Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL.,
Petitioners,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

DNC RESPONDENTS' BRIEF

MARC E. ELIAS
Counsel of Record
BRUCE V. SPIVA
ELISABETH C. FROST
AMANDA R. CALLAIS
LALITHA D. MADDURI
ALEXANDER G. TISCHENKO
PERKINS COIE LLP
700 Thirteenth St. N.W.
Suite 800
Washington, D.C. 20005
(202) 654-6200
MElias@perkinscoie.com

SARAH R. GONSKI
PERKINS COIE LLP
2901 N. Central Ave.
Suite 2000
Phoenix, AZ 85012
(602) 351-8000

LAUREN P. RUBEN
PERKINS COIE LLP
1900 Sixteenth Street
Suite 1400
Denver, CO 80202
(303) 291-2385

Counsel for Respondents

January 13, 2021

QUESTIONS PRESENTED

The right to vote is the foundation of a democratic society. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.*

Two restrictions on the right to vote are at issue here: Arizona's policy of wholly discarding, rather than partially counting, ballots cast in the wrong precinct ("out-of-precinct policy"), and its criminalization of ballot collection (the "ballot-collection ban").

Both restrictions disparately impact minority voters, who disproportionately rely on ballot collection and are twice as likely as white voters to vote out-of-precinct. These disparities are directly attributable to the ongoing effects of Arizona's documented history of racial discrimination. Further, the evidence showed that the ballot-collection ban was enacted at least in part because of its anticipated negative impact on Latino and Native American voters.

The questions presented are:

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

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

RULE 29.6 DISCLOSURE STATEMENT

Respondents the Democratic National Committee, DSCC, and the Arizona Democratic Party certify that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES

INTRODUCTION 1

STATEMENT 4

A. Section 2 of the VRA 4

B. Arizona's challenged laws 7

1. The out-of-precinct policy 7

2. The ballot-collection ban......................... 9

C. Proceedings below 13

1. Initial proceedings 13

2. The Ninth Circuit's *en banc* analysis... 13

a. Section 2 results test. 14

b. Intentional discrimination. 18

3. Proceedings at this Court 20

SUMMARY OF THE ARGUMENT...................... 20

ARGUMENT 24

TABLE OF CONTENTS
(continued)

Page

I. The two-part §2 results test tracks §2's text and purpose and adheres to this Court's jurisprudence. 24

A. Step one of the §2 results test requires plaintiffs to show disparate impact but does not impose a "substantial" test. 25

B. Under any standard, the court correctly found that Arizona's out-of-precinct policy and ballot-collection ban disparately impact minority voters. 30

C. The court properly analyzed causation at step two of the §2 results test. 32

D. The two-part §2 test will not result in a one-way ratchet to liability. 40

E. Republican Petitioners' arguments cannot be reconciled with §2's text or purpose. 42

1. Racially-neutral "time, place, and manner" laws are not immune from §2 review. 42

2. Republican Petitioners' baseline and benchmark arguments are unfounded. 45

TABLE OF CONTENTS
(continued)

Page

II. The two-part §2 results test presents no constitutional concerns. 46

A. Section 2 falls comfortably within Congress's constitutional authority. 47

B. The §2 results test does not impermissibly intrude on powers reserved to the states. 52

C. The §2 results test does not mandate an excessive focus on race. 54

III. The Ninth Circuit correctly held that the ballot-collection ban was enacted with intentional discrimination. 58

CONCLUSION 62

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 44

Bd. of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 51

Bush v. Vera,
517 U.S. 952 (1996) (plurality opinion) 57

Chisom v. Roemer,
501 U.S. 380 (1991) .... passim

City of Boerne v. Flores,
521 U.S. 507 (1997) 49, 50, 51

City of Mobile v. Bolden,
446 U.S. 55 (1980) 5, 41

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 57

City of Rome v. United States,
446 U.S. 156 (1980) 23, 47, 48, 53

Common Cause/Ga. v. Billups,
554 F.3d 1340 (11th Cir. 2009) 42

TABLE OF AUTHORITIES

Page(s)

Cooper v. Harris,
137 S. Ct. 1455 (2017)..................................55, 60

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008)................................23, 24, 61

Ex parte Commonwealth of Va.,
100 U.S. 339 (1879)... 47

Fisher v. Univ. of Tex. at Austin,
136 S. Ct. 2198 (2016)..................................55, 56

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,
527 U.S. 627 (1999)... 51

Frank v. Walker,
768 F.3d 744 (7th Cir. 2014) 42

Gonzalez v. Arizona,
485 F.3d 1041 (9th Cir. 2007)........................... 42

Hunter v. Underwood,
471 U.S. 222 (1985)... 18

Jones v. City of Lubbock,
727 F.2d 364 (5th Cir. 1984) 39

TABLE OF AUTHORITIES

Page(s)

Jordan v. Winter,
604 F. Supp. 807 (N.D. Miss. 1984) 48

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 6, 25, 37, 41

Lee v. Va. State Bd. of Elections,
843 F.3d 592 (4th Cir. 2016) 41, 42

Lopez v. Monterey Cnty.,
525 U.S. 266 (1999)................................48, 50, 52

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,
138 S. Ct. 1719 (2018)....................................... 60

Miss. Republican Exec. Comm. v. Brooks,
469 U.S. 1002 (1984)... 48

N.C. State Conf. of NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016) 60, 61

Nev. Dep't of Hum. Res. v. Hibbs,
538 U.S. 721 (2003).. 51

TABLE OF AUTHORITIES

Page(s)

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 49

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016) 32, 34

Ohio State Conf. of NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014) 6, 46

Oregon v. Mitchell,
400 U.S. 112 (1970) 35

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 57

Ricci v. DeStefano,
557 U.S. 557 (2009) 56

Roudebush v. Hartke,
405 U.S. 15 (1972) 53

Shelby Cnty. v. Holder,
570 U.S. 529 (2013) 4, 35, 49

Smiley v. Holm,
285 U.S. 355 (1932) 53

TABLE OF AUTHORITIES

Page(s)

South Carolina v. Katzenbach,
383 U.S. 301 (1966)....................................passim

Tennessee v. Lane,
541 U.S. 509 (2004)......................................49, 52

Tex. Dep't of Hous. & Comty. Affairs v. Inclusive Communities Project, Inc.,
576 U.S. 519 (2015)......................................55, 56

Thornburg v. Gingles,
478 U.S. 30 (1986)......................................passim

United States v. Gradwell,
243 U.S. 476 (1917)... 53

United States v. Marengo Cnty. Comm'n,
731 F.2d 1546 (11th Cir. 1984)......................... 51

United States v. Morrison,
529 U.S. 598 (2000)... 51

Veasey v. Abbott,
830 F. 3d 216 (5th Cir. 2016).....................passim

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977)..........................18, 19, 23, 59

TABLE OF AUTHORITIES

Page(s)

Voinovich v. Quilter,
507 U.S. 146 (1993).. 39

Wesberry v. Sanders,
376 U.S. 1 (1964).. i

White v. Regester,
412 U.S. 755 (1973).. 5

CONSTITUTION AND STATUTES

A.R.S. § 16-411(B)(4).. 7, 9

A.R.S. § 16-1005..10, 12, 13

A.R.S. § 16-1017.. 10

A.R.S. § 16-1018.. 10

52 U.S.C. § 10301...................................5, 26, 33, 34

Ariz. Const. art. 4, pt. 1, § 1(6), (14)...................... 12

Pub. L. 89–110, 79 Stat. 437 (1965)........................ 5

U.S. Const. art. I, § 4, cl. 1.................................... 53

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

Caroline Kelly, CNN Politics, *Carter affirms safety of mail-in voting after Barr and White House cite him to diminish it* (Sept. 4, 2020), https://www.cnn.com/2020/09/04/politics/carter-vote-by-mail-safety-barr-white-house/index.html 62

Daniel P. Tokaji, Applying Section 2 to the New Vote Denial, 50 Harv. C.R.-C.L. L. Rev. 439 (2015)............................. 52

Daniel P. Tokaji, Intent and Its Alternatives: Defending the New Voting Rights Act, 58 Ala. L. Rev. 349 (2006).. 53

Fair Housing Act.. 55

Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 Ohio St. L.J. 763 (2016).................................... 58

TABLE OF AUTHORITIES

Page(s)

Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 Ala. L. Rev. 653 (2015) 55

S. Rep. No. 97-417, 1982 U.S.C.C.A.N. 177 ....passim

INTRODUCTION

Congress passed the Voting Rights Act ("VRA") with the goal of "banish[ing] the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA, Congress's nationwide ban on voting discrimination, is key to accomplishing that difficult task. It is voters' only tool to directly challenge laws, practices, or procedures that have the purpose or effect of denying or abridging minorities' right to vote.

