" that the second prong was not met. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

On the surface, the standards outlined in the plain language of §2 and in the *Gingles* "results" test adopted by many of the circuit courts seem simple enough to lead to predicable outcomes—but that could not be further from the truth. As evidenced by the examples below, the reality of the matter is that courts across the country, while applying those "clear" standards have done nothing but muddy the waters of §2 "results" jurisprudence in arriving at inconsistent and diverging conclusions.

B. Examples of Judicial Confusion.[5]

1. Case at Hand (Ninth Circuit).

This case involves a 2016 lawsuit where Appellees-Plaintiffs challenged two Arizona laws under §2—one that dealt with the requirement of voters to vote in their assigned precincts and another that dealt with the criminalization of certain third-party ballot collection practices. JA 582-83. Following an eventual ten-day trial on the merits where the District Court heard live testimony from seven experts and 33 lay witnesses, the District Court rejected Appellees' §2 challenges. JA 246-258.

In regard to the out-of-precinct ("OOP") ballot rejection challenge, the District Court held that "Arizona's rejection of OOP ballots ha[d] no impact on the vast majority of voters." JA 305. The District

[5] The purpose of this discussion is to highlight the stark disagreement in outcomes in §2 cases across the County—not just between different circuits, but between different courts within the same circuit. As such, an in-depth discussion of the various legal arguments will not take place here.

Court found that the voters who were voting OOP were not doing so because of the challenged Arizona law, but because of independent factors such as: residential instability, transportation difficulties, or informational deficits on voters. JA 302-03. The District Court further held, "Precinct-based voting merely requires voters to locate and travel to their assigned precincts, which are ordinary burdens traditionally associated with voting." JA 302.

With Appellees' challenge of HB 2023, the law relating to certain third-party ballot collection practices, the District Court held that it was impossible to find that the challenged law resulted in a decreased opportunity for minority groups to participate in the political processes and to elect candidates of their choice because there are no reliable records of voters who used third-party ballot collectors to collect their ballots in any given election. JA 272. And, for those voters who did use third-party ballot collectors, "relatively few early voters g[a]ve their ballots to individuals who would be prohibited by H.B. 2023 from possessing them." JA 273. "On its face, H.B. 2023 is generally applicable and does not increase the ordinary burdens traditionally associated with voting." JA 273. "Early voters may return their own ballots, either in person or by mail, or they may entrust a family member, household member, or caregiver to do the same."[6] JA 273.

[6] It is important to note that there is no fundamental right to vote via absentee or mail-in ballot. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09 (1969). Here, Arizona made it *easier* for certain individuals to vote via an early mail-in ballot. "[L]aw[s] that make[] it *easier* for others to vote do[] not abridge

Appellees then appealed the matter to the Ninth Circuit where, looking at the same factual record developed in the District Court, a divided panel affirmed the ruling of the District Court. JA 407, 437. The Ninth Circuit then granted en banc review where, again, looking at the same factual record developed in the district court, the majority (7-4) held that the Challenged Provisions violated §2's "results" test, and in a 6-5 decision, that the ballot-collection law was enacted with a discriminatory intent. JA 584, 691. The Ninth Circuit en banc majority held that §2 is implicated where "more than a de minimis number of minority voters" "are disparately affected" by a voting policy. JA 619, 621.

Looking at the same factual record and allegedly applying the same legal standard, the District Court and the Ninth Circuit panel arrived at a starkly different conclusion than the divided en banc Ninth Circuit.

2. Fifth Circuit.

Both the State Appellants and the Secretary of State Appellee argue that the Fifth Circuit opinion of *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), supports their respective positions, thus illustrating just how unclear and confusing this opinion actually is. *See* Pet. for Writ of Cert. 30-31; Sec. of State's Opp. to Pet. for Writ. of Cert. 19-20.

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any person's right to vote." *See Tex. League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 U.S. App. LEXIS 32211 at *14 (5th Cir. Oct. 12, 2020) (emphasis in original) (citation omitted).

Veasey involved a Texas law that required voters "to present one of several forms of photo identification in order to vote." 830 F.3d at 225. After a trial on the merits, the district court "held that [the challenged ID law] was enacted with a racially discriminatory purpose, has a racially discriminatory effect, is a poll tax, and unconstitutionally burdens the right to vote." *Id.* The State of Texas appealed the district court's ruling to the Fifth Circuit, and a panel affirmed in part, vacated in part, and remanded the case for further findings. *Id.* The Fifth Circuit then granted the State's request to rehear the matter en banc. A divided en banc court: (1) reversed and remanded the district court's finding of discriminatory purpose; (2) affirmed the finding that the challenged provision violated the §2 "effects" (also referred to as "results" test) and remanded to the district court to craft an appropriate remedy; (3) vacated the district court's holding that the ID requirement is a poll tax under the Fourteenth and Twenty-Fourth Amendments and rendered judgment for the State on those issues; (4) vacated the district court's rulings that the ID requirement unconstitutionally burdened the right to vote under the First and Fourteenth Amendments under the doctrine of Constitutional avoidance; and (5) directed the district court to not craft any remedies that would disrupt the upcoming November 2016 general election. *Id.* at 272.

Mixed into the procedural history above were more elections, preclearance issues, temporary injunctions, stays, remands, a motion to this Court, legislative amendments to the challenged law while litigation was pending, and a slew of further

procedural matters that dragged this matter on for several years. *Id.* at 227-29.

The Fifth Circuit essentially adopted the same two-part "results" test discussed *supra* that has been adopted in various circuits. In adopting the two-part test, the Fifth Circuit stated, "Use of the two-factor test and the *Gingles* factors limits Section 2 challenges to those that properly link the effect of past and current discrimination with the racially disparate effects of the challenged law." *Id.* at 246. In responding to concerns that the application of the two-part test could be limitless, the Fifth Circuit stated that using the two-part test, together with the *Gingles* factors, "serve[s] as a sufficient and familiar way to limit courts' interference with 'neutral' election laws to those that truly have a discriminatory impact under Section 2 of the Voting Rights Act. Just because a test is fact driven and multifactored does not make it dangerously limitless in application." *Id.* at 246-47. The Fifth Circuit then, quoting the district court below, outlined their logic in finding a discriminatory "effect" or "result":

> (1) SB 14 specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it; (2) a disproportionate number of Texans living in poverty are African-Americans and Hispanics; and (3) African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic

> effects caused by decades of racial discrimination.

Id. at 264.

Despite the Fifth Circuit's conclusory statement that the "results" test's application was not limitless, one could remove "SB 14" from the explanation above and insert virtually any voting requirement that requires affirmative effort (such as obtaining a witness for a mail-in ballot or getting to a polling location) and link it to poverty, then to a minority group, and then to a history of racism of a particular state because, unfortunately, the sad truth is that each of the fifty states have a past history of racism. Notwithstanding the poverty rate being at an all-time low for African-Americans and Hispanics, the poverty rate for Whites is still well below that of African-Americans and Hispanics.[7] Therefore, the Fifth Circuit's logic, when applied to a different voting requirement—the requirement many states have to vote in-person—would also lead to a finding of a §2 "results" violation: (1) you need some type of reliable transportation to get to a polling location; (2) those in poverty have a harder time obtaining reliable transportation; (3) African-Americans and Hispanics have higher poverty rates than Whites; and (4) African-Americans and Hispanics have higher poverty rates because of the racist history of a particular state.

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[7] *See* John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019*, U.S. Census Bureau (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

While the Fifth Circuit stated the right principles in that the two-part test was not limitless, their application and lack of limiting principles say otherwise. No state should be able to pass discriminatory laws, but state legislatures need room to enact sensible regulations of elections without every election regulation being at risk of being stuck down under §2. While the district court and the Fifth Circuit agreed in their §2 "results" findings in *Veasey*, other circuits, discussed *infra*, applying the exact same two-part test, arrived at very different conclusions.

3. Seventh Circuit.

In 2011, Wisconsin passed a law very similar to the law at issue in the Fifth Circuit *Veasey* case—namely that a voter is required to present a photo ID at the polls. *Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014). Additionally, the law was strikingly similar to the one upheld by this Court in *Crawford v. Marion County Election Board*. *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)). Notwithstanding the controlling precedent in *Crawford*, a district court held that Wisconsin's voter ID law violated §2 and enjoined its implementation. *Id.* The Seventh Circuit then stayed the injunction and later reversed the district court. *Id.*

In reasoning nearly identical to that of the Fifth Circuit in *Veasey*, the Wisconsin district court justified its findings this way: "[T]he reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to

live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing." *Id.* at 753 (quoting *Frank v. Walker*, 17 F. Supp. 3d 837, 877 (E.D. Wis. 2014)). Again, based on that logic, what election regulation could pass §2 muster?

The Seventh Circuit cautioned against reading §2 in such an overly expansive way: "[I]t would be implausible to read §2 as sweeping away almost all registration and voting rules. It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." *Id.* at 754. Because all Wisconsin voters had an equal opportunity to get an ID, but some simply chose not to, the Seventh Circuit held that the challenged law did not violate §2. *Id.* at 749, 753.

While the Seventh Circuit did not adopt the two-part "results" test at issue in the case at hand, it did alternatively hold that, had they adopted it, the first prong would not have been satisfied because everyone had an equal opportunity to obtain an ID and vote. *Id.* at 754-55. The Seventh Circuit further noted that it was skeptical of the second "history and conditions" prong because it fails to distinguish between discrimination by the government and discrimination by unrelated third parties—such as private businesses, etc. *Id.* at 755.

Again, with *Frank*, just as with the case at hand, you have a circuit court overturning a district court on a §2 "results" ruling. In *Frank*, the Seventh Circuit exercised judicial restraint and correctly

allowed a facially neutral, everyday election regulation to stand.

4. Sixth Circuit.

Although the Sixth Circuit appears to have adopted the two-part "results" test, it follows a more restrained approach similar to that of the Seventh Circuit in *Frank*. *See Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). In *Ohio Democratic Party*, the Sixth Circuit reversed a district court opinion that struck down Ohio laws reducing the days allowed for early voting and eliminating same-day voter registration. *Id.* at 637.

The Sixth Circuit upheld the challenged laws despite a showing in the district court that African-Americans voted early and used same-day registration "at a rate higher than other voters." *Id.* at 627-28. The Sixth Circuit held that "disproportionate racial impact alone" was not enough to establish a discriminatory burden, result, effect. *Id.* at 637 (citation omitted). The plaintiffs were required to show that the challenged laws caused the "racial inequality in the opportunity to vote," but they failed to do so. *Id.* at 637-39.

Again, using the same two-part "results" test, and applying the same facts to the standard, a district court and a circuit court arrived at different conclusions. Further, the Sixth Circuit properly exercised restraint in holding that statistics alone did not show a discriminatory §2 "result."

5. Fourth Circuit.

Two recent cases out of the Fourth Circuit confirm that the Sixth Circuit is more in line with the limited approaches of the Seventh and Sixth Circuits.

