Nos. 19–1257, 19–1258

IN THE

Supreme Court of the United States

MARK BRNOVICH, ATT'Y 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 VOTING RIGHTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Amici curiae are recognized scholars in the constitutional regulation of the franchise.

Amicus curiae Joseph Fishkin, is the Marrs McLean Professor in Law at the University of Texas. He teaches and writes about constitutional law and the law of democracy, including questions of discrimination, equality, and the Voting Rights Act ("VRA"). Before he began his work as a law professor, he worked briefly at the NAACP Legal Defense and Educational Fund, where he assisted with the effort to reauthorize the VRA in 2006.

Amicus curiae Rebecca Green is Professor of the Practice of Law and the Kelly Professor for Excellence in Teaching at William and Mary Law School. She is the Co-Director of the Election Law Program, a joint project of the William and Mary Law School and the National Center for State Courts.

Amicus curiae Justin Levitt is Professor of Law at Loyola Law School, Los Angeles. His teaching and scholarship focus on constitutional law and the law of democracy, including the interpretation and application of the VRA. He served as Deputy Assistant Attorney General for the Civil Rights Division of the Department of Justice, where (among other things) he

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[1] Pursuant to Supreme Court Rule 37.3, *amici curiae* certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission.

supported and supervised the Department's work on voting rights. He has been invited to testify on the enforcement of and constitutional authority for the Voting Rights Act by committees of the United States Senate and House of Representatives, the United States Civil Rights Commission, and State legislative bodies, and has served as an expert witness in both state and federal courts.

Amicus curiae Douglas Spencer is Professor of Law and Public Policy at the University of Connecticut and Distinguished Faculty Fellow at the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado. His scholarship centers on issues of constitutional law and voting rights, including Section 2 of the VRA. Spencer has also served as an expert witness in cases brought under Section 2 of the VRA.

SUMMARY OF THE ARGUMENT

The Voting Rights Act is one of the country's most successful civil rights laws, and Section 2 is now its most essential provision. Congress properly enacted, and then amended, Section 2 pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments to the United States Constitution, and this case is a poor vehicle to map the precise boundaries of that enforcement authority. Claims that Section 2 would overshoot constitutional borders if used to prohibit mere disparate impacts are misplaced here; this case does not turn on whether evidence of disparate racial impacts alone could establish a violation of Section 2, given that no court below so held. Rather, each of those courts applied the statute with an eye to preventing or remedying

constitutional violations, in a manner well within the bounds of congressional power. Resolving this case on the merits would require the Court to weigh the evidence and decide whether the lower courts made "erroneous factual findings" or misapplied well-established "rule[s] of law" — all in service of determining the permissibility of specific election laws with limited continuing relevance even in Arizona, much less in other jurisdictions. S. Ct. R. 10. In short, this case provides neither a reason to doubt the constitutionality of Section 2 or its application by the Ninth Circuit, nor an effective channel to examine those issues. The Court should therefore dismiss the petition for certiorari as improvidently granted. See, *e.g.*, *City of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) (noting that "we are not, and for well over a century have not been, a court of error correction," and maintaining that the proper course was to dismiss the questions presented as improvidently granted because "certiorari jurisdiction exists to clarify the *law*").

First, this case presents no real dispute regarding Section 2's object or constitutional imprimatur. In 1982, Congress recognized that a statute designed to enforce constitutional protections against intentional discrimination in the franchise could effectively accomplish that goal only if it proscribed behavior lying slightly beyond the express constitutional prohibition itself. That is, in the arena of voting rights, Congress recognized that a statute requiring direct present proof of intentional discrimination was inadequate in order to deter and remedy discrimination. And so the 1982 amendments

to the Voting Rights Act created a bit of prophylaxis. Congress chose to deter present intentional discrimination in the franchise by addressing present danger signs of discrimination; Congress chose to remedy past intentional discrimination by addressing lingering present electoral consequences of that discrimination.

This choice was well within the congressional authority expressly conveyed by the Fourteenth and Fifteenth Amendments. Under either the standard of review the Court applies to enforcement of the Fifteenth Amendment — with its narrow focus on the confluence of racial discrimination and the franchise — or the more restrictive standard the Court applies to enforcement of the broader Fourteenth Amendment guarantees, the means by which Congress chose to deter or remedy constitutional violations via Section 2 passes constitutional muster.

Second, no court in this case applied a legal standard crossing statutory or constitutional bounds. Section 2's twin goals of deterring and remedying intentional discrimination find expression in the command to examine the "totality of circumstances," with guidance from factors identified by the U.S. Senate as indicative of present discriminatory risk or past discriminatory conduct in need of present electoral remedy. Every appellate circuit — and each of the courts below — has recognized that the statutory text requires more than disparate impact alone to establish Section 2 liability.

