No. 19-1257

IN THE
Supreme Court of the United States

MARK BRNOVICH, ET AL.,
Petitioners,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[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.

INTRODUCTION AND SUMMARY OF ARGUMENT

As amended in 1982, Section 2 of the Voting Rights Act allows a plaintiff to establish a violation if the "standard, practice, or procedure" being challenged is "imposed or applied … 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." 52 U.S.C. §10301(a) (emphasis added). In other words, proof of a racially discriminatory *intent* "is no longer required to prove a Section 2 violation." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991). This results-without-discriminatory-intent theory of Section 2 has come to be known as the "results test" or "results prong" liability. *See*, *e.g.*, *Ala.*

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[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 received timely notice and have consented to the filing of this brief.

Legislative Black Caucus v. Alabama, 575 U.S. 254, 287 (2015) (Scalia, J., dissenting).

The scope of Section 2's results test is a tremendously important issue for the orderly administration of elections. Every year, numerous states, counties, municipalities, and other government entities face Section 2 suits that often seek sweeping changes to election laws. Yet this Court has given little guidance about the proper interpretation and application of the results test; indeed, in the nearly 40 years since Congress adopted that test, this Court has not considered a single Section 2 case outside the context of "vote dilution" challenges to at-large elections or redistricting plans.

As a result, the lower courts have struggled with the proper framework for analyzing other types of Section 2 cases, such as challenges to voter-identification laws, restrictions on third-party ballot collection, rules for verifying absentee ballots, early voting policies, and countless other election-related laws. Although several major Section 2 cases have escaped the Court's review in recent years due to legislative changes or disputes over litigation authority, this petition squarely presents the relevant issues in a case that reached final judgment in district court based on a comprehensive and fully developed record.

The Court should grant certiorari and reverse the Ninth Circuit's deeply problematic approach to Section 2. The Ninth Circuit would effectively find liability under the results test whenever a law would have a racially disparate impact that is "more than de

minimis." This Court has "never directly address[ed] [Section 2's] constitutionality." *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring). But if the Ninth Circuit's interpretation of the statute were correct, Section 2 would be unconstitutional. Invalidating a state's neutral ballot integrity measure based on a mere disparate impact would far exceed Congress' authority to enforce the Fourteenth and Fifteenth Amendments, both of which are limited to *intentional* discrimination. And the Ninth Circuit's "more than de minimis" approach would itself raise serious constitutional concerns under the Equal Protection Clause by placing racial considerations at the forefront of every decision to pass, modify, or repeal an election law.

At a minimum, this Court should construe Section 2 to ameliorate these constitutional infirmities. First, the Court should hold that Section 2 requires a disparate impact that is so *substantial* or *significant* as to give rise to an inference of intentional discrimination. Nearly every law will have some differential effect on different racial groups, and the Ninth Circuit's "more than de minimis" approach makes it far too easy for a court to invalidate even neutral, common-sense election security measures. Second, the Court should hold that any racial disparities must have been *caused* by the challenged law; without this critical requirement, it is impossible to tell whether any alleged disparities were the result of the law at issue or unrelated social or economic conditions that are not attributable to state action. Without a proper causation element, a state could find

itself liable under Section 2 for disparities it did nothing to create.

Finally, this Court should reverse the Ninth Circuit's deeply flawed holding that Arizona's ballot-collection regulations were motivated by discriminatory intent. Much of the court's analysis turns on century-old history of Arizona's territorial and early statehood periods. And the court seemed to infer discriminatory motive based on what it deemed to be a lack of evidence supporting the ballot-collection rules. But as the bipartisan Carter-Baker Commission has recognized, there is a perfectly rational, neutral, non-discriminatory basis for Arizona's law, which is to protect vulnerable citizens from exploitation by paid third-party ballot collectors. "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op.). This Court should grant certiorari and affirm the district court's decision upholding all aspects of the challenged laws.

ARGUMENT

I. The Court should grant certiorari because the scope of Section 2's results test is a critically important issue that has repeatedly evaded this Court's review.

Since 2013, there have been at least 75 cases filed against states, cities, counties, and other government entities under Section 2 of the VRA. *See* ACLU, *The Case for Restoring and Updating the Voting Rights Act* 42 (2019) (collecting statistics); *see*

also Veasey v. Abbott, 830 F.3d 216, 247 n.37 (5th Cir. 2016) (en banc) (noting that "challenges to election laws under Section 2 have increased" substantially in the last decade). And, as explained further below, Section 2's results test is a remarkably powerful tool, as it has been construed to allow invalidation of even neutral state voting rules without proof of discriminatory intent.