The first case, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), involves a Virginia voter-ID law that the plaintiffs argued was a violation of §2. Notwithstanding a finding that black voters lacked proper ID at a higher rate than white voters, the Fourth Circuit rejected finding a §2 violation because doing so would "sweep away all elections rules that result in a disparity in the convenience of voting." *Id.* at 600-01. The Fourth Circuit held that §2 was not about "disparate inconveniences" but rather about equal "opportunity of the protected class to participate in the electoral process." *Id.* at 601.

The second case, *N.C. State Conference of the NAACP v. Raymond*, No. 20-1092, 2020 U.S. App. LEXIS 37663 (4th Cir. Dec. 2, 2020), a matter decided just days ago, involves a North Carolina voter-ID law. Here, the Fourth Circuit reversed a district court's finding of a §2 violation. *Id.* at *3. The Fourth Circuit held that the district court's over-reliance on North Carolina's racial history was improper. *Id.* Because "a legislature's past acts do not condemn the acts of a later legislature" and because a court "must presume [the legislature] acts in good faith," the Fourth Circuit reversed the district court. *Id.* (citation omitted).

These two cases are further examples of judicial restraint and, as evidenced in *Lee*, the confusion that currently exists between the district and circuit courts regarding the proper application of the §2 "results" test.

* * *

Laid out in this way it is clear that the prevailing legal standards invite different judges to make different rulings based on the same sets of facts—and that often these judgments seem to be policy decisions of the sort better left to the state legislatures. More clarity is needed from this Court to end the string of confusing and conflicting opinions and to provide a uniform standard by which state legislatures can pass the reasonable, nondiscriminatory laws necessary for the regulation of elections without immediate fear of a §2 challenge.

II. Under The Ninth Circuit's Section 2 Analysis, Virtually *Any* Election Law or Regulation Could be Struck Down as a Violation of Section 2.

As discussed in Section I.B.2, *supra*, a court using the two-part legal standard adopted by the Ninth, Fifth, and other circuit courts, can arrive at an infinite number of outcomes because an infinite number of statistics can be mined from different factual scenarios before the courts.

Given the unfortunate, yet very real, racial history of our country, any court can find a history of racism coupled with the higher levels of poverty

among minority groups. *See* Section I.B.2, *supra*. With that information, courts could label any ordinary election regulation as targeting minority groups through the poverty that was brought on by a prior history of discriminatory practices in a particular state.

Bare statistical disparities cannot be enough to find a violation of the §2 "results" test. For example, if white voters are 2% more likely to register to vote than black voters, the voter registration system cannot simply be held to violate §2. *See Frank*, 768 F.3d at 754. Further, if white voter turnout was 2% greater than black voter turnout on Election Day, the in-person voting requirement could not simply be held to violate §2. *Id.*

However, following the §2 framework outlined in the Ninth and Fifth circuits, ordinary voting regulations, such as the requirement to register to vote or simple polling location hours, could easily be invalidated due to racial statistical disparities. Following this logic, "[m]otor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses." *Id.* "[I]t would be implausible to read §2 as sweeping away almost all registration and voting rules," yet that is exactly how the Ninth and Fifth Circuits have read the §2 "results" test. *Id.*

When simple cherry-picked statistics are used to measure whether a law has a disproportionate racial effect, state legislatures will start to place a

disproportionate emphasis on racial outcomes and studies when passing and considering legislation, thus putting the legislature in danger of violating the First and Fourteenth Amendments' Equal Protection Clause. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017) (race cannot be a predominate factor in motivating a legislature's decision).

A. Statistics Can Be Misleading.

Simple reliance on statistics can be dangerous because statistics can be misleading. For example, in the case at hand, the Ninth Circuit emphasized the higher percentage of minorities who cast OOP ballots. JA 592-95. In describing the 2012 OOP numbers for Pima County, the Ninth Circuit used phrases such as, "the rate of OOP ballots was 123 percent higher for Hispanic voters, 47 percent higher for American Indian voters, and 37 percent higher for African American voters." JA 594. The problem with simply providing percentages is that one does not know what is actually going on behind the curtain. It is the experience of *Amicus* that when parties to a case, courts, or simply the general public use blanket percentages to support their arguments, the numbers behind those percentages often tell a different story. In the percentages discussed above, the Ninth Circuit was specifically discussing Pima County, Arizona's second most populous county. JA 594. The actual OOP numbers in Pima County tell an entirely different story than the misleading percentages used by the Ninth Circuit to justify their §2 "results" finding. First, the OOP numbers in Pima County have significantly decreased since 2012. JA

299. In the 2016 general election, only 1,150 OOP ballots were cast out of 427,102, representing only 0.27% of all votes. JA 299. The 2016 numbers are down from the 2012 numbers, which saw 2,212 OOP ballots out of 385,725 total votes, representing 0.57% of all votes. JA 299.

Why did the Ninth Circuit use older numbers that told a different story than more recent OOP numbers? Because it helped its narrative. Such is the danger with legal standards that disproportionally rely on potentially misleading statistics. Dissecting the Ninth Circuit's statistical statements above, it appears that one is dealing with a difference of mere dozens of voters between different racial groups. Judge Easterbrook of the Seventh Circuit warned against dividing percentages to prove a point in the §2 context. *See Frank*, 768 F.3d at 752 n.3. Judge Easterbrook wisely stated:

> If 99.9% of whites had photo IDs, and 99.7% of blacks did, the same approach would yield the statement "blacks are three times as likely as whites to lack qualifying ID" (0.3 / 0.1 = 3), but such a statement would mask the fact that the populations were effectively identical. That's why we do not divide percentages.

Id. This is similar to the consumer assuming that they are saving a sizeable amount of money by the "50% off" sale tag on a piece of furniture, only to find that the item was originally priced at $10, making their discount just $5. It is important to fully

understand the numbers behind the asserted statistics before arriving at any conclusions.

The truth of the matter is that in Arizona as a whole, OOP ballots have decreased from 14,885 OOP ballots out of 2,320,851 total (0.64%) in 2008 to 3,970 total OOP ballots out of 2,661,497 total ballots (0.15%) in 2016. JA 297-98. Using the language of the Ninth Circuit, Arizona has had a 73% decline from 2008 to 2016. JA 298. This large decrease in numbers is likely due to the expansion of the Vote Center model (as opposed to the precinct model) in eleven out of Arizona's fifteen counties. *See* 2020 November Election, Citizens Clean Elections Commission (last accessed Dec. 6, 2020), https://www.azcleanelections.gov/arizona-elections/November-3-election. Each Vote Center is equipped to print a specific ballot, depending on each voter's particular district. This way, all races for which a voter is eligible to vote are included on their ballot regardless of which Vote Center they attend county-wide. Ariz. Rev. Stat. § 16-411(B)(4).

An additional concern with an over-reliance on statistical data to prove a §2 violation is that it can often lead to a counterintuitive outcome. For example, as discussed *supra*, the number of OOP voters in Arizona keeps falling. However, under the Ninth Circuit's approach, the rarer a situation becomes, the more potential there is for an asserted statistical disparity to be used to upend the provision. Such is the case with the challenged precinct-voting model currently being used in only four Arizona counties. Even while a practice is naturally phasing out and becoming less relevant, it

is more susceptible to a §2 challenge because if there are only 100 OOP voters in a single county, and there is a change of just a few, it statistically appears to be a larger problem than it is in reality.

Another example of a counterintuitive outcome is in dealing with year-to-year fluctuations in voting numbers and what type of voting is being used by different racial groups. This could mean that a law has no disparity in years two or four, but then does have one in year six, thus leading to an invalidation of the law under §2, only to return to no disparity in year eight. The invalidation in year six appears to be driven by a random statistical anomaly that has nothing to do with the legislature's intent or motives, and not a real racial problem such as §2 was intended to solve. A law should not be valid under §2 one year, but then invalid the next. However, with the statistical cherry-picking used by the Ninth Circuit to support its §2 holding, this feared counterintuitive outcome is exactly what lies in store if the Ninth Circuit's opinion is allowed to stand.

III. Courts Should Not Be Involved In Statistical Comparisons of Policy Choices of State Legislatures.

The Ninth Circuit's decision in this case is replete with statistical analysis but conspicuously light on judicial interpretation of the relevant issue: namely, the state legislature's constitutional authority over election rules. "Under the Constitution, it is the state legislature—not the governor *or* federal judges—that is authorized to establish the rules that govern the election[s]" in each state. *Tex. League of*

United Latin Am. Citizens v. Hughs, No. 20-50867, 2020 U.S. App. LEXIS 32211, at *29 (5th Cir. Oct. 12, 2020) (Ho, J., concurring) (emphasis in original). States may decide upon different policies concerning provisional ballots and other issues, but that "variation … reflects our constitutional system of federalism. Different state legislatures may make different choices." *Democratic Nat'l Comm. v. Wis. State Legis.*, No. 20A66, (Oct. 26, 2020) (Kavanaugh, J., concurring), slip op. 5.

This year, there were a number of cases in which federal courts overturned lawfully adopted state election rules, and in all but one of those cases, the Supreme Court affirmed the legislature's prerogative to adopt its own rules. *See, e.g.*, *id.* at *1; *Andino v. Middleton*, No. 20A55 (Oct. 5, 2020) (granting stay where district court order enjoined South Carolina's witness requirement for absentee ballots as unconstitutional); *Merrill v. People First of Ala.*, 20A67 (Oct. 21, 2020) (granting stay where district court order enjoined Alabama's photo identification and witness requirements for absentee voting during the Virus as unconstitutional and violative of the Americans with Disabilities Act); *Clarno v. People Not Politicians Or.*, No. 20A21 (Aug. 11, 2020) (granting stay of district court order relaxing Oregon's election procedures because of the Virus); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (granting stay of district court order relaxing Idaho's rules for ballot initiatives); *but see, Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28 (Aug. 13, 2020) (denying request for stay only because all state officials were of the same party and supported the lower court's decree relaxing Rhode Island's witness

requirement). There are no facts here which compel a different outcome.

While "[o]ur founding charter never contemplated that federal courts would dictate the manner of conducting elections[,]" that is precisely what the Ninth Circuit did here. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020). The constitutional authority conferred upon state legislatures by the Elections Clause should be affirmed here as it has been in similar cases, and federal courts should avoid playing a policymaking role for which they are not properly equipped.

IV. A "Safe Harbor" Approach to Facially Neutral Election Laws and Regulations Is Needed With Section 2 Claims.

> It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives," and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections ….

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (citations omitted).

As the Seventh, Fourth, and Sixth Circuits held, the §2 "results" test cannot be read in a way to invalidate everyday voting regulations that simply require the "usual burdens of voting." *See* Sections I.B.3-5, *supra*; *see also Crawford*, 553 U.S. at 198. However, under the current framework of the §2 "results" test advanced by the Ninth Circuit, virtually any election regulation could be invalidated as having a disproportionate racially discriminatory "result."

In order to provide for the proper regulation of elections, a "safe harbor" standard, similar to the standard established in the *Anderson/Burdick* line of cases—i.e., a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory voting restrictions—is needed in the §2 "results" context. *See Burdick*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). Otherwise any ordinary voting regulation could be struck down due to a purported racial statistical disparity.