Thus, the primary disputes among the courts below were factual disputes that do not implicate any concern regarding congressional power. Because those

primary disputes are fact-bound and steeped in local context, they are unlikely to substantially affect the resolution of future cases; moreover, one of the Arizona provisions at issue in this case has become significantly less meaningful even in Arizona as modes of voting there have changed. This Court should therefore dismiss the petition for certiorari as improvidently granted.

ARGUMENT

Petitioners and several *amici* suggest that the Ninth Circuit's interpretation of Section 2 of the Voting Rights Act is premised solely on the disparate impact of the Arizona provisions challenged in this case, and assert that such an application exceeds Congress's constitutional authority. Brief for State Petitioners 25–26; Brief for Private Petitioners 41; Brief of *Amici Curiae* States of Ohio et al. 30; Brief *Amicus Curiae* of American Constitutional Rights Union 5–6; Brief of Sen. Ted Cruz et al. as *Amici Curiae* 14, 28–29; Brief of *Amicus Curiae* Gov. Kristi Noem 13. This is not an accurate description of the Ninth Circuit's opinion, but a strawman. The Ninth Circuit — like all other circuits — does not allow for Section 2 violations premised solely on disparate impact, but instead applies Section 2 in a manner consistent with precedent and well within the permissible scope of Congress's authority under its enumerated powers to enforce the Fourteenth and Fifteenth Amendments.

I. Section 2 of the Voting Rights Act Is a Constitutional Exercise of Congress's Enumerated Power

A. This Court Has Consistently Recognized the Importance and Propriety of the Voting Rights Act

The Voting Rights Act is often cited as the country's most successful civil rights law. See William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes 1–24, 117–18 (2010) (underscoring the essential role of the Act). The most powerful remaining provision of the statute is the nationwide protection against discriminatory laws contained in Section 2. In its opinion striking down the 2006 coverage formula of Section 4 as insufficiently attuned to present conditions, this Court took pains to note that the "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2." *Shelby Cty.* v. *Holder*, 570 U.S. 529, 557 (2013). And as a governmental interest, Section 2 of the Act is sufficiently vital that the Court has long assumed — and individual Justices have clearly stated — that compliance with Section 2 is sufficient to satisfy the constitutional strict scrutiny that is required where electoral regulations are predominantly motivated by racial considerations. *Cooper* v. *Harris*, 137 S. Ct. 1455, 1464, 1469 (2017); *League of United Latin Am. Citizens (LULAC)* v. *Perry*, 548 U.S. 399, 475 (2006) (Stevens, J., concurring in part and dissenting in part); *Bush* v. *Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring). *Cf. Cooper*, *supra,* at 1464, 1469 (noting the same for Section 5); *Bethune-Hill* v. *Va. State Bd. of Elections*, 137 S. Ct. 788, 801–02 (2017) (Section 5);

LULAC, *supra,* at 475 n. 12 (Stevens, J., concurring in part and dissenting in part, and noting the agreement of Justice Breyer on this point) (Section 5); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part) (Section 5).

This Court has recognized the VRA's legitimacy as well as its importance. Indeed, several Justices have pointed to the Voting Rights Act as a model of enforcement authority under the Reconstruction Amendments: the VRA has been deployed as the exemplar of proper congressional action, offered up in contrast to the inadequacies of other federal statutes. It is unsurprising, perhaps, that the most thorough approbation arrives in citation of the original 1965 enactment and its preclearance regime. For example, in an opinion questioning congressional authority under the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity in Title II of the Americans with Disabilities Act of 1990, Chief Justice Rehnquist contrasted what he described as a meager evidentiary record of relevant state violations concerning access to the courts for persons with disabilities with the far more "extensive" record supporting the remedial action of the Voting Rights Act. See *Tennessee* v. *Lane*, 541 U.S. 509, 547–48 (2004) (Rehnquist, C.J., dissenting). And in an opinion similarly questioning congressional authority to abrogate sovereign immunity in the Family and Medical Leave Act of 1993, Justices Kennedy, Scalia, and Thomas similarly cited the contrasting authority of the Voting Rights Act "as a proper exercise of Congress's remedial power." *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 756–57 (2003) (Kennedy, J., dissenting); see also *Bd. of Trustees of Univ. of Ala.* v.

Garrett, 531 U.S. 356, 373 (2001) (finding insufficient Fourteenth Amendment foundation for Title I of the ADA, in marked contrast to the Voting Rights Act's "detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment").

