No. 19-1257

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,
*Respondents.*

**On Petition for Writ 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

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 over 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?

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## 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 non-profit, 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 decision making 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).

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. All parties received notice of Amici Curiae's intent to file this brief at least 10 days prior to the due date.

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 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

This case presents a compelling front in what Justice Scalia foreshadowed as "the war between disparate impact and equal protection." *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). Since 1982, Section 2 of the Voting Rights Act has prohibited 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). While Congress intended the "results" language to

eliminate the previous requirement that plaintiffs prove discriminatory intent, a deep circuit split has recently emerged over whether Section 2 prohibits any voting regulation that produces a racially disparate outcome. The interpretation adopted by the court below transforms Section 2 into a pure disparate impact provision, which not only raises significant equal protection concerns, but also threatens to usurp the powers of the States to regulate their own elections. Certiorari is needed to clear up this confusion and ensure that Section 2 is applied in a manner consistent with the Constitution.

At issue here are both Arizona's law prohibiting the collection and delivery of another person's absentee ballot and the State's policy of refusing to count ballots cast outside a voter's precinct on Election Day. Arizona asserts that its ballot-collection law is intended to promote public confidence in elections and reduce the likelihood of ballot tampering. The requirement that voters vote in their proper Election Day precinct is a common election administration tool shared by the majority of states. *See Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 568-69 (6th Cir. 2004); *see also Democratic National Comm. v. Hobbs*, 948 F.3d 989, 1031 (9th Cir. 2020) (en banc) (opinion below) (noting that 20 states count out-of-precinct ballots). But the Ninth Circuit dismissed those interests, concluding that Arizona's justifications were so tenuous as to weigh in favor of the challengers. *Hobbs*, 948 F.3d at 1030-31, 1035-37. The court proceeded to invalidate both provisions based on a disparate impact analysis. *Id.* at 1032, 1037. In fact, under the Ninth Circuit's rule, Arizona is effectively prohibited from enforcing any election

regulation that happens to produce a statistical disparate impact on minority voters.

The Ninth Circuit's decision is not only contrary to the plain text of Section 2; it has exacerbated an ongoing circuit split. As the Seventh Circuit observed, Section 2 is an "equal-treatment requirement," not an "equal-outcome command." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). Indeed, if Section 2 were interpreted to prohibit all election regulations that produce a "disparate outcome," *id.* at 753, as the Ninth Circuit and several circuits have held, it would incorporate nationwide the "non-retrogression" requirement that characterizes Section 5 of the Act, *see Beer v. United States*, 425 U.S. 130, 141 (1976). But Section 5's preclearance requirement was an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), that currently applies nowhere in the United States, *see Shelby County v. Holder*, 570 U.S. 529 (2013). The Seventh Circuit's reading avoids this problem while being faithful to the statutory text of Section 2.

The elephant in the room, however, is that the Ninth Circuit's interpretation of Section 2 raises serious constitutional questions. Most prominently, the transformation of Section 2 into a disparate-impact statute poses significant equal protection concerns. Any statute that requires governments to draw racial classifications is inherently suspect and must satisfy strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). And as Justice Scalia observed, "disparate-impact provisions" do just that by "plac[ing] a racial thumb on the scales" and requiring decision makers to not only "evaluate" expected racial outcomes, but to "make decisions

based on (because of)" those outcomes. *Ricci*, 557 U.S. at 594. Any interpretation of Section 2 that requires jurisdictions to make race-based decisions, thereby subjecting the statute itself to strict scrutiny, should be avoided.

And further, it is not at all clear that Congress has the authority under Enforcement Clauses of the Fourteenth and Fifteenth Amendments to mandate such an "equal-outcome command" upon the States. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). While a broad remedial statute such as Section 5 was necessary in 1965, *Shelby Cty.*, 570 U.S. at 555, the conditions that made that true no longer prevail. *Id.* at 552-53. Thus, it is doubtful that Congress may use its power under the Enforcement Clauses to require the States to surrender so much of their power under the Elections Clause.

This Court should grant the petition for certiorari to address the burgeoning conflict among the circuits and rein in the Ninth Circuit's expansive, constitutionally-problematic reading of Section 2.

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit's Interpretation of Section 2 Is Contrary to the Text and Exacerbates an Existing Circuit Split

As originally enacted, Section 2 of the Voting Rights Act prohibited 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). In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), this Court held that the

statute required proof of discriminatory intent. In response, Congress amended Section 2 to prohibit any voting 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). The amendment was intended to undo *Bolden* by eliminating the requirement that Section 2 plaintiffs prove discriminatory intent. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). It also incorporated the "results test" that had purportedly been applied in cases such as *White v. Regester*, 412 U.S. 755 (1973). *See Gingles*, 478 U.S. at 35. But, as this and other recent cases demonstrate, there is no consensus regarding the scope of the Congress's expansion of Section 2.