To allow the standard adopted in the Ninth and Fifth Circuits to stand without clarity from this Court would be to "afford state legislatures too little breathing room, leaving them 'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 137 S. Ct. at 802 (citation omitted). State legislatures are stuck between a rock and a hard place in attempting to legislate around the ever

expanding §2 "results" umbrella by attempting to temper their legislation by relying on racial statistics, and thus risk making race a predominate factor and leading to an Equal Protection violation. *See id.* at 794.

Absent action by this Court, states will be unable to adhere to their Constitutional duty to adopt election regulations. *See* U.S. Const. Art. I, § 4, cl. 1. The "breathing room" required can be achieved by adopting the *Anderson/Burdick* Equal Protection "safe harbor" pertaining to everyday neutral election regulations that simply require the "usual burdens of voting." *See Bethune-Hill*, 137 S. Ct. at 802; *Crawford*, 553 U.S. at 198. This is a similar standard adopted in the Seventh, Sixth, and Fourth Circuit cases discussed above. *See* Sections I.B.3-5, *supra.* Afterall, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

CONCLUSION

We respectfully urge this Court to reverse the decision below and to elucidate a standard that provides a "safe harbor" in which state legislatures can perform their Constitutional duty to prescribe the times, places, and manner of holding elections in their respective states.

Respectfully submitted,

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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.

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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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Authorities

Other Authorities

In the Supreme Court of the United States

Nos. 19-1257 & 19-1258

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
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ON WRITS OF CERTIORARI
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BRIEF OF SENATOR TED CRUZ AND TEN OTHER MEMBERS OF THE UNITED STATES SENATE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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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 *AMICUS CURIAE* PROFESSOR NICHOLAS STEPHANOPOULOS IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

Statutes and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Professor Nicholas Stephanopoulos is a Professor of Law at Harvard Law School, where he specializes in election law. He is the author of a recent article on how courts should address claims of racial vote denial under Section 2 of the Voting Rights Act ("VRA"). *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566 (2019). He has also published extensively on other VRA issues. *See, e.g.*, Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. (forthcoming 2021); Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323 (2016); Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329 (2016); Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 Sup. Ct. Rev. 55. He is a coeditor, as well, of a leading election law casebook. *See Election Law: Cases and Materials* (6th ed. 2017).

SUMMARY OF THE ARGUMENT

Over the nearly four decades that have passed since Congress enacted Section 2 in its current form in 1982, this Court has never decided a racial-vote-denial case under the provision. (In contrast, the Court has decided many racial-vote-dilution cases under Section 2.) To rule in this matter, then, the Court will have to determine the standard for liability

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[1] No party or its counsel had any role in authoring or made any monetary contribution to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37. All parties have consented to the filing of this brief and blanket letters of consent have been filed with the Clerk. *Id.*

that applies to Section 2 vote-denial cases. The Court should consider alternatives to the two-part test, recently embraced by several lower courts, that asks (1) whether an electoral regulation causes a disparate racial impact, and (2) whether this disparity is attributable to the regulation's interaction with historical and ongoing discrimination. In particular, the Court should consider adopting the disparate-impact framework used for decades under Title VII of the Civil Rights Act ("CRA"), the Fair Housing Act ("FHA"), and many more laws. The first step of this framework is the same: whether a particular practice causes a significant racial disparity. But the defendant then has the opportunity to show that the practice is necessary to achieve a substantial interest. And if that showing is made, the plaintiff may still prevail by demonstrating that this interest could be attained in a different, less discriminatory way.[2]

[2] Scholars recommending an approach along these lines include Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 Ind. L.J. 299, 316 (2016); Stephanopoulos, *Disparate Impact, Unified Law*, *supra*; and Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 441 (2015).

This brief takes no position on what the result would be if the usual disparate-impact framework were applied to the facts of this case. However, the court below did thoroughly analyze "whether the polic[ies] underlying" Arizona's rules on out-of-precinct ballots and third-party ballot collection are "tenuous." S. Rep. No. 97-417, at 29 (1982); *see Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc) ("Of the various factors, we regard . . . the tenuousness of the justification for the challenged voting practices[] as particularly important."). As discussed below, the most obvious way to adopt the usual disparate-impact framework in the Section 2 vote-denial context

This approach (the "usual disparate-impact framework," or "usual framework" for short) applies to voting as naturally as to employment, housing, or other activities that are subject to antidiscrimination laws. Consider the most familiar theoretical account of disparate-impact law: that it smokes out racially discriminatory motives that cannot be proven directly. This theory works perfectly well in the voting context. When an electoral regulation differentially affects minority and nonminority citizens—and this disparate impact is unnecessary or could have been mitigated—a discriminatory purpose may reasonably be inferred. Absent such a purpose, after all, why would the regulation have been enacted in the first place?

As a substantive matter, voting also resembles employment, housing, and other areas already subject to the usual framework. Like a job or a home, the franchise is a valued good to which access is determined by criteria that not everyone can satisfy. It is true that voting (unlike employment and housing) is exclusively regulated by the state. But this only means that it is public rather than private interests that are the potential justifications for disparate impacts. It is true as well that voting (again unlike employment and housing) is a nonmarket good. This too, though, simply takes off the table one common rationale for racial discrepancies: private actors' pursuit of profit.

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is precisely by highlighting this tenuousness factor. *See* Argument IV, *infra*.

Turning to doctrine, the usual framework has a major practical advantage. Because it has been employed for so long, many contentious issues have been resolved under it. For example, must litigants establish a *large* disparate impact, or will any discriminatory effect do? Lower courts have disagreed in Section 2 vote-denial cases. But under the usual framework, it has been clear for decades that, to make out a prima facie case, a plaintiff must show that a policy has "*significantly* different" effects on minorities and nonminorities. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (emphasis added).

Similarly, what *kind* of disparate impact must be proven in Section 2 litigation—a difference between minority and nonminority citizens' likelihoods of compliance with an electoral requirement, or a racial gap in voter turnout? Again, lower courts have arrived at divergent conclusions. But under the usual framework, this Court long ago rejected the "suggestion that disparate impact should be measured only at the bottom line." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982). The Court held, in other words, that the racial discrepancies caused directly by a policy are at least as probative as its ultimate downstream consequences.

Beyond settling doctrinal issues, the adoption of the usual framework would bolster Section 2's constitutionality. Section 2 enforces the Fourteenth and Fifteenth Amendments. Both of these provisions are generally violated only if a racially discriminatory purpose is established. Such a purpose can seldom be deduced from a racial disparity alone. But an invidious aim can be inferred more readily when a

disparate impact is unnecessary and could have been reduced by a different policy. In that case, "disparate-impact liability under the [usual framework] plays a role in uncovering discriminatory intent." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015). Accordingly, the usual framework would tighten the fit between Section 2 and the underlying constitutional violations it seeks to prevent or remedy.

The usual framework would also alleviate any tension between Section 2 and the equal protection principle of colorblindness. If electoral regulations breach Section 2 whenever they produce racial disparities, then jurisdictions might have to fixate on race to avoid such disparities. This racial focus could "cause race to be used and considered in a pervasive way" and "serious constitutional questions then could arise." *Id.* at 542. In contrast, the usual framework would not create the same incentive for jurisdictions to operate race-consciously. Jurisdictions would simply have to ensure that their electoral policies actually advance important interests and do so without creating unwarranted racial discrepancies. Jurisdictions would not have to try to eliminate all racial gaps in voting.

Lastly, the adoption of the usual framework would be consistent with Section 2's text and history. On its face, Section 2 forbids one type of racial disparity from leading automatically to liability. "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). The usual framework dovetails nicely with

this disclaimer since, under it, neither this nor any other disparate impact would suffice, alone, to invalidate an electoral regulation.

Moreover, the definitive Senate report that accompanied the 1982 amendments to Section 2 identified as a probative factor "whether the policy underlying [a jurisdiction's electoral policy] is tenuous." S. Rep. No. 97-417, at 29 (1982). This tenuousness factor has been highlighted by this Court's Section 2 decisions. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 37, 45 (1986). And the factor could easily be construed to incorporate the second and third steps of the usual framework. An electoral practice that does not serve a substantial interest, or is unnecessary to a substantial interest's attainment, has a tenuous justification. So does an electoral practice whose disparate racial effects could have been lessened without compromising a jurisdiction's legitimate goals.

ARGUMENT

I. THE USUAL DISPARATE-IMPACT FRAMEWORK IS APPLICABLE TO VOTING.

The usual disparate-impact framework is currently employed under a wide range of federal statutes. Most prominently, it applies to employment under Title VII of the CRA, *see* 42 U.S.C. § 2000e-2(k), and to housing under the FHA, *see* 24 C.F.R. § 100.500. The usual framework also applies to recipients of federal funds under Title VI of the CRA, *see* Civil Rights Div., U.S. Dep't of Justice, *Title VI*

Legal Manual, § 7, at 6 (2017), to age discrimination under the Age Discrimination in Employment Act ("ADEA"), *see Smith v. City of Jackson*, 544 U.S. 228, 233–40 (2005), to lending discrimination under the Equal Credit Opportunity Act, *see* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994), and to disability discrimination under the Americans with Disabilities Act, *see* 42 U.S.C. § 12112(b)(6). In fact, the only corner of disparate-impact law where the usual framework is *not* used, at present, is voting.

To reiterate, the usual framework has three sequential steps. First, the plaintiff must identify a particular practice that causes a significant racial disparity. Next, if this showing is made, the defendant has the burden of proving that the practice is necessary to achieve a substantial interest. Finally, if the defendant carries this burden, the plaintiff must demonstrate that this interest could be attained in a different, less discriminatory way. The best-known statement of this approach is found in the 1991 amendments to Title VII of the CRA. Under these amendments, liability ensues if,

1. "[A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race[.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i).

2. "[T]he respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]" *Id.*

3. "[T]he complaining party makes the demonstration"—that the disparate impact could be mitigated without undermining the employer's business objectives—"with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." *Id.* § 2000e-2(k)(1)(A)(ii).

Another influential formulation of the usual framework, used for decades in FHA cases, is as follows: The "plaintiff first bears the burden of proving . . . that a practice results in . . . a discriminatory effect on the basis of a protected characteristic." Implementation of the Fair Housing Act's Discriminatory Effects Standard ("FHA Implementation"), 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013). Second, "[i]f the . . . plaintiff proves a prima facie case, the burden of proof shifts to the . . . defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests." *Id.* And third, "[i]f the . . . defendant satisfies this burden, then the . . . plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect." *Id.*[3]

[3] The Department of Housing and Urban Development ("HUD") recently made certain amendments to this formulation, *see* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020), but these changes have not yet been recognized by any courts.