But it is not merely the VRA's preclearance regime that has earned the Court's stamp of approval. In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), this Court held that the Religious Freedom Restoration Act of 1993 was not a proper use of the enforcement power of the Fourteenth Amendment, sufficient to apply against the States. *Id.* at 536. In doing so, the Court repeatedly juxtaposed the improper thrust of that statute with Congress's appropriate use of enumerated power in passing the Voting Rights Act. *Id.* at 518. And the Court in *Boerne* emphasized the propriety of not merely the preclearance provisions of the original VRA, but also nationwide provisions aimed at remedying or deterring constitutional violations, without proof of localized discriminatory intent. For example, the Court noted the Act's ban on literacy tests as a proper prophylactic use of congressional authority even as applied to States without a record of intentional racial discrimination in the franchise. *Id.* at 518, 526-27, 533; see also *Oregon* v. *Mitchell*, 400 U.S. 112, 118 (1970) (Black, J.) (describing unanimity on the Court regarding the propriety of the ban on literacy tests); *id.* at 216 (Harlan, J., concurring in part and dissenting in part) (finding the ban justified by the risk of discrimination); *id.* at 234–36 (Brennan, J., dissenting in part and concurring in the judgment in part) (finding the ban justified by the lingering electoral effects of prior educational discrimination);

id. at 283–84 (Stewart, J., concurring in part and dissenting in part) (focusing on the nationwide scope). And the Court noted the Act's national ban on English-only franchise restrictions for voters educated in American schools in languages other than English as a similarly a proper prophylactic use of congressional authority even as applied to States without a record of intentional racial discrimination in the franchise. *City of Boerne, supra,* at 528, 533; see also *Katzenbach* v. *Morgan*, 384 U.S. 641, 648–49, 652–54 (1966).

B. This Court Has Recognized that Congress Has Substantial Authority to Exercise Its Enumerated Powers to Address Racial Discrimination in the Franchise

The Court's repeated invocations of the constitutional legitimacy of the core protections of the Voting Rights Act are rooted in the VRA's power to address the convergence of racial discrimination and the right to vote—the lingering cancer that is the country's most troubling social cleavage, and the critical point of access to the political process that is "preservative of all [other] rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). Without robust protections against racial discrimination in the franchise, there can be no hope for the public's confidence in government of the people by the people.

The Fifteenth Amendment is devoted exclusively to rooting out this evil of racial discrimination in the franchise, and expressly authorizes Congress to enforce its command by appropriate legislation. U.S. Const. amend. XV. Unlike the Fourteenth Amendment, which protects a

broad expanse of constitutional rights and authorizes a broad expanse of congressional action, *Tennessee*, 541 U.S. at 518, the Fifteenth Amendment concerns only a single subject embracing the confluence of two constitutionally protected arenas, and, it follows, must be deep in impact. See *id*. at 555 (Scalia, J., dissenting) ("But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race."); *id.* at 561–63 (discussing the reasons to give "more expansive scope" to congressional legislation directed against racial discrimination by the States, including provisions of the Voting Rights Act).

This Court has, accordingly, recognized the wisdom of deferring to congressional execution of its enumerated power to enforce the Fifteenth Amendment. On the rare occasions when Congress has exercised its constitutional prerogative under this Amendment, the Court has asked only if the congressional action constitutes "any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *S. Carolina* v. *Katzenbach*, 383 U.S. 301, 324, 330 (1966); *id.* at 326 (emphasizing the "full remedial powers" of Congress in this arena); *Katzenbach*, *supra,* at 651; *City of Rome* v. *United States*, 446 U.S. 156, 175–77 (1980); *Shelby Cty.*, 570 U.S. at 550, 556 (holding that it would have been "irrational" for Congress to enact a coverage formula in 2006 based on 40-year-old data); *id.* at 569 (Ginsburg, J., dissenting) (noting that the Court "does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed 'rational means'"); cf. *Tennessee*, *supra,* at 564 (Scalia, J., dissenting) ("Thus, principally for

reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States."); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne* v. *Flores*, 111 Harv. L. Rev. 153, 182 (1997) (quoting Republican Senator Oliver Morton, a Framer of the Reconstruction Amendments, as explaining that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative[.]").

Perhaps because the substantive scope of the Fourteenth Amendment is much more expansive than the Fifteenth Amendment, and because the enumerated power to enforce the Fourteenth Amendment thus conveys far more substantive power on Congress than the similar enumerated power to enforce the Fifteenth Amendment, this Court has articulated a somewhat more intensive "congruence and proportionality" standard of review for Fourteenth Amendment legislation. *City of Boerne*, 521 U.S. at 520. But whether Section 2 of the Voting Rights Act is evaluated under the standard articulated in *Boerne* relating to the Fourteenth Amendment, or the rationality standard consistently deployed to evaluate legislation to enforce the Fifteenth Amendment, cf. *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009) (noting the distinction), Section 2 — as applied in each and every circuit, including the Ninth Circuit — is legislation well within the power conferred on Congress by the Constitution.