There are two species of Section 2 cases—vote dilution and vote denial. Dilution cases are those challenging the drawing of district lines or other mechanisms that affect the *weight* an individual's vote. *See Gingles*, 478 U.S. 30; *Johnson v. De Grandy*, 512 U.S. 997 (1994); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). Vote denial cases challenge a voting regulation that allegedly "results in the denial of the right to vote on account of race." *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc). This is a vote denial case. Unlike vote dilution, vote denial cases were, until recently, relatively rare. As recently as 2014, the Sixth Circuit observed that "[a] clear test for Section 2 vote denial claims . . . has yet to emerge." *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014) (*Husted I*), *vacated as moot by* 2014

WL 10384647 (6th Cir. Oct. 1, 2014).[2] The current circuit split arose out of that lack of precedent in the wake of this Court's decision in *Shelby County*. Indeed, in the nearly four decades since the amendments to Section 2 took effect, this Court has never decided a vote-denial case, and so has not explained how the "results" language applies in this important context. The urgency of the current circuit split makes this case an ideal vehicle to clarify the proper vote-denial inquiry.

### A. Post-*Shelby County* Courts Sharply Diverge in Vote Denial Cases

Beginning in 2014, a host of cases challenging new voting regulations progressed to the Circuit Courts of Appeal. The Fourth Circuit twice dealt with a North Carolina law reducing the number of days of early voting, ending the practice of same-day registration during early voting, restricting the counting of out-of-precinct ballots, and instituting a voter ID requirement. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). The Fifth Circuit encountered Texas' new voter ID requirement. *Veasey*, 830 F.3d 216. Two separate Sixth Circuit panels addressed Ohio's decision to reduce the number of early voting days from 35 to 29. *Husted I*, 768 F.3d 524; *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (*Husted II*). And

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[2] Although the Sixth Circuit vacated the *Husted I* opinion as moot after this Court stayed the issuance of the preliminary injunction and allowed the 2014 election to take place under the challenged rules, it has been cited as persuasive authority long after it was vacated. *See Veasey v. Abbott*, 830 F.3d 216, 244-45 (5th Cir. 2016) (en banc).

the Seventh Circuit confronted Wisconsin's voter ID requirement. *Frank*, 768 F.3d 744. Two distinct and irreconcilable results emerged from these cases.

The Sixth Circuit's first *Husted* decision was the beginning of this series. The panel in that case emphasized that a Section 2 plaintiff "need show only that the challenged action or requirement has a discriminatory effect on members of a protected group." 768 F.3d at 550 (quoting *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002)). Under the two part test the court adopted, a successful challenger must only show that the observed statistical disparate impact is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* at 554. The Fourth Circuit adopted the same test in *League of Women Voters*, 769 F.3d at 240, while the Fifth Circuit adopted a similar formulation in *Veasey*, *see* 830 F.3d at 264-65. All three courts found that the challenged provisions violated Section 2 by linking the disparate statistical outcome with some combination of historical *de jure* discrimination and contemporary socioeconomic disparities. *See Husted I*, 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)); *League of Women Voters*, 769 F.3d at 246 (focusing on "effects of past discrimination that hinder minorities' ability to participate effectively in the political process"); *Veasey*, 830 F.3d at 259 ("[T]he history of State-sponsored discrimination led to . . . disparities in education, employment, housing, and

transportation."). While these courts also considered other factors—particularly the strength of the asserted state interest involved—the dispositive factors in all three were the observed link between a statistically significant racial effect and the socioeconomic disparity.

Although it accepted the two-part test applied by the above trio, the Seventh Circuit in *Frank* applied both parts in a substantially different manner. The court first rejected the implied premise of *Husted I* and *League of Women Voters* that a statistically disparate *outcome* is enough to trigger Section 2. Both those cases (and *Veasey*, decided later) found "discriminatory effect" based on a simple statistical comparison between the old and new conditions. *See Husted I*, 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, same-day registration, and out-of-precinct ballots); *Veasey*, 830 F.3d at 250-51 (discussing four expert opinions that black and Hispanic voters in Texas are more likely than white voters to lack a photo ID). *Frank* recognized similar findings, but rejected the proposition that a mere disparity in possession of IDs amounted to a "discriminatory result," noting that while the statistics demonstrate a "disparate outcome, they do not show a 'denial' of anything by Wisconsin, as § 2(a) requires." *Frank*, 768 F.3d at 753. Rather than a mere disparate outcome, *Frank* recognized that Section 2—and particularly the interpretive guide present in Section 2(b)—requires an appraisal of a State's entire voting apparatus to determine whether

voters of every race have an *equal opportunity* to register and vote. *See id.* at 753-54. Since Wisconsin had not made it "*needlessly* hard to get photo ID," *id.* at 753, "everyone ha[d] the same opportunity to get a qualifying photo ID," *id.* at 755.