A. The Theoretical Justifications for the Usual Framework Apply to Voting.

To determine if the usual framework is applicable to voting, a logical place to start is with the theories that underpin disparate-impact law. These theories, it turns out, extend to voting as readily as to employment, housing, or any other activity covered by antidiscrimination laws. First, one prominent account of disparate-impact law sees it as a way to target racially discriminatory motives that are suspected but cannot directly be proven. On this view, few contemporary defendants are so foolish as to create records that reveal their invidious objectives. In the absence of smoking guns, discriminatory intent must be inferred from circumstantial evidence. And perhaps the most probative such evidence is a significant racial disparity, caused by a particular practice, that could have been avoided without compromising any legitimate interest.

Justice Scalia characterized disparate-impact law in these terms in a 2009 concurrence, "framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment." *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). The Court has shared this perspective, observing that "disparate-impact liability . . . plays a role in uncovering discriminatory intent." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015). Discriminatory intent, the Court added, may include "unconscious prejudices," "disguised animus," and "covert and illicit stereotyping." *Id.*; *see*

also, e.g., Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1376–77 (2010) (presenting disparate-impact law as "an evidentiary dragnet intended to identify hidden intentional discrimination").

This model of disparate-impact law plainly applies to voting. The logic that allows an invidious aim to be inferred is identical whether the practice at issue pertains to employment, housing, elections, or some other activity. In each context, one may surmise that a defendant intends to handicap minority members when she adopts a policy that causes a substantial and unjustified racial disparity. This sort of disparity in the electoral process is as suspicious as in any other domain. Put differently, the theory of disparate-impact law as a proxy for deliberate discrimination is trans-substantive. There is nothing about it that is limited to a particular legal field.

The other leading account of disparate-impact law stresses the removal of obstacles that unjustifiably prevent racial minority members from enjoying the same opportunities as nonminority members. By lowering these hurdles, disparate-impact law is supposed to improve conditions for minorities, to prevent their existing disadvantages from spreading into new areas, and ultimately to undermine the racial hierarchies of American society. This Court invoked this anti-racial-stratification model in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the decision that first recognized a disparate-impact cause of action under Title VII. So construed, Title VII would facilitate "the removal of artificial, arbitrary, and unnecessary barriers to employment"

that "operate as 'built-in headwinds' for minority groups." 401 U.S. at 431, 432. In *Inclusive Communities*, likewise, the Court quoted this language from *Griggs* and criticized housing policies that "arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation." 576 U.S. at 540; *see also, e.g.*, Primus, *supra*, at 1376 (noting that disparate-impact law can be seen as "redress[ing] self-perpetuating racial hierarchies inherited from the past").

This theory, too, is as germane to voting as to employment, housing, or any other area where discrimination is prohibited. Elections, like workplaces or real estate, often exhibit racial discrepancies. (In the electoral context, these discrepancies are between minority and nonminority citizens' political participation.) Some of these discrepancies, in any domain, are justifiable or unavoidable. But some are not. These racial gaps could be eliminated, or at least reduced, without impeding defendants' legitimate objectives. Under the anti-racial-stratification model, disparate-impact law helps to induce the removal of these unnecessary gaps. It thus makes progress toward a society where unwarranted racial disparities no longer exist—not in voting and not anywhere else either.

B. Voting Is Sufficiently Similar to Other Activities Covered by the Usual Framework.

To be sure, voting differs from employment and housing (the areas at the core of the usual framework) in certain key respects. Voting is exclusively

regulated by the state; indeed, it cannot even occur unless the government first establishes and administers an electoral system. In contrast, private actors make most decisions about workplaces and real estate based on their own considerations, rather than those of any public authority. Voting is also not a market good; it has no price set by the forces of supply and demand. Conversely, market dynamics largely determine the wages of employees and the costs of residences. And voting is not a rival good either; when one citizen casts a ballot, she does not stop another from doing the same. But when a job is filled or a home is sold, the position or the property becomes unavailable to everybody else.

Significant as these distinctions are, they do not render the usual framework any less apt for voting. Instead, they either are legally irrelevant or suggest that courts should have fewer qualms about striking down electoral (as opposed to employment or housing) practices. Start with the fact that the defendant in Section 2 vote-denial cases is necessarily the government. This does not actually distinguish these cases from Title VII and FHA suits, which can be brought against public employers and housing providers as readily as against private ones. Additionally, the governmental status of Section 2 defendants simply means that public rather than private interests must be analyzed under the usual framework's second and third prongs. Public interests like preventing fraud, conserving resources, and efficiently administering elections are *different* from the private pursuit of profit. But they are no less amenable to being weighed for their importance, scrutinized for their fit with challenged policies, and

having this fit compared to that of alternative measures. *See, e.g.*, FHA Implementation, 78 Fed. Reg. at 11,470 (explaining, in the FHA context, that the usual framework "applies to individuals, businesses, nonprofit organizations, *and public entities*" (emphasis added)).

Similarly, the main implication of voting not being a market good is that there is no market-based reason to limit it. The burdening of the franchise, that is, cannot be justified by what *Griggs* called "business necessity," 401 U.S. at 431, or *Inclusive Communities* described as "the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system," 576 U.S. at 533. The most familiar rationale for countenancing racial disparities is thus off the table when it comes to disputed electoral practices. To defend such disparities, jurisdictions must cite non-market interests.

As for voting's lack of scarcity, it avoids a potential pitfall of judicial intervention. When a good (like employment or housing) is in short supply, courts may be concerned about the innocent victims of their decisions: the nonminority job applicants who would no longer get offers if a hiring criterion were dropped, the nonminority homebuyers who would no longer be sold units if a housing policy were revised, and so on. These worries may convince courts not to invalidate challenged practices, or at least to dilute the remedies they ultimately impose. But with a nonrivalrous good like voting, there is no risk of such collateral damage. A ruling that makes it easier for minority citizens to vote does not inhibit nonminority

citizens from casting ballots. In fact, it *helps* them to vote, thus yielding innocent *beneficiaries* rather than victims.

II. THE USUAL DISPARATE-IMPACT FRAMEWORK WOULD RESOLVE A SERIES OF ISSUES ABOUT RACIAL-VOTE-DENIAL CLAIMS.

Both disparate-impact theory and the nature of voting, then, indicate that the usual framework *could* be applied to Section 2 vote-denial claims. One compelling reason why it *should* be applied to them is that doing so would resolve a number of issues that have arisen under Section 2. To date, these issues have divided the lower courts. But they have been settled—and reasonably so—over the decades in which the usual framework has been employed in other fields. Accordingly, if the usual framework were extended to Section 2, these doctrinal solutions would come with it.

A. Must a Plaintiff Challenge a Specific Practice or the Whole Electoral System?

To begin with, what exactly is a Section 2 vote-denial plaintiff supposed to challenge—a particular electoral practice or a jurisdiction's integrated system of election administration? Some courts have individually examined a series of measures, making factual findings and reaching legal conclusions as to each discrete policy. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 658 (6th Cir. 2016) (Keith, J., concurring) (observing that the court

"engage[d] in a piecemeal freeze frame approach . . . finding that each new requirement in a vacuum does not meet the standard for disparate impact"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014). In contrast, other courts have evaluated the collective results of all relevant electoral rules. *See, e.g.*, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (analyzing an Ohio cutback to early voting as "one component of Ohio's progressive voting system"); *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

Under the usual framework, this question has a clear answer: A disparate-impact plaintiff must ordinarily attack a specific practice. In the Title VII context, Congress opted for particularity in most circumstances in its 1991 amendments to the CRA. As a general matter, Congress required "the complaining party [to] demonstrate that each *particular* challenged employment practice causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (emphasis added). The only exception arises "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis." *Id.* HUD took the same position when it clarified the operation of the usual framework in FHA cases. Typically, a plaintiff must "identif[y] the *specific* practice that caused the alleged discriminatory effect." FHA Implementation, 78 Fed. Reg. at 11,469 (emphasis added). On occasion, though, "it may be appropriate to challenge the decision-making process as a whole." *Id.*

B. Does the Magnitude of the Racial Disparity Matter?

Second, does a policy's disparate racial impact have to reach a certain magnitude before Section 2 can be violated? Some courts have said yes, rejecting claims where the differences in political participation between minority and nonminority citizens were small. *See, e.g.*, *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1274 (N.D. Ala. 2018) (ruling against a challenge to Alabama's photo ID requirement where "the discrepancy in photo ID possession rates among white, Black, and Hispanic registered voters in Alabama is miniscule"), *aff'd sub nom. Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202 (11th Cir. 2020); *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 367–68 (M.D.N.C. 2014), *aff'd in part and rev'd in part*, 769 F.3d 224 (4th Cir. 2014). Conversely, other courts have concluded that any racial discrepancy caused by an electoral requirement is sufficient. *See, e.g.*, *League of Women Voters*, 769 F.3d at 244 ("[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied . . . .").

The usual framework has also resolved this issue. In some of its first decisions interpreting Title VII, this Court held that only employment practices that have "*significantly* different" effects on minorities and nonminorities establish a prima facie case. *Albemarle Paper Co.*, 422 U.S. at 425 (emphasis added); *see also, e.g.*, *Teal*, 457 U.S. at 446 (requiring "a *significantly* discriminatory impact" (emphasis

added)). Consistent with the Court's rulings, the Equal Employment Opportunity Commission ("EEOC") published guidelines in 1978 stating that employment practices' "differences in selection rate" may "constitute adverse impact" when "they are *significant* in both statistical and practical terms." 29 C.F.R. § 1607.4(D) (emphasis added).[4] These guidelines have long been treated as "a rule of thumb for the courts." *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (plurality opinion).

C. What Kind of Racial Disparity Must Be Shown?

Third, how should a racial disparity be measured—in terms of minority and nonminority citizens' likelihoods of compliance with a provision, or based on the provision's downstream effect on voter turnout? Some courts have taken the former approach under Section 2, focusing on a policy's immediate consequences for minority and nonminority citizens. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 260 (5th Cir. 2016) (en banc) ("[W]e decline to require a showing of lower turnout to prove a Section 2 violation."); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 953 (W.D. Wis. 2016), *aff'd in part and rev'd in part sub nom.*

[4] The EEOC's guidelines also suggested a specific threshold for a racial disparity: "[a] selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate." 29 C.F.R. § 1607.4(D). This approach is less useful than determining the statistical significance of the difference between minority and nonminority selection rates, however, when these rates are low or when the number of observations is small. *See, e.g.*, David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* 88–90, 154 (1980).

Luft v. Evers, 963 F.3d 665 (7th Cir. 2020). However, other courts have insisted that a measure ultimately reduce the turnout of minority citizens to a greater extent than that of nonminority citizens. *See, e.g.*, *Ohio Democratic Party*, 834 F.3d at 639; *Frank*, 768 F.3d at 747 (asking "[d]id the requirement of photo ID reduce the number of voters below what otherwise would have been expected?" and "[d]id that effect differ by race or ethnicity?").