Yet, despite the importance of these issues, this Court "has yet to consider a Section 2 vote-denial claim after [*Thornburg v.*] *Gingles*," a case decided more than three decades ago. *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 626 (6th Cir. 2016). Indeed, this Court has *never* addressed how Section 2 applies outside the context of challenges to at-large districts or redistricting plans. For example, despite an abundance of litigation, *see infra*, this Court has never addressed the interpretation or application of Section 2 in the context of voter identification laws, security measures for absentee ballots, limits on paid ballot harvesting, or changes to early or in-person voting. As a result, "[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), *vacated sub nom. Ohio State Conf. of NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The lower courts have lamented the "unsettled … standard for … adjudication" in these important cases. *Northeast Ohio Coal. for the Homeless*, 837 F.3d at 626; *see also Veasey*, 830 F.3d at 305 n.41.

Section 2 cases often escape this Court's review for reasons that have nothing to do with either the

merits or the importance of these issues. Some cases never make it even to the petition stage because the parties choose to end the litigation after stay proceedings without completing the litigation on the merits. *See, e.g.*, *Ohio State Conf. of NAACP*, 768 F.3d 524 (parties settled after this Court granted a stay); *Ohio Dem. Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (no certiorari petition filed after this Court denied a stay); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656 (6th Cir. 2016) (no certiorari petition filed after this Court denied a stay). In other instances, states have declined to seek certiorari after changing the law at issue. *See*, *e.g.*, *Mich. State A. Philip Randolph Inst. v. Johnson*, 2019 WL 4145547 (6th Cir. Jan. 14, 2019) (granting motion to vacate opinion as moot after voter initiative changed the challenged law).

Even for those cases that do make it to the petition stage, procedural or vehicle issues often keep this Court from reaching the merits. Consider *Abbott v. Veasey*, a high-profile Section 2 challenge to a Texas voter-identification law. The district court held a nine-day trial with dozens of witnesses before permanently enjoining the law. The case then bounced back and forth between the district court and the Fifth Circuit for three years, culminating in a 203-page en banc opinion by a sharply divided court. *See* 830 F.3d 216. Texas petitioned for certiorari in 2016, but despite a well-developed record and comprehensive discussion of the legal issues by the Fifth Circuit, the district court had not yet entered a final remedial order as to the Section 2 claim. Although this Court denied certiorari, the Chief Justice wrote separately to

emphasize that Texas could petition the Court for review "again after entry of final judgment" because "[t]he issues will be better suited for certiorari review at that time." *See Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting denial of cert.). But in 2018, Texas "passed a law designed to cure all the flaws" of the previous statute, and the lawsuit was dismissed later that year. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018).

That same Term, the Court also declined to hear *North Carolina v. North Carolina State Conference of NAACP*—a sweeping challenge to North Carolina's voter-identification, out-of-precinct voting, and same-day registration laws. The Court denied certiorari after receiving a "blizzard of filings" about whether North Carolina's Legislature or Attorney General was the proper party "authorized to seek review in this Court under North Carolina law." *North Carolina v. North Carolina State Conference of NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., respecting denial of cert.). Once again, the scope of Section 2's results test evaded this Court's review not because the issue was unimportant but because of an intra-state dispute over litigation authority that posed serious obstacles to an orderly resolution of the case. The Chief Justice reiterated that the denial of certiorari "'imports no expression of opinion upon the merits of the case.'" *Id.* (citation omitted).

Finally, the Court also denied certiorari in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), which involved a Section 2 challenge to Wisconsin's voter-identification law. That case was complicated by a number of intervening developments after the district

court issued its decision enjoining the challenged law. Following the district court's decision, Wisconsin made significant changes to its enforcement policies, including providing voters free identification cards and issuing new rules that expanded the types of documents that could be used to obtain identification. *See* Br. in Opp., 2015 WL 512901, *13-17 (Feb. 6, 2015) (discussing "post-judgment issues" that "complicate the record on appeal").