Arizona has been no stranger to minority voting discrimination. For over a century it has consistently disadvantaged minority voters, oftentimes with facially race-neutral voting restrictions that have the purpose or effect of disproportionately burdening minority voters. The two Arizona voting restrictions at issue here continue that legacy: (1) Arizona's policy of wholly discarding, rather than partially counting, ballots cast in the county where the voter is registered but in a precinct other than the one to which they are assigned ("out-of-precinct policy"), and (2) its criminalization of ballot collection (the "ballot-collection ban").

In a carefully reasoned opinion, the *en banc* Ninth Circuit concluded that both the out-of-precinct policy and the ballot-collection ban violated

the §2 results test of the VRA, and that the ballot-collection ban additionally was enacted with intentional discrimination in violation of §2 and the Fifteenth Amendment.

Arizona's out-of-precinct policy is consistently one of the most punishing in the nation. An "extreme outlier" among states with similar policies, it has disenfranchised over 38,000 Arizonans since 2008. JA.588. Minority voters are vastly over-represented among that number—they are *twice* as likely as white voters to have their votes rejected. JA.333. These disparate rejection rates are directly linked to Arizona's long history of racial discrimination and its continuing effects: Arizona changes its polling locations in minority areas with unusual frequency, JA.590; polling locations are frequently located farther from minorities, JA.592; and minorities are far more likely than whites to move between elections, JA.594. Arizona election officials—including the Secretary of State—have repeatedly confirmed that Arizona can achieve its election administration goals *without* discarding out-of-precinct ballots. But Arizona refuses to do so.

The disparate impact of Arizona's ballot-collection ban is likewise directly tied to racial discrimination—indeed, discrimination was starkly evident in the legislative history surrounding its passage. A majority of Arizona voters vote using mail ballots. JA.596. Returning those ballots has historically been more difficult for Arizona's Native American and Latino communities, both of which

have limited access to reliable or secure home mail delivery. JA.598-99. Consequently, ballot collection emerged over the last decade as an important tool to assist them in returning their ballots. "Uncontested evidence in the district court established [that]. . . prior to the enactment of [the ban], a large and disproportionate number of minority voters relied on third parties to collect and deliver their early ballots." JA.659. Recognizing that ballot collection was primarily used in these Democratic-leaning communities, Republicans in the Arizona Legislature began efforts to ban ballot collection. They faced heated opposition, passing and repealing ballot collection restrictions twice—one was repealed after the U.S. Department of Justice ("DOJ") raised questions as part of the preclearance process, and another after organizations began a citizen's referendum. Simply put, Arizona's ballot-collection ban has never been anything other than a racially-charged tool to suppress minority votes.

The court below, sitting *en banc*, properly found that both challenged restrictions violate §2. In so doing, it applied the two-part vote-denial test that tracks the statute's text, follows this Court's jurisprudence, and is the same test that has been adopted by the majority of circuits to consider the question. Its careful and "intensely local appraisal" of the challenged restrictions correctly determined that both result in unequal opportunity for Arizona's minority voters to participate in the political process and elect candidates of their choice in violation of §2. Its analysis also found that the ballot-collection ban

intentionally discriminates against Arizona's minorities in violation of the §2 intent test and the Fifteenth Amendment.

More than half a century after the VRA's passage, history continues to confirm that banishing racial discrimination in voting is no easy task. As this Court recently confirmed, "voting discrimination still exists." *Shelby Cty., v. Holder*, 570 U.S. 529, 536 (2013). The decision below faithfully applies governing precedent and protects minority voting rights in Arizona, ensuring that minorities have an equal opportunity to participate in the political process. This Court should affirm.

STATEMENT

A. Section 2 of the VRA

Pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments, Congress enacted the VRA "for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.'" *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Katzenbach*, 383 U.S. at 315). The VRA sought to "correct an active history of discrimination" and "deal with the accumulation of discrimination . . . and the continuance of the wrongs." S. Rep. No. 97-417, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (quotations omitted).

Section 2, the VRA's "permanent, nationwide ban on racial discrimination in voting," is key to this objective. *Shelby Cnty.*, 570 U.S. at 557. As

originally enacted, §2 prohibited "any State or political subdivision" from "deny[ing] or abridg[ing] the right of any citizen of the United States to vote on account of race or color." Pub. L. 89–110, 79 Stat. 437 (1965). While the Court originally interpreted §2 to prohibit voting laws that resulted in racial discrimination, *e.g.*, *White v. Regester,* 412 U.S. 755 (1973), in *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), it reversed course, finding that the then-applicable §2 required proof of "discriminatory purpose."

In response, Congress amended §2 in 1982 to prohibit any voting practice 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). A §2 violation is established if,

> based on the totality of circumstances, . . . the political processes leading to nomination or election in the State [] are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id., § 10301(b).

This Court has recognized that "[t]he results test mandated by the 1982 amendment is applicable to

all claims arising under § 2," *Chisom*, 501 U.S. at 398, including vote-denial and vote-dilution claims. Although this Court has never considered a §2 vote-denial claim, the majority of courts to consider these claims—including the *en banc* Ninth Circuit here—have followed the test set forth in *Thornburg v. Gingles*, 478 U.S. 30, 43-46 (1986). *E.g.*, *Veasey v. Abbott*, 830 F. 3d 216, 244 (5th Cir. 2016); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *League of Women Voters of N.C. v. North Carolina ("LOWV")*, 769 F.3d 224, 240 (4th Cir. 2014). That test follows §2's text and Congress's directives in the accompanying Senate Report. It is thus equally applicable to a vote-denial claim.

Evaluating a vote-denial claim under §2 is a two-step process. *First*, courts consider "whether the challenged standard, practice or procedure results in a disparate burden on the protected class," *e.g.*, "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." JA.611-12. *Second*, courts consider "whether, under the 'totality of the circumstances,'" there is "a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them." JA.613. To evaluate that relationship, courts consider the nine "Senate

Factors" enumerated in the Senate Report and adopted in *Gingles*.[1]

B. Arizona's challenged laws

1. The out-of-precinct policy

Each Arizona county chooses whether to offer in-person voting at precinct locations or vote centers. Under the precinct-based model, a voter is assigned to vote at a single precinct. JA.585-86. Under the vote-center model, a voter may cast their ballot at any county polling location. A.R.S. § 16-411(B)(4).