Having concluded that the challengers failed to show the Wisconsin voter ID law had a discriminatory result, the *Frank* court further questioned the others' reliance on socioeconomic data to establish interaction between the ID requirement and social and historical conditions, noting that this analysis "does not distinguish discrimination by the defendants from other persons' discrimination." *Id.* In the Seventh Circuit's view, Section 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.* at 753. While the *Veasey* court tried to distinguish *Frank* on this point by noting that there had been no finding of official discrimination by Wisconsin, *Veasey*, 830 F.3d at 248, the socioeconomic data on its own tends to do most of the work in these cases. *See Husted I*, 768 F.3d at 556-57 ("African Americans' lower-socioeconomic status in turn plays a key role in explaining why the disproportionate impact of SB 238 and Directive 2014–17 burdens African Americans' voting opportunities."). *Frank* presents a clear contrast from the trio of other appellate cases, requiring Section 2 plaintiffs to show a clear connection between the disparate outcome of a particular regulation and some state action.

The Sixth Circuit later expanded this split when a new panel abandoned the analysis in the initial *Husted* case and upheld the state's early voting changes. The second *Husted* panel sided with the

Seventh Circuit, holding that "the 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 in the political process." *Husted II*, 834 F.3d at 637-38. Like *Frank*, the *Husted II* court required more than a statistically disparate *outcome* to clear the first step.

The current split of authority covers two discrete questions essential to the interpretation of Section 2: (1) what constitutes a "discriminatory result?"; and (2) to what extent must this result be connected to discrete state action? Both questions involve the thorny issue of causation—to what extent does the statute hold states responsible for existing socioeconomic conditions? This Court's intervention is necessary because the current patchwork of case law is entirely unworkable and renders a state's power to regulate its own elections subject to the mercy of geography.

### B. Section 2 Guarantees Equal Opportunity to Participate in Elections

For several reasons, *Frank* and *Husted II* represent the better approach. The statute is clear that a violation occurs only when the political processes "are not equally open to participation by members of a class of citizens protected" under its terms. 52 U.S.C. § 10301(b). To prevail, a plaintiff must show that members of that protected group "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). The mere fact that some methods of voting

might be incidentally favored by individuals of particular races does not mean that a state necessarily violates Section 2 by curtailing that method. The same is true of neutral, generally applicable voting regulations such as voter ID.[3]

First, it is clear, even in prior Ninth Circuit precedent, 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). The few vote-denial cases litigated before *Shelby County* uniformly held that plaintiffs must show a lack of opportunity distinct from the mere racial outcome of a policy. Courts of

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[3] A separate problem raised by the outcome-based interpretation of Section 2 is the weight, or lack thereof, that courts using that formulation give to the asserted state interest involved. *Cf. 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"). Even where a statute authorizes disparate impact liability, the defendant's 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"). Any interpretation of Section 2 must give significant weight to the asserted state interests, many of which this Court or other courts have recognized as important or legitimate. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-97 (2008) (plurality opinion) (voter ID law serves interests of protecting against voter fraud and promoting confidence in elections); *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (registration cutoff before Election Day permits maintenance of accurate voter rolls); *Blackwell*, 387 F.3d at 568-69 (importance of precinct system).

Appeal turned away challenges to Virginia's system of appointing (rather than electing) school board members, *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), an agricultural district's requirement that individuals own property in the district to vote in district elections, *Smith*, 109 F.3d 586, and a city's implementation of a state statute that automatically purged from the voting rolls individuals who had not voted for the past two years, *Ortiz v. City of Philadelphia*, 28 F.3d 306 (3d Cir. 1994). All three courts confronted racial disparities, but reasoned that the provisions at issue did not deprive anyone of equal opportunity to participate in elections. As *Ortiz* put it, "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." 28 F.3d at 314; *see also Irby*, 889 F.2d at 1358 (explaining that there was no evidence the system of appointing school board members caused the admitted racial disparity; rather, black Virginians simply sought school board membership less frequently). These examples demonstrate that the mere failure to take advantage of the opportunity to vote or register does not establish even a prima facie Section 2 violation.