Although the scope of Section 2 has evaded the Court's review in recent years, this case poses none of the obstacles that led the Court to deny certiorari in the cases discussed above. Arizona's laws are the same today as they were when they were first challenged. The appeal was taken from a final judgment in district court. There is no dispute about who has authority to litigate on behalf of Arizona. And the record is as developed as it will ever be: the district court held a 10-day trial and issued an 83-page opinion, and the Ninth Circuit panel and en banc court issued a combined 255 pages of opinions that comprehensively address the relevant issues. At bottom, the critical issues presented here about the scope and application of Section 2 will never "be better suited for certiorari review." *Veasey*, 137 S. Ct. at 613 (Roberts, C.J., respecting denial of cert.).

This Court's review is especially imperative because Section 2 litigation has, if anything, only continued to increase in recent years in terms of both the number of cases and the breadth of the challenges. A broad array of state voting laws across the country are under currently attack. Just within the last few years, parties have brought Section 2 challenges to

voter-identification requirements, *see North Carolina State Conference of the NAACP v. Cooper*, No. 1:18-cv-1034 (M.D.N.C. 2018); early voting locations, *see Allen v. Waller County*, No. 4:18-cv-3985 (S.D. Tex. 2018); *Navajo Nation v. Hobbs*, No. 3:18-cv-8329 (D. Ariz. 2019); witness requirements for absentee ballots, *see League of Women Voters v. Virginia State Board of Elections*, No. 6:20-cv-24 (W.D. Va 2020); language assistance laws, *see Navajo Nation,* No. 3:18-cv-8329; and to all manner of "election conditions" in light of Covid-19, *see Texas Democratic Party v. Abbott*, No. 5:20-cv-438 (W.D. Tex. 2020). The scope of liability under Section 2's results test is a question of profound importance that is overdue for this Court's intervention.

II. The Ninth Circuit's interpretation of Section 2's results test is untenable.

A. The Constitution gives states broad leeway to adopt common-sense election integrity measures.

The Framers "intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). Alexander Hamilton flatly rejected any idea to the contrary: "Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it … as a premeditated engine for the destruction of the State governments?" Federalist No. 59 at 361 (A. Hamilton) (Clinton Rossiter, ed. 1961). And the Constitution itself

textually commits to state legislatures the authority to regulate the "Times, Places and Manner of holding Elections." U.S. Const. art. 1 § 4, cl. 1. In fact, the Constitution not only commits this power to states, but imposes a *duty* to exercise it. *See Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8 (2013). Given that this broad power "'embrace[s] authority to provide a complete code for the conduct of congressional elections,'" *id.* at 8-9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)), it assuredly allows states to adopt common-sense regulations to protect the security and integrity of their election processes.

States employ many different methods to regulate their elections, serving their intended "'role'" in our federalist system "as laboratories for experimentation.'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Courts "should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). As this Court has recognized, every election law "invariably impose[s] some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And no citizen has a right to be free from "the usual burdens of voting." *Crawford*, 553 U.S. at 198. States can—and always have been able to—enact rules governing the electoral process, a process "that is necessarily structured to maintain the integrity of the democratic system." *Burdick*, 504 U.S. at 441.

The Arizona policies at issue here fall within the heartland of state authority to ensure the integrity of electoral process through neutral, common-sense regulations. Arizona's longstanding out-of-precinct rule—which is similar to policies in a

majority of other states—provides that in-person, Election Day voters must "cast their ballots in their assigned precinct." Pet. 6; Pet. App. 408-09. In turn, precincts may only "count[] those ballots cast in the correct precinct." Pet. 6; Pet. App. 408-09. Voters who fail to vote in the correct precinct may cast a provisional ballot. Pet. 6; Pet App. 409, 452. That policy "is important to the State's precinct-based election-day voting system," and affects only fractions of a percentage of voters who cast ballots in the wrong precinct. Pet. 2, 16.

Second, Arizona's ballot-collection law prohibits any "person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." Pet. 2. This law reasonably seeks "to prevent undue influence, fraud, ballot tampering, and voter intimidation." Pet. 6-7 (citation omitted). And it directly follows the recommendations of the bipartisan Carter-Baker Commission, which found that "[a]bsentee ballots remain the largest source of potential voter fraud." Report of the Comm'n on Federal Election Reform 46 (2005). Once again, this is precisely the sort of neutral, common-sense ballot integrity measure that is well within a state's discretion to enact.

B. If Section 2 requires invalidation of neutral state laws without proof of intentional discrimination, then the statute exceeds Congress' enforcement power.