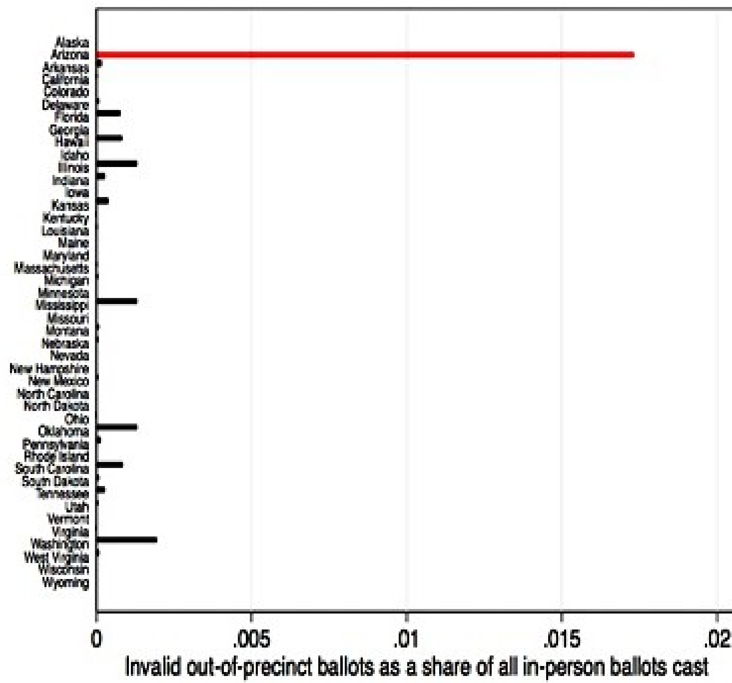
Ballots cast under the precinct-based model are rejected in full if the voter mistakenly presents at the wrong precinct to vote. An out-of-precinct voter loses not only their precinct-specific votes but also their votes for statewide, countywide, and federal races for which the voter was otherwise eligible to vote—even where those races are the only races on the ballot. JA.585.

---

[1] These include: (1) history of official discrimination; (2) racially polarized voting; (3) the use of voting practices or procedures to enhance discrimination; (4) candidate slating; (5) on-going effects of discrimination in areas like education, employment, and health, which hinder the ability to participate in the political process; (6) racial appeals in campaigns; (7) minority representation in public office; (8) lack of responsiveness to minority needs from elected officials; and (9) tenuousness between the challenged practice and underlying policy. S. Rep. No. 97-417, at 28-29.

Arizona has consistently been "an extreme outlier" in rejecting out-of-precinct ballots, discarding *eleven times* as many out-of-precinct ballots than the next closest state. JA.588. Between 2008 and 2016, Arizona discarded 38,335 out-of-precinct ballots in general elections—all cast by registered, eligible voters. JA.586-88.

Figure 6: Rejected out-of-precinct ballots as a share of in-person ballots cast according to 2012 EAC Report



JA.588-89.

Minority voters are vastly over-represented among those casting out-of-precinct ballots and *twice* as likely as whites to have their votes rejected as a result of the out-of-precinct policy. JA.333.

2. The ballot-collection ban

Arizona has allowed early voting by mail for over 25 years, and it has become the primary means by which Arizonans vote.[2] In the 2016 presidential election, 80 percent of Arizona voters cast their ballots this way. *Id.* Voting by mail is crucial for voters who live far from polling locations, lack reliable transportation, or otherwise struggle to vote in person because of socioeconomic conditions. JA.664. These voters are more likely to be minorities. JA.689.

The same voters for whom in-person voting is most difficult also face challenges returning their voted mail ballots because of Arizona-specific conditions, including the state's history of racial discrimination. Arizona is heavily rural and many voters lack meaningful access to mail services. Disparities are most striking for Arizona's Native Americans, only 18% of whom have access to regular mail services. JA.124; JA.183; JA.484. Rural Latino populations, such as in San Luis (98% Latino), suffer

---

[2] The term "voting by mail" references ballots received by mail, but which voters can cast by mail or via in-person delivery to a county office or other authorized location.

similarly from a lack of mail service. JA.599. Likewise, high-density urban housing units in predominantly minority neighborhoods often lack secure outgoing mail. JA.327. As a result, many voters—a disproportionate share of whom are minorities—have come to rely upon friends, neighbors, activists, and campaigns to collect and deliver their voted mail ballots. Ballot-collection assistance is particularly crucial in the final days before an election when it is too late to return ballots by mail. JA.329.

Even before the ban, ballot collection in Arizona was heavily regulated, minimizing any risk of malfeasance. Arizona has long criminalized "knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to fix an election." A.R.S. § 16-1005(A). It also outlaws ballot tampering, vote buying, impersonating election officials, hindering others from voting, and discarding ballots. A.R.S. §§ 16-1005(A)-(F), 16-1017, 16-1018. Mail voting includes a constellation of procedural safeguards, such as opaque and tamper-evident envelopes, rigorous signature verification, and other identity verification measures. JA.293; JA.668. Voters can also confirm ballot delivery online, and many ballot collectors implemented additional security measures, such as tracking receipts or chain-of-custody trackers. ER.337-38; ER.424; ER.430-32.

Given these restrictions, it is unsurprising that, prior to the ban, there was no evidence that ballot

collection had resulted in fraud, or that existing safeguards were inadequate to prevent against it. Nevertheless, in 2011, Republican legislators launched their first attempt to severely restrict ballot collection. That year, the Arizona Legislature enacted S.B. 1412, which banned individuals from collecting more than ten ballots. JA.353. The bill's sponsor, then-State Senator Shooter, had narrowly won an election in which his Democratic opponent had used ballot collection as an effective get-out-the-vote tool among Hispanic supporters. During legislative debates, Shooter repeatedly made "unfounded and often far-fetched allegations of ballot collection fraud" that featured prominently in the discourse over the bill. JA.675.

At the time, Arizona was subject to §5 of the VRA. As a result, it had to submit S.B. 1412 to DOJ for preclearance. DOJ declined to preclear the provision, requesting additional information because it could not conclude that "the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." JA.353. Rather than provide the information, Arizona withdrew the restriction from preclearance and repealed it. *Id.*

In 2013, the Legislature again attempted to restrict ballot collection via H.B. 2305, but again repealed its own legislation before the law took effect. It did so preemptively after citizen groups collected more than 140,000 signatures to repeal

H.B. 2305 via referendum. JA.354. Had the referendum succeeded, the Arizona Constitution would have effectively prohibited the Legislature from further attempts to restrict ballot collection. Ariz. Const. art. 4, pt. 1, § 1(6), (14).

The ballot-collection ban at issue here—a continuation of these earlier efforts—was passed in 2016. Introduced as H.B. 2023, codified at A.R.S. § 16-1005(H)-(I), it makes the "knowing[] collect[ion] [of] voted or unvoted early ballots from another person … a class 6 felony" punishable by up to two years in jail and a $150,000 fine. A.R.S. § 16-1005(H)-(I). The law contains only limited exceptions for family members, household members, and medical caregivers. *Id.*

Legislative debates on the bill were contentious. Many legislators "expressed concerns" that the ballot-collection ban "would adversely impact minority [get-out-the-vote] efforts." JA.356. Legislators discussed the bill's negative impact on the predominantly Hispanic community of San Luis, along with the sovereign Tohono O'odham, Cocopah, and Navajo Nations—all of which have limited home mail delivery. *See* ER.737-38.

Supporters repeated the same baseless claims originally propagated by Senator Shooter and pointed to "a racially charged video created by Maricopa County Republican Chair A.J. LaFaro." JA.344. The "LaFaro Video" showed surveillance footage of a Hispanic man delivering a stack of

completed ballots to election officials. *Id.* Accompanying commentary from LaFaro included "statements that the man was acting to stuff the ballot box; that LaFaro did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug; and that LaFaro did not follow him [] because he feared for his life." *Id.* (quotation omitted). The video featured prominently in legislative debates, at Republican district meetings, and in a television advertisement for a successful 2014 Arizona Secretary of State campaign. JA.345.

Although some claimed the ballot-collection ban was necessary to prevent fraud, the legislative record was devoid of *any* evidence that fraud had in fact occurred. JA.289-90. The ban passed along party lines. ER.667; ER.688-89.