Under the usual framework, again, this problem has been solved. In *Teal*, this Court held that disparate impact under Title VII refers to the direct effects of employment practices, not their downstream consequences. The Court faced an employer whose written exam for promotion to supervisor caused a racial disparity but whose affirmative action program ensured a proportional share of minority supervisors. 457 U.S. at 443–44. The Court ruled that the "'bottom line'" of proportionality "does not preclude [plaintiffs] from establishing a prima facie case, nor does it provide [defendants] with a defense to such a case." *Id.* at 442. The Court explained that a racial disparity at one stage of the promotion process, which bars certain minority employees from becoming supervisors, cannot be offset by racial balance after the process has concluded, which benefits a different set of minority employees. "Title VII does not permit the victim of a . . . discriminatory policy to be told that he has not been wronged because other persons of his or her race . . . were hired." *Id.* at 455.

D. Is Interaction with Discrimination Necessary?

Fourth, must a practice's disparate racial impact be linked to its interaction with historical and ongoing discrimination? The second element of the two-part test recently adopted by certain lower courts for Section 2 vote-denial claims requires such a connection. These courts also view the factors identified by the critical 1982 Senate report as valuable evidence of the discriminatory conditions with which a practice must interact. *See, e.g.*, *Veasey*, 830 F.3d at 244–45 (emphasizing the Senate factors); *League of Women Voters*, 769 F.3d at 240 (same). In contrast, other courts have declined to consider private (as opposed to public) discrimination as well as any socioeconomic differences it may have caused. *See, e.g.*, *Frank*, 768 F.3d at 753 (Section 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters").

The usual framework has answered this question as well: The reason for a policy's disparate impact need not be the policy's interaction with discriminatory conditions. In *Dothard v. Rawlinson*, this Court examined two hiring criteria for Alabama prison guards: a minimum height of five feet two inches and a minimum weight of 120 pounds. 433 U.S. 321, 323–24 (1977). In tandem, these criteria excluded far more women than men. *Id.* at 329–30. But they did so not through any interaction with historical and ongoing discrimination, but rather because women, as a biological matter, tend to be shorter and lighter than men. The Court nevertheless

found Alabama liable under Title VII on a disparate-impact theory. *Id.* at 331. As scholars have recognized, the Court thus codified the principles that "the reason the [practice] has an adverse impact is [not] at issue" and that "the mere fact of adverse impact requires the employer to justify its practice." Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 Wis. L. Rev. 937, 963.

E. What Is the Proper Remedy?

Lastly, what relief is appropriate when an electoral requirement violates Section 2? Some courts have opted to invalidate unlawful practices, permanently enjoining their future use. *See, e.g.*, *N.C. State Conf. of NAACP*, 831 F.3d at 239 ("[T]he proper remedy . . . is invalidation."); *Frank v. Walker*, 17 F. Supp. 3d 837, 879 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). Conversely, other courts have ruled that measures should be softened when they contravene Section 2—relaxed for minority and nonminority citizens alike—not struck down in their entirety. *See, e.g.*, *Veasey*, 830 F.3d at 271 ("The remedy must be tailored to rectify only the discriminatory effect on those voters who do not have [photo] ID or are unable to reasonably obtain such identification."); *Frank v. Walker*, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016), *aff'd in part and rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

Under the usual framework, once more, this issue has been decided. Under Title VII, "the usual remedy in a disparate impact case" is "general

invalidation of the challenged policy." Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 680 (2001). The court simply nullifies the unlawful employment practice; it does not try to reduce the practice's racial disparities or to make the practice more "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under the FHA, likewise, this Court held in *Inclusive Communities* that "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice." 576 U.S. at 544. Unlike such relief, "[r]emedial orders that impose racial targets or quotas might raise more difficult constitutional questions" and so are disfavored. *Id.* at 545.

* * *

If the usual framework were imported to Section 2, then, vote-denial cases would follow the same rules as disparate-impact proceedings under Title VII, the FHA, and many other laws. (1) Plaintiffs would challenge particular electoral practices, not whole systems of election administration. (2) Significant (but not all) racial disparities in citizens' access to the franchise would be actionable. (3) Disparities caused directly by disputed practices would be relevant, while ultimate voter turnout would not be. (4) Disparities would not have to be linked to practices' interaction with historical and ongoing discrimination. And (5) if liability were imposed, invalidation of the offending measure would typically be the remedy.

To be clear, these doctrinal parameters may or may not be *optimal*. But they are certainly

reasonable—comporting with the goals of disparate-impact law and plausibly balancing plaintiffs' and defendants' interests. Equally important, these rules are *settled* by decades of legislative, administrative, and judicial precedent. The unification of disparate-impact law would thus answer many of the lingering questions about Section 2 vote-denial claims and answer them in defensible ways. It would provide the benefit of doctrinal coherence without exacting any serious cost.

III. THE USUAL DISPARATE-IMPACT FRAMEWORK WOULD BOLSTER SECTION 2'S CONSTITUTIONALITY.

The other advantage of adopting the usual framework for Section 2 vote-denial claims is constitutional rather than doctrinal. If Section 2 is construed as a pure disparate-impact provision—imposing liability for racial discrepancies, standing alone—then it runs into two constitutional objections. First, it may exceed Congress's enforcement powers under the Reconstruction Amendments. Second, it may conflict with the equal protection norm of colorblindness. Both of these concerns dissipate, however, if Section 2 is implemented through the usual framework. In that case, Section 2's fit with underlying constitutional violations tightens, and jurisdictions may comply with Section 2 without fixating on race.

A. The Usual Framework Tightens Section 2's Fit with Underlying Constitutional Violations.

The first constitutional issue that arises if Section 2 is understood as a pure disparate-impact provision is easy to spot. Under the Fourteenth Amendment, there must be "congruence and proportionality" between Congress's chosen means and the "injury to be prevented or remedied." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Under the Fifteenth Amendment, Congress must use "rational means" to enforce "the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). And under both of these provisions, the essential evil to be avoided or cured is *intentional* racial discrimination. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fourteenth Amendment).

Consequently, if Section 2 could be violated by racial disparities, without more, then it would prohibit a broad swath of conduct that is constitutionally innocuous: electoral regulation that lacks a discriminatory purpose but produces a disparate impact. This wide reach could arguably make Section 2 noncongruent with, and disproportionate to, the underlying injury of intentional racial discrimination. Similarly, a provision of such sweep could arguably be an unreasonable response to deliberate racial discrimination in voting. *See, e.g.*, *Veasey*, 830 F.3d at 315 (Jones, J., concurring in part and dissenting in

part) (if Section 2 "eliminate[s] disparate impact," then it is "not congruent and proportional as a remedy for violation of voting rights"); *Farrakhan v. Washington*, 359 F.3d 1116, 1123 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (if Section 2 is breached by "nothing but disparities," that "destroys Section 2's congruence and proportionality").

Of course, the two-part test recently adopted by certain lower courts does *not* make Section 2 a pure disparate-impact provision. The test's second element requires an electoral policy's disparate impact to be caused by the policy's interaction with historical and ongoing discrimination. This second element, though, can usually be satisfied when plaintiffs comply with the test's first criterion by identifying a racial disparity caused by an electoral practice. In fact, "of all the recent Section 2 vote denial decisions, only *one* seems to have found a racial disparity but then concluded that it was not the result of a measure's interaction with discrimination." Stephanopoulos, *Disparate Impact, Unified Law*, *supra*, at 1591. "In every other case, if a court discerned a disparate impact, it also managed to link that impact to past and present discrimination, as illuminated by the Senate factors." *Id.* at 1591–92; *see also id.* at 1592 n.141 (collecting cases).[5]

[5] The two elements' correlation should not be surprising. When an electoral policy causes a racial disparity, it rarely does so at random—because a condition for voting just happens to be associated with race. Rather, the causal chain connecting the policy with the disparity usually includes a role for historical and

In contrast, the usual framework does not risk collapsing into a single requirement that a policy cause a racial disparity. Plaintiffs who satisfy the usual framework's first step frequently lose in Title VII and FHA cases. And the reason for their defeats is that the usual framework's second step has real teeth. Defendants, that is, are often able to show that their challenged practices are necessary to achieve their substantial interests. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 738–39, 749 (2006) (finding that plaintiffs bringing disparate-impact claims under Title VII win only 20–25 percent of the time, and that "the business necessity prong . . . always proved [a] greater hurdle" than establishing a racial disparity); Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 393, 413–14 (2013) (finding that plaintiffs' win rate in FHA disparate-impact cases is about 20 percent, and that defendants generally have an "easier time" justifying their policies).

The constitutional implications of the usual framework's rigor are straightforward. Intentional racial discrimination can rarely be inferred from a racial disparity alone. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.15 (1977) (noting "the limited probative value of

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ongoing discrimination. Discrimination helps explain minority citizens' worse education, higher poverty, and greater residential isolation. These socioeconomic disadvantages, in turn, help explain why minority citizens are less likely to register to vote, to have photo IDs, to vote on Election Day, and so on.

disproportionate impact"). But when a racial discrepancy cannot be justified by a defendant's valid interests, it becomes easier to conclude that the defendant's motivation is invidious. As this Court stated in *Inclusive Communities*, a needless discrepancy helps to "uncover[] discriminatory intent" and so "permits plaintiffs to counteract unconscious prejudices and disguised animus." 576 U.S. at 540.

If Section 2 were enforced through the usual framework, then, the provision would forbid only electoral practices that are, or plausibly might be, driven by racial bias. In other words, Section 2 would bar only governmental activity that unjustifiably causes a racial disparity—and that thus supports a finding of a discriminatory purpose. This narrow scope, in turn, would enhance Section 2's fit with the Reconstruction Amendments. These Amendments are offended only by deliberate racial discrimination, and that is all that Section 2 would target: voting requirements that are actually invidious or from which an invidious objective can reasonably be inferred. Section 2 would not reach the wider zone of governmental conduct, involving disparate impact alone, that does not permit this inference to be drawn.

B. Compliance with the Usual Framework Requires Less Focus on Race.

The second constitutional issue with construing Section 2 as a pure disparate-impact provision involves the Equal Protection Clause rather than Congress's authority under the Reconstruction Amendments. In *Inclusive Communities*, this Court

warned that if a statute "cause[s] race to be used and considered in a pervasive way," "serious constitutional questions then could arise" under the Equal Protection Clause. *Id.* at 542–43. The statute could conflict with the equal protection principle of colorblindness by, as Justice Scalia put it on a different occasion, "plac[ing] a racial thumb on the scales" and "requiring [jurisdictions] to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

Under the two-part test recently adopted by certain lower courts, jurisdictions might be induced to act in such race-conscious ways. To the extent the test's two elements are mistakenly reduced to a single criterion—whether an electoral practice causes a racial disparity—jurisdictions might decide to take race into account when they change (or maintain) their electoral regulations. They might analyze each potential (or existing) measure's racial effects, and depending on what they find, they might implement race-related policies in order to avoid liability. *See, e.g.*, *Veasey*, 830 F.3d at 317 (Jones, J., concurring in part and dissenting in part) (arguing that a pure disparate-impact approach "force[s] considerations of race on state lawmakers who will endeavor to avoid litigation by eliminating any perceived racial disparity in voting regulations").