C. In Section 2, Congress Sought to Deter and Remedy Constitutional Violations by Responding to the Lingering Impact or Present Danger Signs of Intentional Discrimination

Under either standard of review, Section 2 of the Voting Rights Act is within Congress's enforcement power under the Fourteenth and Fifteenth Amendments because it effectuates their substantive provisions, and does not seek to alter the constitutional standard.

The Fourteenth Amendment prohibits intentional discrimination on the basis of race; the Fifteenth Amendment prohibits intentional discrimination on the basis of race specifically in the electoral context. The Voting Rights Act clearly prohibits intentional discrimination. But in 1982, Congress just as clearly recognized that prohibiting intentional discrimination was insufficient in practice to enforce the constitutional command. S. Rep. No. 97–417, at 16, 26–27, 36–38 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 193, 204, 214–17. Therefore, as amended, Section 2 also seeks "to remedy and to deter violations of rights guaranteed [by the Reconstruction Amendments] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment[s'] text." *Tennessee*, 541 U.S. at 518–19 (quoting *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)). That is, Congress did not purport to alter that which is constitutionally proscribed, but instead chose to establish an additional narrow zone of prophylaxis to protect the constitutional core by remedying and deterring

discrimination with an impact on the franchise. *See, e.g.*, S. Rep. No. 97–417, at 16–17, 1982 U.S.C.C.A.N. at 194 ("The proposed amendment to Section 2 is well within Congress's constitutional authority. It is not an effort to overrule a Supreme Court interpretation of the Constitution, rather it provides a statutory prohibition which the Congress finds is necessary to enforce the substantive provisions of the 14th and 15th Amendments."); see also *id.* at 41, 1982 U.S.C.C.A.N. at 219.

This Court has repeatedly held that provisions aimed at remedy and deterrence of constitutional violations are within the scope of Congress's enumerated enforcement powers, as congruent and proportional efforts to protect the constitutional mandates. See, *e.g.*, *id.*; *Nev. Dep't of Human Res.*, 538 U.S. at 737–38 (specifically citing the prophylactic provisions of the VRA as an example of appropriate authority); *City of Boerne*, *supra,* at 520 (same). Because such legislation meets the "congruent and proportional" *Boerne* test of congressional legislation, it *a fortiori* satisfies rational basis review under the Fifteenth Amendment. *City of Rome*, 446 U.S. at 173–75 (noting that "even if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."); *Lopez* v. *Monterey Cty.*, 525 U.S. 266, 283 (1999); *S. Carolina*, 383 U.S. at 327.

The nature of the tailored prophylaxis deployed by the Voting Rights Act varies by provision. In different portions of the Act, Congress "confronted a difficult and intractable problem, where previous

legislative attempts had failed." *Nev. Dep't of Human Res.*, *supra,* at 737 (citation, internal quotation marks, and alteration omitted). In 1965, Section 5 of the Voting Rights Act sought to combat systematic intentional discrimination that evaded individual reactive enforcement efforts. S. Rep. No. 97–417, at 5–6, 1982 U.S.C.C.A.N. at 182–83.

In 1982, the amendments to Section 2 of the Act confronted a different remedial failure: requiring proof of present discriminatory intent in the allocation of the franchise left constitutional violations insufficiently remedied and insufficiently deterred. S. Rep. No. 97–417, at 16, 26–27, 36–38, 1982 U.S.C.C.A.N. at 193, 204, 214–17. In some instances, enforcement against intentional discrimination in the terms of political participation or electoral opportunity faltered on an extreme standard of proof, or on courts' reluctance to brand sovereign jurisdictions or pivotal legislators with the scarlet letter of intentional misconduct. *Id.* at 36–37, 1982 U.S.C.C.A.N. at 214–15. Congress therefore reinforced Section 2 by imposing prophylactic liability around danger signs of present discrimination. In other instances, discrimination in non-electoral arenas had lingering electoral consequences — such as, paradigmatically, minority voters' ability to pass a literacy test to vote after extensive discrimination in the education system. Congress thus provided in Section 2 a remedy for the lingering impact that manifested in the electoral realm. See, *e.g.*, *Thornburg* v. *Gingles*, 478 U.S. 30, 69 (1986) (plurality opinion) ("Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination."). While these uses

reach beyond the substantive prohibitions of the Reconstruction Amendments themselves, as Congress stated, they remain necessary to deter or remedy the constitutional violations at their core. S. Rep. No. 97-417, at 40, 1982 U.S.C.C.A.N. at 218.