C. Proceedings below

1. Initial proceedings

In 2016, the Democratic National Committee, individual voters, and others (collectively, the "DNC") sued to enjoin the out-of-precinct policy and ballot-collection ban. JA.583. In 2018, after a bench trial, the district court found no §2 or Fifteenth Amendment violation. On appeal, a divided three-judge panel affirmed. JA.361.

2. The Ninth Circuit's *en banc* analysis

The Ninth Circuit reheard the case *en banc*, and reversed, holding that Arizona's out-of-precinct

policy and ballot-collection ban violated §2 and that the ballot-collection ban violated the Fifteenth Amendment. The court relied almost exclusively on the district court's factfinding, disagreeing only with the ultimate conclusions drawn from those facts.

a. Section 2 results test

The court performed the same two-part totality-of-the-circumstances analysis employed by the majority of circuits in §2 vote-denial cases. First, the court asked whether the challenged restrictions result in disparate burdens on members of a protected class, confirming that "[t]he mere existence—or 'bare statistical showing'—of a disparate impact on a racial minority, in and of itself, is not sufficient." JA.613 (citing *Smith v. Salt River Project Agric. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)). Finding this element satisfied, it proceeded to evaluate the Senate Factors to determine whether, "under the 'totality of the circumstances,' there is a relationship between the challenged [law] on the one hand, and 'social and historical conditions' on the other." JA.613 (quoting *Gingles*, 478 U.S. at 47).

1. The court first considered the out-of-precinct policy. At step one, it held that the policy disparately burdens minority voters: "[e]xtensive and uncontradicted evidence established that American Indian, Hispanic, and African American voters are over-represented among [out-of-precinct] voters by a ratio of two to one." JA.618.

The court explained that the district court's step-one analysis was legally flawed in several ways. *First*, the district court erred in concluding that the number of affected voters was too small to create a cognizable disparity. Neither §2's text nor relevant precedent suggest that a minimum threshold of voters must be affected before a disparate burden may be found. JA.618-19. And, in any event, "a substantial number of minority voters [(thousands) were] disparately affected by" the policy. JA.621.

Second, the district court mistakenly believed that DNC was required to show that Arizona caused minorities to vote out-of-precinct. Not so. "Rather, [DNC] need only show that the result of entirely discarding [out-of-precinct] ballots has an adverse disparate impact, by demonstrating a causal connection between the challenged voting practice and a prohibited discriminatory *result*." JA.622 (quotations omitted). DNC satisfied this requirement by showing that the policy of discarding out-of-precinct ballots results in the two-to-one rejection of minority votes to white votes.

At step two, the court held that the disparate burden on minority voters is linked to social and historical conditions in Arizona so as to cause "an inequality in the opportunities enjoyed by minority and white voters to elect their preferred representatives and to participate in the political process." JA.658-59. Arizona has a long history of discrimination and racially polarized voting patterns (Senate Factors 1 and 2); minorities bear

the effects of discrimination such that they are more likely to experience changes in polling locations and less likely to be able to ascertain and travel to the correct location (Factor 5); "political campaigns have been characterized by overt [and] subtle racial appeals" (Factor 6); minorities are underrepresented in public office (Factor 7); Arizona has a "history of advancing partisan objectives with the unintended consequence of ignoring minority interests" (Factor 8); and there was no administrative justification necessitating the policy (Factor 9).[3] The court further found that Arizona elections officials disproportionately change polling locations in minority neighborhoods, JA.590; JA.688, and frequently locate polling locations farther from minority voters, JA.592. For these reasons, the court concluded that, under the totality of the circumstances, Arizona's out-of-precinct policy violated §2. JA.658.

2. The court next considered the ballot-collection ban. At step one, it observed that the record contained "extensive and uncontradicted evidence" that "third parties collected a large and disproportionate number of early ballots from minority voters." JA.659. This evidence was not merely "circumstantial and anecdotal." JA.661. It

---

[3] While the district court made these findings, it erroneously minimized their significance. JA.645; JA.650-51; JA.653-54; JA.656; *see also* Hobbs.Br.8 (confirming that counting out-of-precinct ballots is administratively feasible).

was based on direct and undisputed evidence from witnesses closely involved in ballot collection. *Id.* Nor were the thousands of ballots collected by third parties insubstantial. The court therefore found DNC satisfied step one. *Id.*

At step two, the court assessed the Senate Factors, noting Arizona's history of discrimination and the racially-charged legislative history of the ballot-collection ban (Factor 1); racially polarized voting patterns in Arizona, including in Senator Shooter's district (Factor 2); effects of discrimination that hinder minority voters' abilities to deliver their ballots or vote in person, including lack of access to transportation, lower literacy rates, tendency to work inflexible, low wage jobs, and severe disparities in secure home mail service (Factor 5); racial appeals in political campaigns, including with respect to the ballot-collection ban (Factor 6); underrepresentation of minorities in public office (Factor 7); and officials' lack of responsiveness to minority needs (Factor 8).

As to tenuousness (Factor 9), the court observed that the law did not criminalize any new malfeasance. JA.668 (collecting statutes). Nor was there reason to believe that the existing deterrents were insufficient; in Arizona, "third-party ballot collection has a long and honorable history," and "[n]o one has ever found a case of voter fraud connected to third-party ballot collection." JA.667. While public confidence in elections is paramount, the court determined that any distrust in ballot

collection was created by the ban's proponents. "[I]it would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation." JA.670. The court held that, under the totality of the circumstances, the ballot collection ban violated §2.

b. Intentional discrimination

The court also held that the ballot-collection ban had been enacted with intent to discriminate in violation of §2 and the Fifteenth Amendment. To evaluate legislative intent, the court surveyed the non-exhaustive factors from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977): (1) historical background, (2) sequence of events leading to enactment, including substantive or procedural departures from the normal legislative process; (3) relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group. *Id.* "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

In conducting the *Arlington Heights* analysis, the court concluded that the district court erred by "discount[ing] the importance" of key factual findings. JA.676. Although the district court

accurately found that two of the most prominent legislative justifications for the ban were Senator Shooter's "unfounded and often farfetched allegations of ballot collection fraud" occurring in his racially-polarized district and the "racially-tinged LaFaro Video," it failed to understand how thoroughly those impermissible motivations permeated the legislative process. JA.675. After surveying the extensive legislative record, the court concluded that even good faith supporters of the ban were "[c]onvinced by the false and race-based allegations of fraud" and "were used to serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies." JA.678. Moreover, the Legislature "was aware" that the ban would disparately impact minority voters. JA.679. The record "cumulatively and unmistakably" revealed that racial discrimination was a motivating factor behind the ban. JA.679-80. The district court clearly erred by holding otherwise.

Finally, the district court made factual findings that the ballot-collection ban would not have been enacted without racial motivations. Specifically, the court observed that the district court's finding that "[t]he legislature was motivated by a misinformed belief that ballot collection fraud was occurring," was a product of Senator Shooter and LaFaro's racially-tinged and unfounded accusations. JA.680.

3. Proceedings at this Court

This Court granted the petitions for certiorari filed by, among others, the Arizona Attorney General and the Arizona Republican Party ("Republican Petitioners") (collectively, "Petitioners").[4] The Secretary of State opposed granting certiorari and is a Respondent here.

SUMMARY OF THE ARGUMENT

I. The two-part results test applied by the Ninth Circuit and the majority of circuits to §2 vote-denial claims tracks §2's text and purpose and adheres to this Court's jurisprudence.