Under the usual framework, on the other hand, jurisdictions would lack this incentive to operate race-consciously. Suppose a state wants to ensure that one of its electoral practices is lawful. The state would not have to amend or annul the practice if it turns out

that it produces a racial disparity. To the contrary, the state would only have to confirm that the practice is necessary to achieve its substantial interests (and that these interests could not be equally achieved by a different policy choice with a smaller disparate impact). Put differently, a pure disparate-impact provision induces jurisdictions to try to *eradicate* racial disparities. The usual framework, however, merely asks jurisdictions to *reduce* racial disparities to the extent they may do so without compromising their legitimate objectives. This is a less intrusive—and less race-conscious—command.

For precisely this reason, this Court held in *Inclusive Communities* that as long as "disparate-impact liability [is] properly limited in key respects," the usual framework "avoid[s] the serious constitutional questions that might arise" otherwise. 576 U.S. at 540. One of these limits is allowing defendants "to state and explain the valid interest served by their policies." *Id.* at 541. "This step of the analysis . . . provides a defense against disparate-impact liability." *Id.* Another constraint is "[a] robust causality requirement" compelling a plaintiff to "point to a defendant's policy or policies causing th[e] disparity." *Id.* at 542. With these safeguards in place, the usual framework does not "cause[] race to be used and considered in a pervasive and explicit manner." *Id.* at 543. It does not "inject racial considerations into every [regulatory] decision" or "perpetuate race-based considerations rather than move beyond them." *Id.*

IV. THE COURT IS FREE TO ADOPT THE USUAL DISPARATE-IMPACT FRAMEWORK AS A MATTER OF STATUTORY INTERPRETATION.

Finally, as a matter of statutory interpretation, it would be straightforward for this Court to adopt the usual framework for Section 2 vote-denial claims. Section 2's text is more consistent with the usual framework than with a pure disparate-impact approach. Section 2's text also refers to relevant circumstances—one of which, the tenuousness of a jurisdiction's rationale for an electoral practice, is essentially shorthand for the usual framework. And because Section 2 facially reaches discriminatory results, not just discriminatory purposes, the usual framework's adoption in the voting context would be less complex than under other statutes that do not explicitly mention disparate impacts.

To start the statutory analysis, consider the proviso at the end of 52 U.S.C. § 10301(b). "[N]othing in this section," the proviso reads, "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* This language was "essential to the compromise that resulted in passage of" Section 2 in its current form. *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). This language also identifies an obvious kind of racial disparity that could be caused by an electoral policy—disproportionately low representation for a minority group—and states that, alone, it cannot give rise to liability. Nothing in Section 2 creates a right to proportional representation for a minority group. By

the same token, a jurisdiction cannot violate Section 2 simply by failing to provide a minority group with proportional representation.

The usual framework is true to the letter and spirit of this proviso. It does not impose liability due to a minority group's disproportionately low representation, standing alone. Indeed, it does not impose liability due to any type of racial disparity solely on that basis. The usual framework thus necessitates neither proportional representation for minority citizens nor the elimination of any other disparate impact. On the other hand, the two-part test recently adopted by certain lower courts could be construed as requiring the eradication of many racial disparities caused by electoral practices. As explained above, many such disparities are attributable to challenged measures' interaction with historical and ongoing discrimination. Accordingly, the two-part test risks "establish[ing] a right to have members of a protected class" affected by an electoral policy "in numbers equal" to nonminority citizens. 52 U.S.C. § 10301(b).

Turn next to the beginning of § 10301(b), which mandates the consideration of "the totality of circumstances" to find liability. *Id.* The "circumstances that might be probative of a § 2 violation" are listed by the Senate report "accompanying the bill that amended § 2." *Gingles*, 478 U.S. at 36. One of these factors is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is *tenuous*." *Id.* at 37 (quoting S. Rep. No. 97-417, at 29 (1982)

(emphasis added)). This Court has emphasized the tenuousness factor in its post-*Gingles* vote-dilution decisions. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 441 (2006); *Holder v. Hall*, 512 U.S. 874, 878 (1994). So have numerous lower courts in Section 2 vote-denial cases. *See, e.g.*, *Veasey*, 830 F.3d at 262–64; *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 440–65 (M.D.N.C. 2016), *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016).

The usual framework's second and third steps are essentially an elaboration of the tenuousness factor. Under the second step, a jurisdiction has the burden of showing that its challenged practice is necessary to achieve its substantial interests. When a practice is not actually necessary to attain a jurisdiction's substantial goals, or when a jurisdiction's goals are not actually substantial, the policy underlying the jurisdiction's use of the practice is tenuous. Under the third step, a plaintiff has the burden of proving that a jurisdiction's substantial interests could be served equally by some different, less discriminatory measure. Again, when a plaintiff makes this demonstration, the policy underlying the practice is tenuous. *See, e.g.*, Issacharoff, *supra*, at 316 (arguing that the tenuousness factor is "the statutory hook for shifting the inquiry onto the state's justification").

A last textual point involves a comparison of 52 U.S.C. § 10301(a)'s wording to that of other statutes under which this Court has embraced the usual framework. Section 2 forbids any electoral practice that "*results in* a denial or abridgement of the

right . . . to vote on account of race or color." *Id.* (emphasis added). In contrast, when the Court applied the usual framework to Title VII in *Griggs*, the provision did not explicitly state whether it could be violated solely by disparate treatment or also by disparate impact. *See* 42 U.S.C. § 2000e-2(a)(2) (making it unlawful for an employer to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race"). The ADEA and the FHA are similarly unclear, on their face, as to whether they encompass disparate-impact liability. *See, e.g.*, 29 U.S.C. § 623(a)(2) (paralleling Title VII's language except with respect to age rather than race); 42 U.S.C. § 3604(a) (making it unlawful to "otherwise make unavailable or deny[] a dwelling to any person because of race"). The Court nevertheless extended the usual framework to the ADEA in *Smith*, *see* 544 U.S. at 233–40 (plurality opinion), and to the FHA in *Inclusive Communities*, *see* 576 U.S. at 530–46.

Textually, the usual framework's further extension to Section 2 would be even easier. Again, Title VII, the ADEA, and the FHA are ambiguous as to whether they can be breached without a showing of discriminatory intent. In *Griggs*, *Smith*, and *Inclusive Communities*, the Court therefore had to resolve this ambiguity first; only then could it rule that the usual framework would govern disparate-impact claims in these areas. However, there is no doubt that Section 2 can be infringed even in the absence of an invidious motive. The whole point of its 1982 revision was to make this clear, *see, e.g.*, *Gingles*, 478 U.S. at 71, and the provision now overtly bans electoral practices that

"*result[] in*" a race-based denial or abridgment of the franchise, *see* 52 U.S.C. § 10301(a) (emphasis added). Consequently, it would take the Court just one step, not two, to apply the usual framework to Section 2. The Court would not have to puzzle over whether Section 2 recognizes disparate-impact discrimination since it obviously does. Instead, the Court could skip ahead to holding that this form of discrimination, when it relates to voting, is regulated by the usual framework.

CONCLUSION

For the foregoing reasons, the Court should consider applying the usual disparate-impact framework, already used in many other contexts, to claims of racial vote denial under Section 2.

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Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, 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 U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING NEITHER SIDE

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QUESTIONS PRESENTED

This Court granted certiorari to review whether (1) Arizona's "out-of-precinct policy," which doesn't count provisional ballots cast in person outside the voter's designated precinct, and (2) "ballot-collection law," which permits only certain persons (family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot, comply with Section 2 of the Voting Rights Act (VRA) and the Fifteenth Amendment. But regardless whether the Court upholds or invalidates those particular Arizona laws, it must address the following questions:

1. Has the dissonance in VRA Section 2 vote-denial standards resulting from different circuit tests created a need for a bright line rule?

2. With VRA Section 5 inoperable until and unless Congress enacts a new and constitutionally sound coverage formula, should Section 5's anti-retrogression standards—effectively preventing any changes in election regulation that could be construed as "tightening the rules"—be judicially transferred into Section 2?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Although the Arizona laws here almost certainly comply with the Voting Rights Act—a majority of states require in-precinct voting and nearly half limit ballot collection (also known as "harvesting")—Cato submits this brief in support of neither side. That's because the need to set clear standards for vote-denial claims under Section 2 of the VRA is more important than whether these two laws stand or fall. The lower courts' divergent jurisprudential rubrics result in ambiguous voting rights and leave state legislatures unable to pass laws without legal uncertainty. Unclear laws and unnecessary litigation caused by nebulous standards undermine the legitimacy of our political institutions. Given the reforms we're bound to see as states adjust their procedures once the pandemic (hopefully) abates and to remedy the flaws exposed by the 2020 process, clear rules are necessary to promote judicial uniformity and the rule of law.

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[1] Rule 37 statements: All parties filed blanket consents to the filing of this brief. No party's counsel authored any part of this brief; *amicus* alone funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

After the contentious election that we've just witnessed, this case presents an opportunity to make future elections cleaner and less litigious, with results that inspire greater public confidence. Those salutary outcomes turn not on whether this Court allows the two specific electoral regulations at issue, in Arizona or elsewhere, but on whether it provides a clear framework by which lower courts are to evaluate Voting Rights Act (VRA) Section 2 claims.

On the surface, this case involves two common state laws: (1) in-person voters must cast their ballots in their assigned precinct and (2) third parties can't harvest ballots (with narrow exceptions for family members and the like). The Court presumably took the case not simply to rule on precinct-based voting or ballot harvesting, but to hand down general rules for evaluating VRA Section 2 vote-denial cases. Although such cases rarely came to the Court before *Shelby County v. Holder*, 570 U.S. 529 (2013), disabled Section 5 preclearance requirements, they have since understandably become the focal point of election litigation. That's why it's crucial that the Court provide guidance on how to evaluate them.

Without a proper guide for Section 2 vote-denial cases, lower courts have attempted to fashion coherent standards for considering alleged violations, but a split has emerged—and is growing. Questions regarding the evidentiary standard that must be met to establish a discriminatory burden remain unanswered. Lack of uniformity has led to virtually identical laws being declared a Section 2 violation in one state but not in

another, merely because the states are located in different circuits. *Compare, e.g., Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (approving Wisconsin's voter ID law) *with Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (disapproving Texas's voter ID law in a splintered opinion that also reversed the district court's finding of discriminatory intent).

Spreading beyond inter-circuit disagreement, circuits are clashing *within themselves*, unable to agree on the proper methodology for evaluating Section 2 interpretation. The Fourth Circuit illustrated this dynamic with two separate panels reaching opposite results over voter ID laws in North Carolina and Virginia, respectively, because of differing Section 2 interpretations. See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (enjoining state law); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (affirming ruling in favor of state law).

A similar situation arose below. While a three-judge panel agreed with a district court's analysis, a splintered en banc panel reversed the decision after disagreeing with the standards used to evaluate the Section 2 claims. Without a clear rule, there is every chance that any change in voting rules, from polling hours to cure periods for faulty absentee ballots, will draw a challenge, and might be upheld one year only to be struck down the next.