Under this standard, the operative question in cases like *Husted I*, *League of Women Voters*, *Veasey*, and the case below changes significantly. As the Seventh Circuit explained, to evaluate equality of opportunity, one "must look not at [the challenged provision] in isolation but to the entire voting and registration system." *Frank*, 768 F.3d at 753. So, in *Husted I*, a court under this standard would have

asked whether the remaining 29 days of early voting still provided individuals of all races an equal opportunity to exercise the right to vote. *Cf. Brown v. Detzner*, 895 F. Supp. 2d 1236, 1255 (M.D. Fla. 2012) (denying preliminary injunction in challenge to Florida's reduction in early voting, noting that because the new system "allows early voting during non-working hours, as well as voting during the weekend, including one Sunday, voting times which are important to African American voters, as well as to [get-out-the-vote] efforts, the Court cannot find that [it] denies equal access to the polls"). In *League of Women Voters*, the court would have asked whether black voters would have an equal opportunity to vote without same-day registration or the counting of out-of-precinct ballots. *Cf. N.C. State Conf. of NAACP v. McCrory*, 997 F. Supp. 2d 322, 350 (M.D.N.C. 2014), *aff'd in part and rev'd in part sub nom. League of Women Voters*, 769 F.3d 224 ("Plaintiffs have not shown that African–American voters in 2012 lacked—or more importantly, that they currently lack—an equal opportunity to easily register to vote otherwise."). And in *Veasey*, the court would have asked whether Texas residents had an equal opportunity to obtain an ID. *Cf. Frank*, 768 F.3d at 753 ("Act 23 extends to every citizen an equal opportunity to get a photo ID," and "unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter."). Framing the cases in terms of opportunity instead of outcome may well have produced a different result in all three, further necessitating this Court's review.

Indeed, were it otherwise, Section 2 would have a similar effect as the "uncommon" Section 5, *Katzenbach*, 383 U.S. at 334, which is currently

unenforceable in light of this Court's *Shelby County* decision. That would effect a sea change, potentially rendering *Shelby County* a dead letter. Unlike Section 2, Section 5 is targeted at certain covered jurisdictions determined to have a "specified history of voting discrimination." *Young v. Fordice*, 520 U.S. 273, 276 (1997). It prohibits any change from taking effect that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The non-retrogression rule is outcome based, a bare disparate impact provision that "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). It was never meant to apply nationwide: Section 2 and Section 5 "combat different evils," *id.* at 477, and this Court generally presumes that a difference in language in two related provisions conveys a difference in meaning, *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071-72 (2018). Nevertheless, some of the cases discussed above 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).

Cases such as *Husted I* can hardly be understood except as retrogression cases. After all, who would seriously contend that offering four-weeks' worth of early voting constitutes a denial of opportunity for *anyone* to vote? *See Husted II*, 834 F.3d at 623 ("The law is facially neutral; it offers early voting to

everyone. The Constitution does not require *any* opportunities for early voting and as many as thirteen states offer just one day for voting: Election Day."). Unless early-voting locations were placed strategically to make it harder for members of one racial group to vote, *see Brooks v. Gant*, No. CIV-12-5003-KES, 2012 WL 4482984, at *1, *6-7 (D.S.D. Sept. 27, 2012) (Section 2 violation where substantially Native American county offered far fewer early voting days than majority-white counties)—something the challengers did not allege—the only way the *Husted I* decision makes sense is as an application of the non-retrogression principle. As the panel in *Husted II* put it, the challengers argued that Ohio's previous 35-day period "established a federal floor that Ohio may add to but never subtract from." *Husted II*, 834 F.3d at 623. This sort of a one-way ratchet is characteristic of a Section 5 non-retrogression analysis, but foreign to the text of Section 2, which speaks only of opportunity.

These results can hardly be explained by the existence of state-sponsored discrimination or the other "Senate Factors" discussed in *Gingles*. After all, Ohio was never a covered jurisdiction under Section 5, and while Texas and North Carolina were, their regimes of state-sponsored discrimination have faded into the distant past. And as this Court has held, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not in itself unlawful." *Bolden*, 446 U.S. at 74. How long may states be held responsible for decades-old discrimination, racially polarized voting, and current socioeconomic conditions? At some point, it becomes impossible to say that state action caused the current situation. *Cf. Frank*, 768 F.3d 753 ("units of

government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination" (citing *Milliken v. Bradley*, 418 U.S. 717 (1974))). But if courts continue to take the path of *Husted I*, *League of Women Voters*, and *Veasey*, the practical result will be the indefinite expansion of Section 5's non-retrogression standard nationwide, in defiance of *Shelby County* and the text of Section 2.