A. Step one of the §2 test requires plaintiffs to show that a challenged law disparately burdens minority voters. Contrary to Petitioners' argument that the burden must meet an undefined substantiality threshold, §2 does not require that a minimum number or percentage of minority voters be impacted to satisfy step one. Neither this Court nor any other has ever required this, and for good reason: any bright-line disparity requirement would be a moving target leaving voters unprotected against racially discriminatory laws if no sufficiently large number of other voters shared the same burden. That is not to say that the size of the

---

[4] DNC joins in the standing arguments advanced by Arizona's Secretary of State. Hobbs.Br. 36-38.

disparate impact is wholly irrelevant; it may be considered as part of the totality of the circumstances at step two of the §2 test. But, as the United States recognizes (U.S.Br.29), there is no numerical threshold that a challenged law must cross to bring it within §2's ambit.

B. Even if there were a minimum threshold at step one, the disparities resulting from Arizona's out-of-precinct policy and ballot-collection ban meet it. Both laws disproportionately impact thousands of minority Arizonans. JA.559-61; JA.619-20. The out-of-precinct policy disenfranchises minority voters at twice the rate of white voters. JA.688. This number is more than the margin in the 2000 presidential election and is consistent with similar findings in persuasive case law. Similarly, the "[u]ncontested evidence" demonstrates that a disproportionate number of minority voters rely on ballot collection. JA.659.

C. If a §2 plaintiff satisfies step one, courts proceed to step two to determine liability. Step two employs the totality-of-the-circumstances test codified in §2 and used by the Court for decades. It is the correct test for §2 causation. It evaluates the Senate Factors, along with other relevant contextual considerations to determine whether a challenged law interacts with social and historical conditions that have produced discrimination to cause racial inequality in the opportunity to participate in the political process. Petitioners' preferred proximate-cause test, along with their assertion that the

Senate Factors are irrelevant to vote-denial claims, cannot be squared with §2's text, purpose, or governing case law. Congress intended that the test codified in the 1982 Amendments and Senate Report be applied to vote-denial and vote-dilution cases alike. Petitioners' proximate cause test also risks immunizing all election laws from §2 review.

D. The §2 test will not result in the one-way ratchet to liability that Petitioners predict. This test has been employed for years, with no flood of liability. Rather, the localized analysis performed under the totality-of-the-circumstances test operates to properly limit §2, striking the balance Congress intended.

E. Republican Petitioners independently make several arguments that cannot be reconciled with §2's text or purpose. First, they argue that all "racially neutral" so-called "time, place, and manner" laws are immune from §2 scrutiny. But §2 applies to all voting restrictions. Its text requires examining the results of a law and its contextual operation to determine whether it produces unequal opportunities; ignoring a law's impact is antithetical to §2's results requirement. Accepting Republican Petitioners' argument would effectively and improperly revert §2 to an intent test, directly contrary to Congress' clear intent when it amended §2 in 1982. Second, they assert that the test provides no baseline against which to determine whether there is a disparate impact. This again ignores §2's

plain text, which instructs courts to compare disparities between minority and white voters.

II. In an attempt to make a constitutional avoidance argument, Petitioners misconstrue the §2 test, which does not raise constitutional concerns. The Fifteenth Amendment grants Congress the authority to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," *Katzenbach*, 383 U.S. at 324, including the authority to prohibit "voting practices that have only a discriminatory effect," *City of Rome v. United States*, 446 U.S. 156, 172 (1980). The §2 results test test falls well within this authority. Moreover, the test does not require racially-biased government action. Eliminating needless barriers for voters *of all races* does not categorize or afford special status to voters based on race; it merely ensures equal opportunities for everyone in keeping with the Constitution and VRA.

III. The Ninth Circuit correctly held, after carefully surveying the extensive legislative record and applying the *Arlington Heights* factors, that the ballot-collection ban was enacted with intent to discriminate against minority voters. Although Petitioners quibble with the court's use of the "cat's paw" doctrine, their argument rests on their misleading insistence that the perpetrators of the racially-tinged and baseless fraud theories that motivated the law played little or no role in its passage. That is not true. Petitioners also argue that the court ignored *Crawford v. Marion County*

Election Board, 553 U.S. 181 (2008), by concluding that the Legislature's claimed anti-fraud rationale was pretextual; but *Crawford* was not a §2 case, and it does not immunize a state from scrutiny into its motivations simply because the state invokes the specter of voter fraud.

ARGUMENT

I. The two-part §2 results test tracks §2's text and purpose and adheres to this Court's jurisprudence.

The two-part §2 results test applied by the Ninth Circuit, and widely adopted in the majority of circuits, is firmly rooted in §2 's text and this Court's precedents. *Supra* at 5-6. It strikes the careful balance Congress articulated in the Senate Report: eradicating unlawful discrimination in voting without requiring proof of intent, while disavowing any proportional representation requirement. Far from the freewheeling, one-way ratchet described by Petitioners, this inquiry "[i]s not [] easy." S. Rep. No. 97-417, at 31. It requires courts to carefully evaluate the real-world impact of voting laws on minority voters compared to their white peers.

At step one, courts "ask whether the challenged standard, practice or procedure results in a disparate burden on members of the protected class." JA.612. If a disparate burden is shown, the court proceeds to step two, evaluating the Senate Factors to determine "whether, under the 'totality of the circumstances,'" there is "a legally significant

relationship between the disparate burden on minority voters and the social and historical conditions affecting them." JA.613.

The Ninth Circuit considered every Senate Factor, performing "a searching practical evaluation of the 'past and present reality,' [with] a 'functional' view of the political process." *Gingles*, 478 U.S. at 45, (quoting S. Rep. No. 97-417, at 30). Moreover, it considered the unique history and practicalities of Arizona, and the relevant aspects of Arizona's election system, performing precisely the "intensely local appraisal of the design and impact of electoral administration 'in the light of past and present reality.'" *LOWV*, 769 F.3d at 241 (quotations omitted). This thorough analysis was driven by both the text and purpose of §2 and is well within constitutional bounds.

A. Step one of the §2 results test requires plaintiffs to show disparate impact but does not impose a "substantial" test.

Step one of the §2 results test asks whether the challenged restriction "results in a disparate burden on a protected class," JA.617. This comes from §2's text and *Gingles*. Petitioners' assertion that §2 requires a threshold showing of a "substantial" disparate impact lacks support in §2's text, depends on subjective and vague definitions of "substantial," and ignores the limiting principles inherent in the totality of the circumstances analysis. Petitioners' argument should be rejected.

1. Nothing in §2's text requires any showing of "substantial" disparate impact. *See generally* 52 U.S.C. § 10301(b). Section 2 asks only whether minorities have less opportunity to participate than whites. The answer to that question will vary from case to case. No court has ever required plaintiffs to make a threshold showing of "substantial" disparity in a §2 vote-denial case.[5] For good reason: the argument that a discriminatory voting law is not actionable unless it affects a "substantial" number of minority voters is at once vague—what, exactly, is the minimum?—and anathema to §2's purpose of prohibiting discrimination in voting. *Supra* at 25-29. Petitioners' §2 construction would turn a blind eye wherever a minority group is too small to influence the outcome of the election. In those instances, even the most discriminatory voting laws would be immunized.

The relevant question—as the court asked here—is simply whether minority voters make up a

---

[5] Petitioners imply that *Gingles* compels a "substantiality" requirement. Brnovich.Br.21 (citing *Gingles*, 478 U.S. at 48, n.15. But the sentence immediately preceding the one Petitioners cite makes clear that, to the extent there would be any substantiality requirement, it is limited to multimember district vote dilution cases. *Gingles*, 478 U.S. at 48, n.15 (explaining that the Court "recogniz[ed] that some Senate Report factors *are more important to multimember district vote dilution claims than others*") (emphasis added). Recognizing this, the Ninth Circuit explained: "[t]he standard in a vote denial case is different." JA.684.

disproportionate share of voters affected by the law. To be sure, a "'bare statistical showing'—of a disparate impact on a racial minority, in and of itself, is not sufficient" to demonstrate a §2 violation. JA.613. But that is why §2 does not stop at the first step. After finding disparate impact, a court considers the context of that impact at step two, as *Gingles* directed.