The Ninth Circuit nonetheless invalidated both challenged laws based on an expansive interpretation of Section 2 that, if allowed to stand, would raise serious constitutional questions. Understanding why requires returning to the constitutional guarantees that Section 2 is designed to protect. The "central purpose" of the Fourteenth Amendment's Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *see also Washington v. Davis*, 426 U.S. 229, 240 (1976) (violations of Fourteenth Amendment require discriminatory purpose). The Fifteenth Amendment likewise prohibits only those voting laws that draw explicit racial classifications or are "motivated by a discriminatory purpose." *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

"As originally enacted," Section 2 comported with those first principles. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 500 (1997). In its original form, Section 2 was "an uncontroversial provision that simply restated the prohibitions against ... discrimination already contained in the Fifteenth Amendment." *Id.* Section 2 thus became a mechanism for challenging *intentionally discriminatory* voting restrictions. Deploying Section 2 this way—to protect citizens' Fourteenth and Fifteenth Amendment rights

to be free from intentional racial discrimination while voting—raised no constitutional concerns.

But the statutory landscape changed dramatically when Congress amended Section 2 in 1982 to abrogate *Bolden*. Section 2 now prohibits States 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 "to vote on account of race or color." 52 U.S.C. §10301(a) (formerly 42 U.S.C. §1973). Those changes meant that a plaintiff now could establish a Section 2 violation "if the evidence established that, in the context of the 'totality of the circumstances of the electoral process,' the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process." U.S. Dep't of Justice, Civil Rights Div., Section 2 of the Civil Rights Act, bit.ly/2XGRyuW. In other words, "proof of" a racially discriminatory "intent is no longer required to prove a Section 2 violation." *Chisom*, 501 U.S. at 394.

The Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have applied a two-part "results test" that finds a violation of Section 2 when an election policy: (1) has disparate impact on a racial minority group; and (2) that impact is related to the social and historical conditions in the state. *See, e.g.*, *Hobbs*, 948 F.3d at 1012. Notably, the "results test" does *not* inquire into whether the state passed the election law with a discriminatory intent. *See Farrakhan v. Washington*, 359 F.3d 1116, 1121-24 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en

banc) (noting constitutional issues raised by a results test that lacks an inquiry into discriminatory purpose).

This Court has "never directly address[ed] [Section 2's] constitutionality." *Vera*, 517 U.S. at 990 (O'Connor, J., concurring); *see also Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting) (noting that this Court has not addressed "whether §2 of the Voting Rights Act of 1965 … is consistent with the requirements of the United States Constitution"). But the Ninth Circuit's decision here squarely presents this issue. If Section 2 invalidates state laws without proof of intentional discrimination, then Section 2 is unconstitutional. "Congress has no power to act unless the Constitution authorizes it to do so." *United States v. Comstock*, 560 U.S. 126, 159 (2010) (Thomas, J., dissenting); *see also United States v. Morrison*, 529 U.S. 598, 607 (2000).

Congress passed the Voting Rights Act as an exercise of its power to enforce the Reconstruction Amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966). The results test, as interpreted by the Ninth Circuit, far exceeds that power. As noted, the "central purpose" of the Fourteenth Amendment's Equal Protection Clause "is to prevent the States from *purposefully* discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642 (emphasis added). Likewise, the Fifteenth Amendment prohibits only laws that explicitly draw racial classifications or that are "motivated by a discriminatory purpose." *Bolden*, 446 U.S. at 62.

When deciding whether Congress' exercise of power under the Reconstruction Amendments is within its authority, this Court has assessed the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* at 519. And "Congress does not enforce a constitutional right by changing what the right is." *Id.*

Because, as interpreted by the Ninth Circuit, Section 2's results test invalidates neutral state legislation—like the Arizona policies at issue here—without a discriminatory intent, it necessarily fails the test set forth in *City of Boerne*. In fact, this Court invalidated the legislation at issue in *City of Boerne* for substantially the same reason that Section 2, as interpreted by the Ninth Circuit, is unconstitutional. *See id.* at 535 ("In most cases, the state laws to which [the legislation] applies are not ones which will have been motivated by … bigotry.").