Judicial inconsistencies create a legal environment where the result of a case may no longer be decided by precedent, but rather by what panel of judges a state happens to draw for its case. Legislatures are left unable to change electoral regulations without an

unending cloud of uncertainty as to their legality. In the end, the ultimate result of these contradictory conclusions is an increasingly partisan view of the judiciary, diminishing the perceived legitimacy of our third branch of government. *See, e.g.*, Charlie Savage, "G.O.P.-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say," N.Y. Times, Oct. 16, 2020, https://nyti.ms/2Vrrphi.

Further threatening to upend legal predictability is a push to meld Section 5's "retrogression" standard—which sought to prevent the reduction of minority electoral power—into Section 2. Section 5 stood as a powerful tool of federal oversight when states were still rife with systemic racial disenfranchisement. But Section 2 was never meant to have the same overbearing control, instead serving as a guarantor of voting rights in individual cases where claims of racial discrimination arise. Any explanation of Section 2's proper standards should clarify that, unlike under the Section 5 rubric, there can be no violation without a finding of actual racial discrimination.

Now presented with the opportunity to correct all this confusion, this Court should hand down a bright-line rule so courts, state legislatures, and citizens alike properly understand Section 2's protections. We need clarity and stability in the law, lest states continue to hesitate to standardize voting practices and make other reforms, whether related to what we've learned about voting during the pandemic or for other reasons. As it stands, with our current patchwork of often conflicting standards, any new expansion of voting times or methods—including mail-in balloting in light of COVID-19—may be deemed the new constitutional minimum in some states, even as others use "lesser"

procedures without legal concern. This past month since the presidential election has demonstrated the critical need to resolve such ambiguities not just for Arizona or for precinct-voting and ballot-harvesting rules, but for all voting-rights cases going forward.

ARGUMENT

I. The Lack of Clear Guidance on Vote-Denial Cases Has Resulted in a Patchwork of Standards

Enacted to reinforce the Fifteenth Amendment, the Voting Rights Act of 1965 (VRA) provided a means to enforce the promise of voting protection for all citizens. An immense success, minority participation in elections skyrocketed in the decades that followed. Section 2 of the VRA encompasses two distinct claims: vote dilution and vote denial. Vote-dilution cases involve districting that minimizes the voting strength of racial minorities, so they have practically no chance to elect candidates of their choice, whereas vote-denial cases involve state action that seeks to prevent minority participation in voting altogether.

After this Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 required a showing of purposeful discrimination, Congress amended Section 2 to contain a "results test":

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race of color.

52 U.S.C. § 10301(a) (emphasis added). After that 1982 amendment, the Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), which provides current guidance for Section 2 cases.

Gingles instructed that, once a court determines that a rule burdens voting, it should consider the totality of the circumstances as to whether there's a violation of Section 2, as informed by nine largely subjective factors. *See Gingles,* 478 U.S. at 43–45. The Sixth Circuit has elaborated that "in response to a step two inquiry, a disparate impact in the opportunity to vote is shown to result not only from the operation of the law, but from the interaction of the law and social and historical conditions that have produced discrimination." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 638 (6th Cir. 2016).

The problem with the *Gingles* factors is that they "are not exclusive . . . there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Veasey*, 830 F.3d at 246. With the immense discretion courts have in applying those factors, it is hard to imagine a cohesive body of law coming together if each circuit has the ability to weigh them as it sees fit.

No case presents a more apt example of judicial discretion dictating a result than the one now before this Court. After an extensive 10-day bench trial, the district court here found that past discrimination in Arizona had "lingering effects on the socioeconomic status of racial minorities," but to suggest that those past indiscretions could still provide the necessary causation element between Arizona's election regulations and any disparate burden for a Section 2

violation was "too tenuous to support." *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 878 (D. Ariz. 2018). For if the court had accepted that causation approach, "virtually any aspect of a state's election regime would be suspect as nearly all costs of voting fall heavier on socioeconomically disadvantaged voters . . . [as well as] potentially . . . sweep away any aspect of a state's election regime in which there is not perfect racial parity." *Id.* The court concluded that the high causation standard of Section 2 had not been met.

After the Ninth Circuit panel affirmed the district court, the en banc court assessed the *Gingles* factors for itself and, in the light of Arizona's full record of discrimination—going back to its territorial period—found that the district court had minimized that history's significance. *See Democratic Nat'l Comm. Hobbs*, 948 F.3d 989, 1016–26 (9th Cir. 2020) (en banc). The en banc court also noted that the district court minimized the importance of the racial disparity in state elected officials. *Id.* at 1029. After correcting the district court's errors, the en banc court held that the *Gingles* factors conclusively favored the plaintiffs.

Differences between the district court and en banc court's analysis should raise an alarm. Neither court applied a clear standard for determining the appropriate weight to assign each *Gingles* factor; neither decision is necessarily wrong under this Court's precedent. Focusing on Arizona's recent achievements toward equality rather than its darker history, the district court ruled for the state. *Reagan*, 329 F. Supp. at 873–76. Believing that Arizona's history is pivotal in revealing a long line of discrimination that continues to this day, the en banc panel ruled for the challengers. *Hobbs*, 948 F.3d at

1025–26. Both courts read the same evidentiary record and applied the same vague guideline about a "history of discrimination"—and reached opposite conclusions. The lack of legal certainty from such a subjective style of analysis should give this Court pause and reinforce the critical need for reform.

"While vote-dilution jurisprudence is well-developed, numerous courts and commentators have noted that applying Section 2's results test to vote-denial claims is challenging, and a clear standard for its application has not yet been conclusively established." *Husted*, 834 F.3d at 636; *see also Veasey*, 830 F.3d at 243–44 ("[T]here is little authority on the proper test to determine whether the right to vote has been denied or abridged on account of race."); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 709 (2006) ("A clear test for Section 2 vote denial claims ... has yet to emerge").

With lower courts determining how to fashion their own workable vote-denial test, three slightly different tests have emerged in the Fourth, Fifth, Sixth, and Seventh Circuits. Unfortunately, any variation in these tests means that there is the possibility of a law being upheld in one state as Section 2-compliant, only to be enjoined as a violation in another, without ever really knowing why. Two prevalent issues that have been especially problematic for continuity across the circuits are the interplay between causation and intent, and what role social and historical conditions play in a vote-denial analysis. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 451 (2015).

A. Lower Courts Are Unclear what the Proper Evidentiary Standard Is to Prove a Discriminatory Burden

There is a general consensus that the first step to a vote-denial claim is that "the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning 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." *Veasey*, 830 F.3d at 244.

Circuits already disagree on how to implement this first step. There is tension regarding whether "a plaintiff must demonstrate that a challenged practice has measurably reduced total levels of minority turnout (either in an absolute sense or relative to white turnout)." Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 Yale L.J. F. 799, 809 (2018). The Fourth, Fifth, and Ninth Circuits have all held that turnout evidence is not necessary, while the Sixth and Seventh Circuits "appear to require something more: namely, evidence concerning the effect of the challenged practice on voter turnout." *Id.* at 810.

For example, both Wisconsin and Texas passed laws requiring voters to show a from of identification from an approved list to vote in person. *See Frank v. Walker*, 768 F.3d at 753; *Veasey*, 830 F.3d at 256. Although the plaintiffs in both cases introduced evidence that racial minorities are less likely to possess appropriate ID, the Seventh and Fifth Circuit came to different conclusions as to the laws' compliance with the VRA.

Indisputably, a burden on voting existed with both ID laws, but the Seventh Circuit determined that the plaintiffs "[did] not show a denial of anything . . . unless Wisconsin makes it needlessly hard to get photo ID. Because every citizen has an equal opportunity to get a photo ID, Wisconsin's ID requirement did not violate anyone's voting rights." *Walker*, 768 F.3d at 461 (cleaned up). Meanwhile, the Fifth Circuit found that there was a disparate impact and moved on to the second step of analysis when experts estimated that, out of the about four percent of Texas voters who lacked the appropriate ID, "Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack the proper ID." *Veasey*, 830 F.3d at 250.

The difference between the two tests is striking. The Seventh Circuit held that a law only meets the level of discriminatory burden if a state makes something needlessly hard to do, while the Fifth Circuit moved forward in its analysis toward invalidating law after finding that the law only imposed a new (and not necessarily insurmountable) burden on racial minorities within a subgroup of four percent of registered voters. And then, similar to the Seventh Circuit, the Sixth Circuit clarified its approach to the first step by cautioning that it should not be "construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2." *Husted*, 834 F.3d at 637. The first element "requires proof that the challenged standard . . . casually contributes to the alleged discriminatory impact." *Id.* at 638.

In sum, even slight adjustments to the burden required under the VRA sets the circuits on different directions. Without clear direction on how to determine what a discriminatory burden is, a lower court could, in theory, make compliance with Section 2 as easy or hard as it wishes.

B. The Seventh Circuit Uniquely Held That Discrimination Must Be Specifically Caused by the Defendant

One of the most noticeable deviations from the two-step test for evaluating vote-denial claims is that the Seventh Circuit makes a point that the "causation" portion of step two should distinguish between active discrimination by state or local election officials and discriminatory effects stemming from some other social or historical factors. *Walker*, 768 F.3d at 755. The court noted that the district judge tried to explain his finding that the ID law violated Section 2 because minorities are disproportionately likely to lack an ID due to their increased likelihood of living in poverty, which in turn is traceable to the effects of discrimination in education, employment, and housing. *Id.* at 753. The court specially noted that the district judge never directly blamed Wisconsin because "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Id.*

So far, the Seventh Circuit is an outlier in its Section 2 vote-denial analysis—and that uniqueness could translate into wildly different laws being Section 2-compliant than in other circuits. This possibility is already clear without even a majority of the circuit courts' having weighed in on these issues post-*Shelby*

County. Before more circuits create their own slightly different frameworks, this Court should craft a uniform rule of evaluation, so Section 2 can properly function as the defense against discriminatory voting laws and actions that it was designed to be.

C. Lack of a Clear Rule Led to Opposing Section 2 Analyses in Two Fourth Circuit Cases

Even more troubling than circuit splits on Section 2 interpretation, however, is disunity *within* a circuit. On their face, two cases in the Fourth Circuit saw two different types of Section 2 analysis solely because of the panels drawn for the case. *See* Maya Noronha, *New Applications of Section 2 of the Voting Rights Act to Vote Denial Cases*, 18 Fed. Soc'y Rev. 32 (2017).

In *League of Women Voters of N.C. v. North Carolina*, the Fourth Circuit chastised a district court for suggesting that a Section 2 violation may not have occurred because, even though same-day registration was no longer available, the burden to register was minimal because voters could easily register by mail instead. 769 F.3d at 243. The court "relieved the plaintiffs of the requirement of actually showing a denial of the right to vote, finding instead that 'nothing in Section 2 requires a showing that voters cannot register or vote under any circumstances.'" Noronha, *supra*, at 34 (*quoting League of Women Voters*, 769 F.3d at 243).