Petitioners claim that the disparate impact must be "substantial" enough to change the outcome of an election. Brnovich.Br.22-23. But winning margins vary in every race and for every election. More importantly, an "election outcomes" requirement would shield laws with even abundantly clear racially discriminatory impacts if the number of voters affected is too small to affect the outcome of an election (*e.g.*, where 90% of Black voters are impacted by a discriminatory law, but only one hundred Black voters live in the affected jurisdiction).

DOJ agrees that this requirement is unworkable. *See* JA.504 ("Section 2 liability in this context does not require that a challenged practice . . . change electoral outcomes."). As DOJ explained to the Ninth Circuit: §2 "safeguards a personal right to equal participation opportunities. A poll worker turning away a single voter because of her race plainly results in 'less opportunity to participate in the political process and to elect representatives of [her] choice.'" JA.620 (quoting 52 U.S.C. § 10301(b)).

To conclude otherwise would also conflict with this Court's statement that "*[a]ny* abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397 (emphasis added). Even a small number of voters could satisfy this test in some elections. Requiring a threshold minimum number "is unquestionably wrong." *Id.* at 409 (Scalia, J. dissenting).

2. Petitioners' contention that a "substantial" disparate impact requirement is necessary because §2 requires "equal opportunities" and not "equal outcomes," Brnovich.Br.21, is also misplaced. The disparate impact requirement neither disturbs §2's express disavowal of proportional representation nor requires states to equalize racial turnout rates. Although courts in at least four circuits have used this test for years, not one has applied it to equalize electoral outcomes. The inquiry simply subjects practices that disparately disenfranchise and burden minorities to §2's totality of the circumstances test. It is only when plaintiffs satisfy step two of §2's test—which mandates a practical evaluation of law's impact and the state's justification for the rule—that a law violates the

VRA. *Infra* at 6. This test does not require proportionality.[6]

3. Petitioners also incorrectly argue that §2 plaintiffs must offer "statistical or expert data" to prove a disparate impact. Brnovich.Br.40. But no precedent establishes that statistical analysis is necessary evidence, and this case demonstrates precisely why that cannot be the law: *no one* possesses detailed statistical records of how many Arizona voters used ballot collection before it was outlawed. Now that it has been criminalized, there is no reliable or feasible way of belatedly collecting the kind of statistical information that would, in Petitioners' view, be a prerequisite to a successful §2 challenge. Creating the statistical requirement that Petitioners urge would only create perverse incentives for states to reject measures that would enable the very type of data collection that Petitioners now argue is necessary. JA.293-94.

Rather, the correct approach to data limitations is the one the Ninth Circuit took here. The court reviewed the extensive, unrebutted testimony of

---

[6] For similar reasons, Petitioners are not correct to assert that a law that disparately impacts minorities may not be actionable if the "system overall" is "accommodating." Brnovich.Br.21-22. Policies that result in disparate impact are not immunized by the mere existence of other voting methods; a state cannot wave away a closed door by pointing to an open window. *Alternative* opportunities do not always mean *equal* opportunities.

"[n]umerous witnesses" who personally collected thousands of ballots, and found that the "uncontradicted evidence established" a large and disproportionate number of minority voters—in the "thousands"—relied on ballot collection, while "white voters did not significantly rely on" ballot collection. JA.659-61. Nothing more is required at step one.

B. Under any standard, the court correctly found that Arizona's out-of-precinct policy and ballot-collection ban disparately impact minority voters.

Though the Ninth Circuit's disparate impact analysis is correct, even under Petitioners' proposed "substantiality" test, Arizona's out-of-precinct policy and ballot-collection ban satisfy step one of the §2 test.

First, the court specifically found that "a *substantial* number of minority voters [were] disparately affected by" the out-of-precinct policy. JA.621 (emphasis added); *see also* JA.622 ("The challenged practice—not counting [out-of-precinct] ballots—results in a prohibited discriminatory result; a substantially higher percentage of minority votes than white votes are discarded.") (quotations omitted).

The court explained that the percentage of out-of-precinct voters had increased over time among in-person voters, and thousands (3,709) were

disenfranchised in 2016 alone. JA.619-20. This was "more than a de minimis number," and—though not required to meet step one—"substantial." JA.621. This finding was bolstered by the slim margin of just 537 votes in the 2000 presidential election, a persuasive Fourth Circuit decision finding that 3,348 voters was sufficient to satisfy step one, and DOJ's disavowal of a threshold. JA.620.

The Ninth Circuit also rejected Petitioners' manipulation of these figures. Although Petitioners argued that a relatively small overall percentage of both minorities and whites had their ballots discarded as a result of the out-of-precinct policy, the relevant question is whether minorities are unequally impacted by the policy. That is indisputably true—the out-of-precinct policy consistently disenfranchises minorities at double the rate of whites. JA.618.

Next, Petitioners incorrectly assert that the court failed to take into account similar out-of-precinct laws in other states. Brnovich.Br.36. Though not required by §2, the court carefully considered this question and determined that Arizona's out-of-precinct policy was in a league of its own, with the highest rate of out-of-precinct voting of any state—eleven times more than the next closest state. JA.687. Under the totality of the circumstances, the court thus correctly concluded that Arizona's out-of-precinct policy is not like other states' policies. That fact-bound holding says nothing about the impact of

other states' out-of-precinct policies on their own minority voting populations. JA.588-89.

Similarly, the court found that the disparity in ballot collection also "surpasses any de minimis number." JA.662. The uncontroverted evidence showed that "many thousands" of minorities utilized ballot collection. JA.661.

Thus, the Ninth Circuit correctly interpreted and applied the law to find that step one was satisfied. JA.620-21.

C. The court properly analyzed causation at step two of the §2 results test.

1. Certainly §2 requires proof of causation. This is precisely why step two of the §2 results test asks "whether, under the 'totality of circumstances,' the disparate burden on minority voters is linked to social and historical conditions . . . so as 'to cause an inequality in the opportunities enjoyed by [minority] and white voters,'" JA.623 (citing *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b)). To answer that question, courts evaluate the objective Senate Factors. JA.616 (citation omitted).

Step two enables the court to suss out whether the challenged law "den[ies] or abridge[s] the right to vote if *the law or structure* has the effect, as *it* interacts with social and historical conditions, of causing racial inequality in the opportunity to vote." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 638 (6th Cir. 2016) (citations omitted). "[A] disparate

impact in the opportunity to vote" triggers §2 liability where it "result[s] . . . from the interaction of the law *and* social and historical conditions that have produced discrimination." *Id.*

Congress intended this framework to apply to vote-denial claims. *Chisom*, 501 U.S. at 398 ("The results test mandated by the 1982 amendment is applicable to all claims arising under § 2."); *id.* at 397 ("Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of '*the right*' to vote."); *see also Gingles*, 478 U.S. at 45, n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution."). Step two of the test faithfully adheres to §2, examining the "totality of circumstances" to determine whether a challenged restriction "results" in "political processes" that "are not equally open to participation" by minority group members. 52 U.S.C. § 10301(a), (b).

This test works well in practice. In this case, Arizona minorities "bear the effects of discrimination" in key areas, such as lower-home ownership and higher transience rates, that interact with the out-of-precinct policy to produce discriminatory results. JA.647-49. As the district court found: "[out-of-precinct] voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently. These groups, in turn, are disproportionately composed of minorities." JA.594.