And so this Court has recognized that, after the 1982 Amendments to Section 2, "*proof* of intent is no longer required to prove a § 2 violation." *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991) (emphasis added). But Congress also recognized that liability under the statute would not turn on disparate impact alone. S. Rep. No. 97–417, at 34, 1982 U.S.C.C.A.N. at 212. And contrary to the claims of *amici*, no circuit court today holds that a regulation yielding a simple racial disparity, standing alone, suffices to establish a violation of the statute. See, *e.g.*, *Simmons* v. *Galvin*, 575 F.3d 24, 41 (1st Cir. 2009) (noting that Section 2 provides no liability for claims of disproportionate impact alone); *Hayden* v. *Pataki*, 449 F.3d 305, 332–33 (2d Cir. 2006) (en banc) (Walker, C.J., concurring), *aff'd and remanded sub nom. Hayden* v. *Paterson*, 594 F.3d 150 (2d Cir. 2010); *Ortiz* v. *City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994); *Lee* v. *Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016); *Veasey* v. *Abbott*, 830 F.3d 216, 244–45 (5th Cir. 2016) (en banc); *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 637–38 (6th Cir. 2016); *Frank* v. *Walker*, 768 F.3d 744, 753 (7th Cir. 2014); *Whitfield* v. *Democratic Party of State of Ark.*, 890 F.2d 1423, 1430–32 (8th Cir. 1989); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc);

Greater Birmingham Ministries v. *Sec'y of State*, 966 F.3d 1202, 1232-34 (11th Cir. 2020).[2]

Nor was disparate impact, standing alone, the basis for any ruling in the instant case. The trial court here did not hold that simple statistical disparity would suffice to establish a Section 2 violation. JA 317–18. The initial appellate panel here, adhering to Ninth Circuit precedent, did not hold that simple statistical disparity would suffice. JA 401 (quoting *Smith* v. *Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) ("[A] bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry. Rather, [Section 2] plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.")). And the en banc court, adhering to the same Circuit precedent, did not hold that simple statistical disparity would suffice. JA 613 (also citing the same portion of *Salt River*); cf. Brief for the United States as *Amicus Curiae* in Support of Petitioners at 15–16 ("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.").

Though Section 2 is often mentioned in casual shorthand as an "effects" or "results" test, that

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[2] It appears that the U.S. Courts of Appeals for the Tenth and D.C. Circuits have not resolved a Section 2 case on the merits beyond the redistricting context since the 1982 amendments to the VRA.

unfortunate shorthand, in truth, merely distinguishes the post-1982 amended version of the statute from the prior requirement to *prove* intentional discrimination. As the Ninth Circuit has noted, "calling [S]ection 2's test a 'results test' is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results." *United States* v. *Blaine Cty*., 363 F.3d 897, 909 (9th Cir. 2004). The notion that simple claims of disparate impact alone will suffice to show liability under Section 2 is a strawman.

Instead, while a claim under the portion of Section 2 amended in 1982 may *begin* with the establishment of a disparate impact, that is never the end of the analysis. A post-1982 "results" claim under Section 2 is always connected to unconstitutional intentional discrimination — in some cases, the lingering present electoral effects of past intentional discrimination in need of remedy; in others, danger signs warning of present intentional electoral discrimination in need of deterrence. Such a claim is tied to intentional discrimination through the textual requirement to examine the "totality of circumstances" before determining that a disparate impact denies or abridges the right to vote, or affords some voters less electoral opportunity than others, on account of race or ethnicity. 52 U.S.C. § 10301.

Examining the totality of circumstances behind a particular VRA claim requires an intensely local examination of context: "The essence of a § 2 claim," this Court has explained, "is that a certain electoral law, practice, or structure interacts with social and historical conditions" to cause an inequality of electoral opportunity rooted in past discrimination or

yielding concern about discrimination in the present. *Thornburg*, 478 U.S. at 47; see also Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 Fla. St. U. L. Rev. 573, 587 (2017); Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2163–68 (2015) (reviewing courts' varying interpretations of the "totality of circumstances" and concluding that though courts may differ in the particulars, all seem to require a tie to intentional discrimination).

This Court has recognized that Congress intended to make the totality of circumstances inquiry administrable through the lens of the "Senate factors": a non-exhaustive set of factors that are potential indicators of liability, listed in the Senate Judiciary report accompanying the 1982 amendment of Section 2. S. Rep. No. 97–417, at 28–29, 1982 U.S.C.C.A.N. at 205–06; accord *Thornburg*, *supra*, at 44–45. Some of these factors point to public or private danger signs of present discrimination by the jurisdiction, or discrimination that is furthered by a jurisdiction's practices: for example, the jurisdiction's history of voting discrimination, raising the risk of a pattern, see *id.* at 36–37 (factor 1); extensive racial polarization creating robust political reward for incumbents to discriminate, see *id.* at 37 (factor 2); discrimination by candidates likely to translate to discrimination in a governing body, see *id.* (factors 4 and 6, and the absence of official responsiveness); voting practices or procedures enhancing the opportunity for discrimination or incentives for campaigns to cater to racial prejudice in the electorate, see *id.* (factors 3, 4, and 6); or a state interest sufficiently tenuous to signal