Conversely, in *Lee v. Va. State Bd. of Elections*, a different Fourth Circuit panel found that "a complex § 2 analysis is not necessary to resolve this issue because the plaintiffs have simply failed to provide evidence

that members of the protected class have less opportunity than others to participate in the political process." 843 F.3d at 600. The court classified obtaining an ID as a mere inconvenience to a voter, rather than a substantial burden—but explained that if Virginia had required IDs but not accommodated citizens who lacked them, there could possibly be a deprival of an opportunity to vote. *Id.* at 601.

It appears that the *League of Women Voters* and *Lee* panels based their decisions on very different views of what constitutes a discriminatory burden. Regardless which of the two views the Court finds more persuasive, the inconsistency in the law within one court has unsettling implications. At an extreme, the result of a case could no longer be determined by precedent, but by which judges a case draws.

Coincidentally—or perhaps not—these two decisions were decided by panels of all-Democrat-appointed and all-Republican-appointed judges, respectively. Judges naturally have their own judicial philosophies, which will differ from their colleagues and can lead to different case outcomes. But it is imperative, especially in election law cases, that courts have as little *appearance* of political bias as possible. By sharpening the applicable standards and limiting the amount of discretion judges have in VRA cases, the Court would help preserve the integrity of and public confidence in the judicial branch.

D. The Ninth Circuit's Interpretation of Discriminatory Burden Exemplifies the Conflicting Circuit Standards

The Ninth Circuit's own disparate rulings here are

a shining example of legal uncertainty. Compare *Democratic Nat'l Comm. v. Reagan,* 904 F.3d 686 (9th Cir. 2018) (panel) with *Hobbs,* 948 F.3d 989 (en banc). The panel and en banc courts both analyzed Arizona's OOP policy using the two-step inquiry seen in other circuits, but had few similarities otherwise. Unclear as to the appropriate way to determine a "discriminatory burden," the en banc court (which of course in the Ninth Circuit comprises only 11 of the court's 29 judges) arrived at a different conclusion than the three-judge panel.

Focused on whether a material impact on the opportunity for minorities to participate in the political process *and* elect representatives of their choice had occurred, the panel asked whether an unusual burden to voting as a whole was present. *Reagan*, 904 F.3d at 730. It opined that "a precinct voting system, by itself, does not have such a casual effect," *id.*, but that if a state "implement[ed] . . . a system in a manner that makes it more difficult for a significant number of members of a protected group to discover the correct precinct in order to cast a ballot" it could meet the burden of giving minority voters less opportunity. *Id.* at 731. With only 3,970 out of 2,661,497 total votes, or 0.15 percent, not cast in the correct precinct in the 2016 general election, the burden of in-precinct voting was deemed minimal and not abridging minority opportunity. *Id.* at 729. Like the Seventh Circuit, the panel looked beyond whether a mere burden existed, but rather how extensive the burden was on the overall ability to vote and elect a preferred representative. *See Walker*, 768 F.3d 744.

Instead of inquiring whether a discriminatory burden to voting existed as a whole, the en banc court

determined that a burden could be established using truncated data similar to the Fifth Circuit's analysis in *Veasey*. *Hobbs*, 948 F.3d at 1014 (citing *Veasey*, 830 F.3d at 256–64). The opinion focused on the increasing percentage of in-person ballots being cast out-of-precinct as seen by "the absolute number of all in-person ballots [falling] more than the absolute number of OOP ballots," *id.* at 1015, thereby increasing the percentage of minorities burdened by the policy compared to years prior. Even if that fact was ignored, the panel concluded that the number of OOP ballots cast in 2016 was substantial enough to be cognizable under the results test, reversing the panel. *Id.* The court bolstered its argument by pointing to *League of Women Voters*, where the Fourth Circuit described a district court's ruling that 3,348 ballots was de minimis as a "grave error." 769 F.3d at 241.

Even though the panel and en banc court came to opposite conclusions by using different frameworks, their dissonance was aggravated by dueling citations to the Fourth Circuit's conflicting cases described above, *Lee* and *League of Women Voters*. The impact of varying approaches to discriminatory burden analysis has already spread beyond the internal struggles of the Fourth Circuit. Without a set framework for explaining how claims of Section 2 violations are to be evaluated, courts will continue to see conflicting results as the Ninth Circuit has. This holds especially true for circuits that have not yet had the opportunity to rule on a case involving discriminatory burden.

Instead of allowing the continued fracture of Section 2 interpretation, this Court should render clear rules for lower courts to follow. For maximum clarity, it would be wise for the rule to pointedly

distinguish between discriminatory intent and disparate impact. *Cf.* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 52 (2009) (describing the same tension regarding the use of race in employment). Although Section 2 now contains a "results test," the text still requires those results to be "on account of race or color." 52 U.S.C. § 10301(a). Despite that language, the confusion around the necessity of intent continues to pervade court interpretations that find disparate impact to be *ipso facto* proof of intent. Such a reading raises several possible interpretive and constitutional issues, as noted in the Pacific Legal Foundation's *amicus* brief in this case, which this Court could put to rest with a bright-line rule that explains the role that both intent and impact play in vote-denial analysis.

II. VRA Section 5 Standards Shouldn't Be Imported into Section 2

As racial disenfranchisement diminished, the tension between states' prerogative to conduct their own elections and the VRA's Section 5 federal preclearance regime became untenable. When *Shelby County* made the obvious point that Section 4's coverage formula was unconstitutional because it hadn't been updated in decades and thus didn't reflect current realities, Section 2 became a more prominent vehicle for litigation—as it should have, to challenge potential instances of racial disenfranchisement. The problem is that courts have been running on a largely open field, with little guidance from this Court on how to evaluate Section 2 claims.

Shelby County may have rendered Section 5 inoperative until and unless Congress passes a new

coverage formula, but that doesn't mean that Section 5's purposes and standards can or should be snuck into Section 2. Section 2 and Section 5 were written with two separate purposes and remedy different constitutional concerns. The Court should be wary of attempts to muddy the waters by combining them.

Indeed, such a distortion of Sections 2 and 5 took place in the litigation over North Carolina's 2013 omnibus election reform bill. The district court viewed the Section 2 inquiry before it as whether minorities had "an equal opportunity to easily register to vote." *N.C. State Conf. of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 350 (M.D.N.C. 2014). Even though North Carolina had eliminated its same-day registration, which minority voters may have preferred to use, there were various other methods to register to vote that on net did not reduce the opportunity to do so. *Id.* at 351. Taking special notice that the plaintiffs incorporated a retrogression standard into their argument, the court clarified that it was "not concerned with whether the elimination of [same-day registration] will worsen the position of minority voters in comparison to the preexisting voting standard, practice or procedures—a Section 5 inquiry." *Id.* at 352. The simple remark provided a clear distinction between the two sections, but on appeal, the Fourth Circuit blurred that line.

Instead of comparing "whether minorities had less of an opportunity to vote than whites under the new election law scheme, as courts have long done in their Section 2 analyses," the Fourth Circuit turned its attention to whether the change in laws decreased minorities' opportunity to vote as compared to before the law was enacted. Noronha, *supra*, at 34 (citing

League of Women Voters, 769 F.3d at 241–42). Justifying its retogression analysis, the Fourth Circuit pointed to a section 5 case "to conclude that Section 2 analysis 'necessarily entails a comparison' and requires 'some baseline with which to compare the practice.'" *Id.* (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333–34 (2000)). Integration of Section 5 into Section 2 is no longer a theoretical concern, but is actively becoming a part of Section 2 jurisprudence.

Moreover, Section 2 is an inappropriate substitute for Section 5, which has a particular history and rationale. The former has always applied nationally to enforce the Fifteenth Amendment's guarantees, while the latter was an extraordinary provision to oversee jurisdictions where racial disenfranchisement couldn't be policed through normal enforcement practices. Most jurisdictions subject to preclearance were located in the South, as a result of Jim Crow and decades of racial disenfranchisement. The overwhelming power of the prohibition on retrogression created a protective barrier for minorities to exercise their right to vote in the face of systematic attempts to silence them. But imprecise changes in the statistical trigger caused seemingly arbitrary changes in which jurisdictions became subject to Section 5. For example, amendments to the Voting Rights Act in the 1970s caused three New York City boroughs (but not the other two) to become subject to preclearance even though black New Yorkers had been freely voting since the Fifteenth Amendment's enactment in 1870, and had held municipal offices for decades. Abigail Thernstrom, "The Messy, Murky Voting Rights Act: A Primer," Volokh Conspiracy, Aug. 17, 2009, https://bit.ly/33qpqOQ.

Of course, the authority Section 5 bestowed on the federal government was never meant to be permanent. The provision had a five-year expiration date and was intended as a temporary stopgap to address egregious practices. After several reauthorizations, Congress even conceded that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." *See* H.R. Rep. No. 109-478, 12 (2006). Regardless whether Section 5 ought to be revived, subjecting the entire country to its extraordinary standards and remedies through Section 2 is not only inappropriate, it's a constitutional malapropism.

Moreover, imputing a national anti-retrogression standard into Section 2 would create a one-way ratchet on voting regulations. "If that were to happen, once any increase in voting periods or expanded procedures is passed, states would only be allowed to 'add to but never subtract from' that baseline. Any reforms reining in expansive laws would be struck down by the court." Noronha, *supra*, at 34–35 (quoting *Husted*, 834 F.3d at 623). The very thing the VRA was created to do—secure and protect the opportunity to vote—would be stymied by such a globally applied standard.

III. Inconsistency in Judicial Outcomes Undermines the Integrity of America's Electoral System and Inhibits State Legislatures

Political stability is the hallmark of a mature democracy. One of the most important factors in that political stability is a citizenry that believes it has the opportunity to participate in free and fair elections. This perception is compromised when state

legislatures enact laws that are viewed by the public as illegitimate—especially if one state has a law adjudicated to be a VRA violation while a similar law exists in another state without legal problem.

The need for a uniform understanding of Section 2 is highlighted by decreasing confidence in the integrity of America's electoral system. With partisan polarization rapidly rising in American elections since 2000, lawyers have increasingly "thrown their hats in the ring" to challenge "virtually every aspect of election administration." Reid Wilson, "Study Ranks Best, Worst States for Electoral Integrity," The Hill, Dec. 28, 2016, https://bit.ly/3orrMoX.

Unsurprisingly, many of the states that have the lowest election integrity scores are those that most frequently in legal battles over election reforms and redistricting. Pippa Norris et al., The Electoral Integrity Project, *Electoral Integrity in the 2018 American Elections* (2019). Providing bright-line rules for legislatures to follow would be a good start to decrease the number of election lawsuits that result from an ambiguous nationwide standard.

CONCLUSION

With an increase in vote-denial claims—though without evidence of actual vote denial, at least not if judged by racial disparities in voting and overall turnout rates—this Court should set out a clear interpretive method that courts can follow nationwide. Without that basic framework, any change in voting rules can draw a legal challenge and might be upheld one year only to be struck down based on new data the next. However the Court rules on the two Arizona laws at issue here, it must lay out a clear jurisprudential framework for evaluating Section 2 claims, free of balancing tests and other subjective standards that are grist for result-oriented and public-confidence-destroying judging.

Respectfully submitted,

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