City of Boerne does not stand alone in this regard. This Court has invalidated multiple congressional overreaches under the Reconstruction Amendments that, like the Section 2 "results test," imposed liability that was "disproportionate to any unconstitutional conduct that conceivably could be targeted by" the legislation. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83-91 (2000); *see also University of Alabama v. Garrett*, 531 U.S. 356, 368-74 (2001) (remedial enforcement legislation must target "a

pattern of *unconstitutional* discrimination" (emphasis added)).

Defenders of the Ninth Circuit's approach to Section 2 would likely emphasize the second prong of that court's results test, which asks whether a disparate impact is related to "social and historical conditions" in the state. Pet. App. 38. Based on that prong of the test, Respondents would likely argue that Section 2 requires more than just a showing of a statistical disparity in order to impose liability.

The second prong does nothing to ameliorate the constitutional flaws of Section 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 Hobbs*, 948 F.3d at 1037; *Mich. State A. Philip Randolph Inst.*, 833 F.3d at 668-69; *Veasey*, 830 F.3d at 256-64; *N.E. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, 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. Collab. v. Husted*, 189 F. Supp. 3d 708, 759-62 (S.D. Ohio), *rev'd*, 834 F.3d 620 (6th Cir. 2016); *League of Women Voters*, 769 F.3d at 245-47; *Ohio State Conf. of the NAACP*, 768 F.3d at 556-57, *vacated by* No. 14-3877, 2014 WL 10384647 (6th Cir. 2014); *Frank v. Walker*, 17 F. Supp. 3d 837, 877-79 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 957-60 (W.D. Wis. 2016).

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 North Carolina State Conf. of NAACP v. McCrory*, 997 F. Supp. 2d 322, 432-33, 486 (M.D.N.C. 2016) *aff'd in part and 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 has been 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. *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

In sum, under several lower courts' approach to Section 2, any finding of a statistical disparity will necessarily lead to the challenged law being invalidated in the absence of even a hint of discriminatory motive, animus, or intent. That sweeping intrusion into core state prerogatives has nothing to do with enforcing the actual rights guaranteed by the Fourteenth and Fifteenth Amendments. *See Davis*, 426 U.S. at 242 (mere disparate impact "[s]tanding alone" does not suggest an invidious racial classification that warrants strict scrutiny). Section 2's results test would be unconstitutional if the statute actually means what the Ninth Circuit says it does.

C. If Section's 2's results test requires states to pervasively consider race in crafting election laws, it also conflicts with the Equal Protection Clause.

The Equal Protection Clause's "central mandate" is "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Accordingly, race cannot be the "predominant factor" in fashioning election laws. *Id.* at 916; *see also Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). That principle applies equally to "laws mandating that third parties"—including state and local governments "discriminate on the basis of race." *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

If Section's 2's results test prohibits states from adopting neutral, common-sense ballot integrity measures merely because they might have a racially disparate impact, then race will be at the forefront of every decision about whether to pass, repeal, or modify a voting regulation. That is, "using 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." *Veasey*, 830 F.3d at 317 (Jones, J., concurring in part and dissenting in part). The Ninth Circuit's approach to the results test would thus impermissibly require "race to be … considered in a pervasive way." *Texas Dept. of Housing and Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2523 (2015). Indeed, it would force every state to make race the predominant factor

in setting the rules governing how voters cast their ballots. But Congress lacks a compelling interest in forcing states and localities to engage in racial discrimination merely to avoid a disparate impact. *Ricci*, 557 U.S. at 594-95 (Scalia, J., concurring).

This Court's redistricting precedents are instructive. The Court has rejected interpretations of Section 2 that "would unnecessarily infuse race into virtually every redistricting." *LULAC v. Perry*, 548 U.S. 399, 446 (2009). And Justice Kennedy has observed that "encourag[ing] or ratify[ing] a course of" conduct so inconsistent with the Equal Protection Clause merely "to find compliance with a statutory directive" would expose a "fundamental flaw" in Section 2. *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring).

Because the results test employed by the Ninth Circuit finds a violation of Section 2 every time there is more than a de minimis disparate racial impact, states will be forced to "subordinate[] traditional race-neutral … principles … to racial considerations" in an attempt to avoid any disparate racial impact of otherwise neutral laws, which is itself a violation of the Equal Protection Clause. *Miller*, 515 U.S. at 916.

D. At a minimum, this Court should interpret Section 2 to require a substantial disparate impact and evidence that the challenged law caused the disparate impact.