pretext, see *id*. (noted but unnumbered in the Senate report). Other factors point to the lingering electoral impact of past local discrimination in other arenas. See, *e.g.*, *id.* at 36–37 (factors 1 and 5); *LULAC*, 548 U.S. at 440 (noting that for some communities in some locations, the "political, social, and economic legacy of past discrimination . . . may well hinder their ability to participate effectively in the political process" (quoting *Thornburg*, 478 U.S. at 45 (internal quotation marks omitted)). In some jurisdictions, for example, a literacy test for voting — even if not itself the product of intentional discrimination — may "'freeze the effect' of past discrimination" in education, *City of Rome*, 446 U.S. at 175–76, or the placement of polling places may import into the electoral arena the lingering present damage of past intentional racial discrimination in housing, transportation, or employment. In other jurisdictions, where a different totality of circumstances is present, even similar laws with similarly disparate impacts will not yield the connection sufficient to demonstrate a violation of the VRA.

It is the application of the "Senate factors" to any disparate impact that, in the Ninth Circuit and elsewhere, keeps enforcement of Section 2 well within the constitutionally authorized zone of congressional power *no matter* the appropriate standard of review. They are factors, not formulas, to be assessed in local context after a "searching practical evaluation of the 'past and present reality'" of the electoral system's operation, *Thornburg*, 478 U.S. at 45 (1986) (quoting S. Rep. No. 97–417, at 30, 1982 U.S.C.C.A.N. at 208, because the precise nature of a connection to a constitutional violation may vary by circumstance and

locality. In many circumstances and localities, a disparate impact will have no such connection and incur no statutory liability. In every case, the "Senate factors" are designed to reveal or refute a present need responsive to current conditions and related to constitutional harm. The "Senate factors" thus help courts distinguish disparate impacts that are merely happenstance from those indicating a need to remedy or deter a constitutional violation.

II. There Is No Reason for this Court to Overturn Precedent, Neutering Congressional Authority to Act Pursuant to an Enumerated Power

As noted above, this Court has repeatedly recognized that Congress's enumerated powers to enforce the Reconstruction Amendments include the power to prohibit a broader swath of conduct than that prohibited by the substantive provisions of the Amendments themselves. This latitude is particularly appropriate when Congress acts to remedy discrimination on the basis of race: the very injustice that spawned the Reconstruction Amendments. And the latitude is more appropriate still when Congress acts to remedy racial discrimination in the franchise, the lone subject to which the Fifteenth Amendment is dedicated, and the right protecting all others in our republican system.

An alternative view of congressional power would amount to a seismic jurisprudential shift with substantial adverse practical consequences. With respect to every other enumerated power, either the enumerated power itself or the Necessary and Proper Clause provides Congress discretion to employ means

related to, but somewhat beyond, the precise text of the enumerated grant; there is no reason to singularly neuter the enumerated powers of the Reconstruction Amendments. *McCulloch* v. *Maryland*, 17 U.S. 316, 324–25 (1819) ("Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it."). And if the enforcement clauses of the Reconstruction Amendments provide Congress no ability to ensure that past constitutional violations do not continue to affect the franchise, and no prophylactic capacity to deter the constitutional violations of the present, then constitutional violations will continue to erupt and fester, with lingering impact resistant to judicial remedy. This Court has acknowledged that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress." *Bartlett* v. *Strickland*, 556 U.S. 1, 25 (2009) (plurality op.); *see also Shelby Cty.*, 570 U.S. at 536 ("[V]oting discrimination still exists; no one doubts that."). As Congress recognized in its 1982 amendments, if Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment authorize nothing beyond a cause of action to bring constitutional claims, the Constitution will remain dangerously underenforced.

Even if this Court believed that such a cramped interpretation of enumerated congressional power were constitutionally required, *stare decisis* would counsel against applying it here and now. *See, e.g.*, *Tennessee*, 541 U.S. at 560–64 (Scalia, J., dissenting) (construing the Reconstruction Amendments to

provide broad enforcement authority to measures designed to remedy racial discrimination, for reasons of stare decisis); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854–55 (1992) (listing factors to consider). Recent events have dramatically underscored the continuing need for robust protections against racially targeted attempts to subvert the franchise. There has been no demonstration that Section 2, as presently applied, presents an unworkable challenge for either trial courts or courts of appeal. And as these briefs are being submitted to this Court in a case concerning the casting and counting of ballots, redistricting bodies are beginning to convene and receive training with respect to their decennial responsibility to redraw district lines — including application of Section 2 of the Voting Rights Act. Overhauling the settled understanding of Section 2 based on a reassessment of congressional authority, at this point in the redistricting cycle and without working through the ramifications for vote dilution claims, would amount to a remarkable upending of settled expectations.