Similarly, minorities depend on ballot collection due to unique, contextual factors that are "closely linked to the effects of discrimination." JA.664 (citations omitted). Minorities "are significantly less likely than non-minorities to own a vehicle, more likely to rely upon public transportation, [] have inflexible work schedules, and [] rely on income from hourly wage jobs," *id.*, all making it significantly harder for them to return their own ballots. Compounding this is minorities' (particularly Native Americans') disproportionately limited access to reliable and secure mail. *Id.* These effects of discrimination impair minorities' ability to return early ballots unassisted. *See also* JA.648-49 (discussing interaction of state-created educational disparities and resulting lower literacy rates which make "minority voters [] more likely to be unaware of certain technical [voting] rules, such as the requirement that early ballots be received by . . . Election Day," which also necessitates ballot collection in the critical last week before an election).

Based on these and other localized considerations, the Ninth Circuit correctly found that the challenged laws' disparate impact "result[ed] from the interaction of the [out-of-precinct policy and ballot-collection ban] *and* social and historical conditions that have produced discrimination," *Husted*, 834 F.3d at 638, "to cause an inequality in the opportunities enjoyed by [minority] and white voters," JA.623 (citations omitted).

2. Petitioners propose a new causation test that is problematic for several reasons. First, Petitioners' assertion that §2 vote-denial plaintiffs must demonstrate that the law *alone* is the proximate cause of the disparate impact is overly narrow. Brnovich.Br.23,37-38. Under that theory, even an indisputably discriminatory English-only literacy test would survive §2 because the literacy test itself does not *cause* minorities to fail it disproportionately. *Cf. Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (upholding Congress's elimination of Arizona's literacy test). Rather, low passage rates would stem from minorities' comparatively lower English fluency and literacy rates and a long history of educational discrimination. *Id.* at 132-33 (noting literacy disparities resulting from "the country's history of discriminatory educational opportunities" when abolishing literacy test); *see* JA.648-49 (discussing history of state-created inequities in education and lower minority literacy rates).

Similarly, Petitioners' preferred causation standard would prevent pre-enforcement §2 challenges. Prior to a law's implementation, it would be impossible to demonstrate a proximate causal connection between the law and a disparate impact. *See Shelby Cnty.*, 570 U.S. at 537 ("[I]njunctive relief is available in appropriate [§2] cases to block voting laws from going into effect."). This would allow jurisdictions to enact and enforce a host of discriminatory laws with impunity for multiple election cycles until private plaintiffs could compile information on disparities.

More fundamentally, this standard departs from §2's text, legislative history, and decades of jurisprudence. Congress instructed that "the question [of] whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" S. Rep. No. 97-417, at 30 (footnote omitted), and is based "on a 'functional' view of the political process." *Id*., at 30, n. 120. This is because "the purpose of the [VRA] was 'not only to correct an active history of discrimination, . . . but also to deal with the accumulation of discrimination,'" S. Rep. No. 97-417, at 5, and to prevent future discrimination. The appropriate test is the totality-of-the-circumstances test applied here, which uses the Senate Factors to conduct that examination.

3. Petitioners' corollary argument that the Senate Factors should not be used in the vote-denial causation analysis also fails. The totality-of-the-circumstances analysis is applicable to all §2 claims, *supra* at 32-34, and logic also dictates their applicability.[7] The Senate Factors are objective and

---

[7] That the 1982 amendments did not immediately give rise to §2 vote-denial claims says nothing about the legislation's reach. Rather, this "likely stems from the effectiveness of the now-defunct [§5] preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions." *LOWV*, 769 F.3d at 239; *see Veasey*, 830 F.3d at 247, n.37 ("Undoubtedly, challenges to election laws under [§2] have

"highly fact dependent, as they must be to address different laws, different states with varying histories of official discrimination, and different populations of minority voters." *Veasey*, 830 F.3d at 247, n.37. Consequently, they illuminate whether a given election law operates in a climate of inequality and discrimination that carries over to the electoral arena—a consideration that is as relevant and important, if not more so, in the vote-denial context as the dilution context. While not all of the factors may be applicable in every case, this is precisely what Congress and the Court envisioned. *Gingles,* 478 U.S. at 45 ("[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.") (citing S. Rep. No. 97-417, at 29); *see Veasey*, 830 F.3d at 245-46.

As the Fifth Circuit explained: "the [Senate] factors should be used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination." *Veasey*, 830 F.3d at 245. They "limit[] [§2] challenges to those that properly link the effects of past and current discrimination with the racially disparate effects of the challenged law," as §2 requires. *Id.* at 246. And the Senate Factors "ensure[] the requisite causal

---

increased since *Shelby County* as states have enacted new laws and regulations that must be challenged under [§2], if at all, because these laws no longer face preclearance.").

linkage between past discrimination and a challenged voting practice's disparate impact" to prevent §2 from becoming a general prohibition on any election law that has a racially disparate result, as Petitioners fear. *Id.* at 273-74 (Higginson, J., concurring).

The court was right to use the Senate Factors to guide the step two inquiry. Its evaluation of the ballot-collection ban illustrates how unique, contextual factors resulting from Arizona's specific history of discrimination are best captured through the Senate Factors. JA.664. Factor 5, for example, demonstrates how Arizona's minorities experience the effects of past discrimination in specific ways that cause them to disproportionately lack access to methods to return their own ballots. *Supra* at 9 These disparities also interact uniquely with local conditions to make ballot collection not a mere convenience, but a necessity. JA.259. Likewise, Factor 9 informs the court about the law's racially-charged justifications. *Supra* at 17-18. Each of these factors demonstrates that "the disparate burden on minority voters is linked to social and historical conditions . . . so as to cause an inequality in the opportunities enjoyed by [minority] and white voters." JA.623 (citations omitted); *Veasey*, 830 F.3d at 273 (finding Factors 1, 3, 5, and 9 useful in vote-denial context) (Higginson, J., concurring) (citations omitted).

4. Although Petitioners criticize the court's consideration of private discrimination,

Brnovich.Br.24, 28, Congress instructed that §2 requires evaluation of *all* "social and historical conditions." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); *Gingles*, 478 U.S. at 47 (same). Courts thus can and must consider discrimination and inequities regardless of the source.

This does not make states responsible for discrimination they did not cause. Republicans.Br.30. But a state's election laws interact with a host of "social and historical" conditions, that can create unequal electoral opportunities. *Gingles*, 478 U.S. at 47. Thus, courts routinely and properly consider the combined effect of such discrimination to determine whether a law hampers minority voting opportunities. *See, e.g.*, *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984) ("Combined with socioeconomic disadvantage resulting from general discrimination, official discrimination has contributed to less frequent and less effective minority participation.").

Nevertheless, the Senate Factors *do* consider state sponsored discrimination, *Gingles*, 478 U.S. at 36-37, as did the Ninth Circuit, *see* JA.624-46. Petitioners' argument misses the mark.[8]

---

[8] Petitioners insinuate that the Ninth Circuit relied too heavily on past state discrimination. *See* Brnovich.Br.39. But evidence of past discrimination matters under §2 because it still impacts

D. The two-part §2 test will not result in a one-way ratchet to liability.

Petitioners' contention that the two-part §2 results test will lead to invalidation of neutral election laws nationwide, *e.g.,* Brnovich.Br.21; Republicans.Br.16., is demonstrably hyperbolic. Courts have been applying this test for years, without the outcome that Petitioners fear. The test's "peculiar[] dependen[cy] upon the facts of each case" and "intensely local appraisal of the design and impact" of the contested electoral mechanisms, *Gingles*, 478 U.S. at 79 (quotation and citation omitted), prevents such an occurrence.

Courts considering challenges under the two-part test utilized here have come to different conclusions based on varying fact patterns and election laws and have often upheld challenged laws. *Compare, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (applying test to Virginia voter ID law and finding no §2 violation), *with*

---

minority voters; "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Gingles*, 478 U.S. at 44, n.9 (citing S. Rep. No. 97-417, at 40). In any event, the court also recognized recent examples of discrimination, JA.643, and to the extent there are fewer such instances, that is likely because §5 preclearance effectively prevented many of the voting laws that might otherwise have been discriminatory—like the precursor ballot-collection ban S.B. 1412—from being enacted. JA.640.