## II. The Lower Court's Reading of Section 2 Raises Significant Constitutional Concerns

Stretching the text of Section 2 to invalidate election regulations like Arizona's decision not to count out-of-precinct ballots threatens to render Section 2 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). The reading adopted by the Ninth Circuit below, as well as the *League of Women Voters*, *Veasey*, and *Husted I* courts, threatens to bring Section 2 into conflict with the Equal Protection Clause and render it an impermissible exercise of Congressional power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments. Certiorari is warranted so that the Court may consider limiting Section 2 to avoid these issues.

Through a broad reading of Section 2, courts like the Ninth Circuit below have effectively expanded disparate impact liability—in a very high-profile area of law—at a time when many have begun to recognize the conflict between disparate impact doctrine and the Constitution's guarantee of equal protection. Indeed, this Court's recent decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, which ultimately found that the Fair Housing Act encompassed disparate impact liability, recognized that the doctrine must be "properly limited in key respects that avoid the serious constitutional questions that might arise" if "liability were imposed based solely on a showing of a statistical disparity." 135 S. Ct. 2507, 2522 (2015). Should the decision below stand, Section 2 is headed that way. After all, for the all of the discussion about the various Senate Factors, liability in such cases is premised on the existence of a statistical disparity—each court that has found a disparate impact at "step one" of the vote-denial inquiry has found the necessary link with social and historical conditions to impose liability. Only those courts that, like *Frank* and *Husted II*, consider equality of opportunity as the touchstone have rejected this theory.

The problems with unrestrained disparate impact are legion. Perhaps worst of all, "[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." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 564 (2003). Relatedly, the existence of disparate impact liability 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 Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989) (noting that employers would be compelled to establish racial quotas in response to a disparate impact provision). Racial classifications are nearly always invalid absent an "extraordinary justification," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979), and facially neutral laws enacted because of their racial outcomes are equally suspect, *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Disparate impact provisions encourage suspect racial classifications and motives at the expense of relevant, race-neutral considerations. Failing to correct an interpretation of Section 2 that effectively requires race-based decision making places 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).

There is already evidence that the debates surrounding election regulations are sordidly consumed with race; in the Texas litigation, the Fifth Circuit had to clarify that a finding of discriminatory intent could not be based on speculation by the bill's *opponents* that the *supporters* had a racial motive. *Veasey*, 830 F.3d at 233-34. Adopting a reading of Section 2 that invalidated any provision with a bare disparate result on minority voters would 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.

Further, the interpretation below raises unnecessary constitutional questions regarding the proper exercise of Congressional power under the Fourteenth and Fifteenth Amendments. Both amendments prohibit only intentional discrimination, and both 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. In *City of Boerne*, this Court recognized important limits on the enforcement power, holding that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. In other words, because Congress' enforcement power is remedial, not substantive, Congress cannot use that power to broaden the scope of constitutional protections. *See id.* at 519, 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.

The Voting Rights Act is indeed the prime example of remedial legislation to enforce the Reconstruction Amendments. *See id.* at 530 (comparing the Voting Rights Act to the Religious Freedom Restoration Act of 1993). Such remedial action was indeed necessary in 1965. *See Katzenbach*, 383 U.S. at 313-14 (noting the ineffectiveness of case-

by-case litigation to protect voting rights in the South). But even then, the Court "indicated that the Act was 'uncommon' and 'not otherwise appropriate,' but was justified by 'exceptional' and 'unique' conditions." *Shelby Cty.*, 570 U.S. at 555 (quoting *Katzenbach*, 383 U.S. at 334-35); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (describing Section 5 remedies as "stringent"). Those conditions no longer prevail. *Shelby Cty.*, 570 U.S. at 535 ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."). Absent the conditions that made remedial legislation necessary in 1965, it is doubtful that Congress could enact a statute as broad as the one imagined by the Ninth Circuit below, or by the *Husted I*, *League of Women Voters*, and *Veasey* courts. Fortunately, Section 2's text naturally favors a narrower reading that avoids this constitutional concern, proscribing only voting regulations that deprive voters of an equal opportunity to participate in an election.

More than a mere dispute over statutory interpretation, this petition presents high constitutional stakes. Certiorari is warranted because failure to correct errant interpretations of Section 2 may well lead to a significant constitutional conflict and exacerbate the continuing tug-of-war between disparate impact and equal protection.

## CONCLUSION

For the reasons stated herein, and those stated by Petitioners, Amici respectfully request that this Court grant the petition for certiorari.

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Respectfully submitted,

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