III. This Case Is a Poor Vehicle to Assess the Scope of Section 2 or the Fifteenth Amendment

Both the district court and court of appeals' opinions carefully applied the Voting Rights Act in a constitutional fashion, examining not only the impact of the challenged electoral provisions, but also the totality of circumstances tying that impact to danger signs of present discrimination or lingering impacts of past discrimination. At the end of the day, there are legitimate arguments to be made for or against a

finding that the challenged Arizona provisions violate the statute; these are close questions on the facts presented. But none of the approaches in this case calls the constitutionality of Section 2 into question, generally or as applied.

We believe that, while a close call, the en banc opinion of the Ninth Circuit ultimately has the better of the argument on the merits. But we also believe in this instance that it is more appropriate for the Court to dismiss its grant of certiorari as improvidently granted than to affirm.

A. The Primary Question with Respect to the Ballot Collection Statute Is a Factual Matter Limited to this Case

This case involved challenges to two provisions of Arizona law: one relating to postal ballots, and one relating to ballots cast in-person at polling places. The postal ballot provision prohibits voters from asking most third parties to assist them with depositing marked and sealed postal ballots in the mail, at a voting site, or at an elections office — including in Native American communities with exceedingly limited mail service. JA 328–29.

The primary question with respect to the postal ballot provision turned on whether the provision was the product of intentional discrimination, prohibited not only by the Voting Rights Act but also directly by the Fifteenth Amendment; in that use of Section 2, there can be no meaningful question of congressional authority. The courts below each engaged in a proper examination of the available evidence, in the deeply and appropriately fact-bound manner required by this

Court's decision in *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). See, *e.g.,* JA 349; JA 410–11; JA 671–73.

Relative to the other decisions, the Ninth Circuit sitting en banc placed comparatively more weight on the entire context that led to the provision in question. It emphasized, *inter alia*, that a first bill prohibiting the collection of marked postal ballots was motivated by seemingly pretextual concerns, targeting predominantly Latino areas, and then withdrawn after a request for more information in the preclearance process, JA 602–04; a subsequent effort in the immediate aftermath of *Shelby County* v. *Holder* was repealed rather than face referendum, JA 605; and — most significantly — the instant provision was propelled in large part by pretextual concerns about fraud and by reaction to an inflammatory racist video, JA 605–07. Among other contextual factors, the en banc court also noted the prevalence of racially polarized voting, providing (as Congress recognized in the "Senate factors") an incentive for incumbents to target voters based on their ethnicity as a means to preserve partisan power. *See* JA 602. The court did not, as the United States claims, Brief for the United States as *Amicus Curiae* in Support of Petitioners at 34, impermissibly attribute the motives of one legislator to specific others. Instead, viewing the legislature's decision as a whole — as courts interpret the intent of any multimember decision maker, legislative, corporate or otherwise — the court determined that racial animus played at least *a* significant part in the decision, and that the legislature would not have come to the same decision absent the animus. JA 679–80. This legal analysis is

in keeping with this Court's precedent. See, *e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

By contrast, the district court and initial appellate panel placed less weight on context. JA 350, 354–55; JA 418. As a result, they reached a different conclusion about the proof of discriminatory intent. JA 356; JA 421.

Most importantly for present purposes, however, each adjudicator applied the appropriate legal framework, even as the en banc court found fault with the trial court's factual conclusions. Even if the en banc court's resolution of the question were incorrect, this Court has explained that it does not normally sit as a body of error correction. *See, e.g.*, *City of San Francisco*, 135 S. Ct. at 1780 (Scalia, J., concurring in part and dissenting in part) (noting that "we are not, and for well over a century have not been a court of error correction," and maintaining that the proper course was to dismiss the questions presented as improvidently granted because "certiorari jurisdiction exists to clarify the *law*"). This Court should not expend further resources on resolving a matter unlikely to yield substantial clarity for future cases, which will necessarily arise out of different contextual circumstances.

B. The Primary Question with Respect to Ballots Cast in an Incorrect Precinct Is Not Only a Factual Matter Limited to this Case, but Also of Limited Practical Significance in Arizona Going Forward

The other provision at issue in this case invalidates any ballot timely cast by an eligible voter at a precinct other than the single location designated for that voter — even if the precinct where the voter is assigned changes frequently, JA 590; even if the precinct where the voter is assigned is much farther from the voter's residence than the precinct where her vote is cast, JA 592; even if the precinct where the voter is assigned is co-located with the precinct where her vote is cast; and even if precinct assignments for Navajo voters in particular parts of a state are "based upon guesswork, leading to confusion about the voter's correct polling place," because those Navajo voters lack standard street addresses, JA 593.