Although Section 2's results test, as interpreted by several lower courts, exceeds Congress' enforcement authority and makes race a pervasive

factor in all election-related decisions, the statute can be interpreted in ways that would ameliorate (if not eliminate) these constitutional concerns. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909).

There are two potential interpretations of Section 2 that would bring the statute more in line with the congruence and proportionality analysis in *City of Boerne*. First, this Court could clarify that the first prong of the results test requires not just a "more than de minimis" disparate impact, Pet. App. 44-46, but a *significant* or *overwhelming* disparity. When a disparity is sufficiently large, it may give rise to an inference of "invidious discriminatory purpose." *Davis*, 426 U.S. at 242. But the mere fact that a law "may affect a greater proportion of one race than of another" cannot by itself show such a purpose. *Id.* It is a rare law indeed that will have a perfectly proportional impact across all racial groups. Yet the Ninth Circuit's approach would allow even relatively small statistical disparities to be used to invalidate neutral, non-discriminatory state laws—especially given that, as noted above, the second prong of the test has effectively become a rubber stamp. At a minimum, this Court should establish a high threshold of significance before a statistical disparity can be used to open the door to liability under Section 2.

Second, the Court could also ameliorate the constitutional flaws of Section 2 by clarifying that a

disproportionate burden on minority voters must have been caused by *the regulation at issue* and not by "'socioeconomic conditions'" or a "'history of discrimination'" in the distant past. *See Veasey*, 830 F.3d at 311 (Jones, J., concurring in part and dissenting in part). Rates of participation in the political process may vary across racial groups, and "it cannot be the case that pointing to a … disparity related to a challenged voting practice is sufficient to 'dismantle' that practice." *Hobbs*, 948 F.3d at 1051 (O'Scannlain, J., dissenting) (citing *Frank*, 768 F.3d at 754). That is, just because a disparity exists does not necessarily mean that the challenged regulation *caused* that disparity. As Judge Jones explained, a "tailored causation analysis is imperative" because otherwise a state could be found liable based on "racial disparities it did not create." *Veasey*, 830 F.3d at 312-13 (Jones, J.) (cleaned up).

III. The Court should also consider, and reverse, the Ninth Circuit's finding of discriminatory intent.

This Court should also review, and reverse, the Ninth Circuit's finding of discriminatory intent. "'Discriminatory purpose' … implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "It implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part '*because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (emphasis added). A non-invidious classification must be upheld unless the plaintiff can prove that the justification for the law was an "obvious pretext" for discrimination—

i.e., that the law "can plausibly be explained only as a [race]-based classification." *See id.* at 272, 275.

The Ninth Circuit's analysis of discriminatory intent was riddled with errors that fundamentally skewed the court's analysis and conclusions. First, the court relied heavily on "Arizona's history of discrimination" dating back to the 1800s, including Manifest Destiny policies (mid-1800s), armed conflicts with Indian tribes (1870s), the Treaty of Guadalupe Hidalgo (1848), and Arizona's constitutional convention (1910). Pet. App. 50-54. But, of course, "history did not end" with those unfortunate events that occurred more than a century ago. *Shelby County, Ala. v. Holder*, 570 U.S. 529, 552 (2013). If a state's discriminatory policies early in its history can be used to show discriminatory intent in a challenge to a modern law, then a cloud will be cast over the validity of election laws in all 50 states.[2]

The Ninth Circuit further suggested that, because there was purportedly no evidence of ballot-collection fraud in Arizona, the entire law *must* have been motivated by racial animus. *See* Pet. App. 101 (discussing purportedly "false" allegations of voter fraud). But this Court has already rejected similar arguments, holding that "[w]hile the most effective method of preventing election fraud may well be

[2] The Ninth Circuit also invoked alleged discriminatory actions by Apache County in the 1970s, Pet. App. 64-65, which are irrelevant for multiple reasons. In particular, the Ninth Circuit made no attempt to explain why the actions of *county* officials 40 years ago are relevant to the intent of *state* officials today—especially given that Apache County comprises approximately 0.1% of Arizona's population.

debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 196.

Moreover, the bipartisan Carter-Baker Report should dispel any notion that ballot-collection laws are pretextual or a solution in search of a problem. To quote the Report, "[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Carter-Baker Report 46. "*States therefore 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.*" *Id.* (emphasis added). The notion that Arizona's neutral, common-sense measures to ensure the integrity of its elections were in fact motivated by a discriminatory purpose does not withstand scrutiny.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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