Here, the Ninth Circuit correctly reversed the trial court on a threshold legal issue concerning the import of a provision affecting only a limited population of voters. This Court has emphasized that the VRA protects a personal right of individuals based on their membership in a group, as distinguished from a group right. See, *e.g.*, *LULAC*, 548 U.S. at 437 ("A local appraisal is necessary because the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members.") (citation and internal quotation marks omitted). The threshold for liability, therefore, cannot depend on a showing that minority voters in a jurisdiction *overall* face a discriminatory abridgement of the opportunity to

participate in the political process, JA 334–35. Instead, it must turn on whether, if a significant number of voters face a potential abridgement, a subset of those voters bear the excessive brunt of a discriminatory practice on account of their race or ethnicity. For example, the placement of several polling places convenient to Anglo voters but out of the reasonable reach of Native American voters in a particular part of a State might, under the totality of circumstances, still present a local Section 2 claim, even if most Native American voters in other parts of the state faced no such impediment. Cf. *Chisom*, 501 U.S. at 397 n.24 (noting that nondilution claims may be available under Section 2 even if the number of affected minority voters is quite small); *id.* at 408–09 (Scalia, J., dissenting) (same).

Past that threshold, though, there was a factual dispute but no meaningful legal one. The en banc court applied the appropriate legal standard under Section 2, evaluating the evidence for substantial burdens and substantial disparity on the basis of race, and then turning to the "Senate factors" to determine whether the differential impediments, in the totality of circumstances, required invalidation in order to remedy or prophylactically deter constitutional violations. *See* JA 594–96, 613–17, 622–58. In Arizona, the en banc court found discriminatory access to polling places. It also found proof of intentional racial discrimination not only in voting but also education, noting a persisting impact in education, poverty, home ownership, and access to transportation that contribute to the increased rate at which minority voters cast ballots outside of their designated precinct. JA 642–43, 647–50. The Ninth Circuit's conclusion

that present policies rejecting relevant minority votes at notably disparate rates reflected a continuing electoral impact of past discrimination may not be the only possible conclusion, but it is supported by the evidence.

Most importantly for present purposes, however, this issue concerns a practice that was meaningful when the case was brought in 2016 based on pre-2016 data, JA 588, but is significantly less prominent in Arizona now based on local changes to the way Arizonans vote.

Ballots cast in an incorrect precinct are only an issue when ballots are cast in person on Election Day. Arizona voters are increasingly voting early or by mail. Even before the 2020 election, 74% of Arizona voters voted early or by mail in 2016, and 79% did so in 2018. U.S. Election Assistance Comm'n, 2016 Election Administration and Voting Survey, https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys; U.S. Election Assistance Comm'n, 2018 Election Administration and Voting Survey, https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys. In addition, among in-person voters, ballots cast in an incorrect precinct are an issue only for precincted polling places where the voter must vote at a single designated location, rather than vote centers where a voter may vote at any location in the county. Arizona counties are increasingly forgoing precincted polling places for vote centers. When the case was brought, approximately 90% of Arizona's population lived in counties relying on a precinct-based system, JA 585; according to the most recent

available data, that number is now about 25%.[3] Given the trends in early and mail voting, in the future less than 25% of that 25% will likely vote on Election Day at a precinct. So the number of Arizona voters affected by any further ruling in this case has declined dramatically from when the case was brought; as a consequence, the context, the extent of any disparity, and the continuing impact of past discrimination felt by those voters may all have changed substantially as well. That fact, in conjunction with the fact that the intensely localized and fact-specific nature of the totality of the circumstances test means that a decision here will shed little light on the legality of other states' treatment of ballots cast in an incorrect precinct, makes this case an awkward vehicle at best for resolution of any significant legal question pertaining to the scope of Section 2.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be dismissed as improvidently granted.

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[3] Approximately 25% of Arizonans live in counties apparently relying exclusively on precincts as of November 2020; another 4% live in counties adopting a hybrid model combining designated precincts with vote-anywhere vote centers. Sam Kmack, *State, County Policies Impact Rejected Ballot Rates in November Election*, Ariz. Ctr. for Investigative Reporting, Dec. 21, 2020, https://azcir.org/news/2020/12/21/state-county-policies-impact-rejected-votes-november-election/; U.S. Census Bureau, Explore Census Data, American Community Survey: Total Population, 2019 ACS 5-Year Estimates tbl. B01003, https://data.census.gov/cedsci/.

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Respectfully submitted,

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