LOWV, 769 F.3d at 239 (applying test to North Carolina's elimination of same day registration and out-of-precinct policy and finding §2 violation). These different outcomes demonstrate that the two-part test imposes precisely the careful, localized analysis that §2 contemplates.[9]

Recent challenges to voter ID laws underscore that §2 does not require broad cross-jurisdiction invalidation of similar laws. The Fifth Circuit's decision to invalidate a voter ID law "differ[ed] from those of other circuits in part because [it was] considering 'the [s]trictest [l]aw in the [c]ountry' in a State with a fairly extensive history of official discrimination." *Veasey*, 830 F.3d at 247, n. 37. In contrast, the Fourth, Seventh, Ninth, and Eleventh Circuits considering other state's voter ID laws under the same test rejected §2 claims based on the unique circumstances of the laws and jurisdictions at issue. *See Lee*, 843 F.3d 592; *Frank v. Walker*, 768 F.3d 744, 746 (7th Cir. 2014); *Common Cause/Ga. v.*

---

[9] When Congress codified the §2 results test, opponents made the same argument Petitioners make here. But "none of these predicted dire consequences occurred." S. Rep. No. 97-417, at 32. In fact, of 23 reported cases applying the results test prior to *Bolden*, defendants won in 13 cases and prevailed in-part in two others. *Id.* at 31-32. Now, as then, there is "an extensive, reliable and reassuring track record of court decisions using the very standard" the Ninth Circuit and the majority of circuits have used. *Id.*

Billups, 554 F.3d 1340, 1346 (11th Cir., 2009); *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

As the Fifth Circuit explained, "the State's gloomy forecast" that "all manner of neutral election laws may be struck down" is "unsound." *Veasey*, 830 F.3d at 246. "Use of the two-factor test and the [Senate] factors *limits* Section 2 challenges." *Id.* (emphasis added). Section 2 neither prohibits nor requires any particular election practice in any particular place at any particular time; instead, liability hinges on consideration of historical, contextual, and local factors unique to each jurisdiction. This is precisely the balance §2 struck between its broad remedial purpose, *see Chisom*, 501 U.S. at 403, and the "fact-intensive" "local appraisal" it requires, *Gingles*, 478 U.S. at 46, 79. "[T]he State's prediction of vast judicial interference with election laws is unfounded." *Veasey*, 830 F.3d at 248.

E. Republican Petitioners' arguments cannot be reconciled with §2's text or purpose.

1. Racially-neutral "time, place, and manner" laws are not immune from §2 review.

Republican Petitioners posit the bright-line rule that "[r]ace-neutral time, place, or manner regulations that are equally applied and impose only the ordinary burdens of voting do not implicate §2." Republicans.Br.19. But this would render §2

unrecognizable, “effectively nullif[ying] the protections of the [VRA] by giving states a free pass to enact needlessly burdensome laws with impermissible racially discriminatory impacts.” *Veasey*, 830 F.3d at 247.[10]

Section 2’s text makes clear that it unquestionably applies to *all* voting standards, practices, or procedures; there is no exception for facially neutral “time, place, and manner” laws. *Supra* at 43; S. Rep. No. 97-417, at 17, 29 n.117, 30. That is because the VRA “was enacted to prevent [] invidious, subtle forms of discrimination.” *Veasey*, 830 F.3d at 247; *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969). And it has been properly used for this purpose since its enactment. *See, e.g., Katzenbach*, 383 U.S. at 310-11 (finding that race-neutral literacy tests and registration requirements violate the VRA). That this purpose extends to §2 is obvious. If racially neutral time, place, and manner voting laws were exempt from §2, there would have been no need for Congress to specifically codify a *results* test, rather than proceed only under an intent standard.

---

[10] The Arizona Attorney General makes a somewhat related and similarly flawed argument, claiming that laws that “reduce the likelihood [a minority group] will use the opportunities they possess” without “draw[ing] any line by race,” cannot cause an actionable disparate impact. Brnovich.Br.19-20 (citation omitted). This fails for the same reasons as the Republican Petitioners’ argument.

That such laws are "equally applied" does not save them from §2 scrutiny either. For instance, poll taxes or literacy tests were often "equally applied" to minority and white voters, but there is no dispute they violate §2 where they disproportionately disenfranchise minoritiess.

Justice Scalia outlined the paradigmatic illustration of a "neutral procedure" that violates §2: "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated." *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). But under the Republican Petitioners' rule, as long as all citizens have the same window in which to register, there could be no §2 violation because any racial disparity would be nothing more than "disproportionat[e] fail[ure] to comply" by minority citizens. Republicans. Br.22. This cannot be squared with any proper interpretation of §2.

At bottom, what the Republican Petitioners really seek is the judicial repeal of amended §2 and its results test, limiting §2 only to discriminatory intent. This is foreclosed by the plain text of §2 and this Court's long-standing precedents.

2. Republican Petitioners' baseline and benchmark arguments are unfounded.

Equally unavailing and irreconcilable with §2 is Republican Petitioners' claim that including a disparate impact test in the §2 vote-denial analysis would force "every hypothetical regime" to increase minority voting. Republicans. Br.25-26. This assertion is premised on the falsehood that the "baseline" for determining whether a challenged law produces a disparate impact "is some hypothetical alternative that benefits minorities relative to the status quo." *Id.* at 25. But that is not the standard. The test is whether the law produces a disparate impact between a minority group and white voters. JA.594. It is this disparity that acts as the "limiting principle" the Republicans claim is absent.

This same straightforward analysis also addresses the Republican Petitioners' purported concern that there is no appropriate "baseline with which to compare the [challenged] practice" to determine whether it causes a disparate impact. Republicans.Br.23. They claim that courts will struggle to "define what the right to vote ought to be," and suggest that courts should determine whether a challenged restriction imposes a "usual burden[] of voting" to determine whether it can cause an impermissible disparate impact. *Id.*; *see also* Brnovich.Br.21-22 (discussing risk of equating voting "inconveniences" with "denial or abridgment"). But all of this ignores that "[§2] vote

denial claims inherently provide a clear, workable benchmark": the relevant inquiry is whether minority voters "have less opportunity *than other members of the electorate* to participate." *See Husted*, 768 F.3d at 556, 559 (emphasis added).

II. The two-part §2 results test presents no constitutional concerns.

The constitutionality of §2 is emphatically not at issue here. Petitioners do not claim otherwise. They argue, however, that the Court must graft artificial restrictions onto §2's text to avoid "serious constitutional concerns," as a way of narrowing the scope of §2. Brnovich.Br.15; *see also* Republicans.Br.39-42. Petitioners are mistaken.

The Reconstruction Amendments give Congress the authority to bar voting restrictions with discriminatory effects. And properly construed, the two-part results test flowing from §2's text and utilized here is entirely consistent with §2 as constitutionally enacted. Eliminating voting laws that have the purpose or effect of making it more difficult for minority voters to vote neither gives minority voters greater benefits based on race, nor categorizes voters based on race. To the contrary, it remedies both intentional and unintentional racial discrimination in voting, to help ensure that all voters have equal opportunities to have their voices heard.

A. Section 2 falls comfortably within Congress's constitutional authority.

Congress enacted §2 under its power to enforce the Fifteenth Amendment. *See City of Rome*, 446 U.S. at 173; S. Rep. No. 97-417, at 39. Congress' authority under the Fifteenth Amendment "[is] no less broad than its authority under the Necessary and Proper Clause." *City of Rome*, 446 U.S. at 175. Thus, Congress may "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. Whatever legislation is "appropriate" to achieve the objects of the Fifteenth Amendment is within Congress's enforcement power. *See id.* at 326-27; *see also Ex parte Commonwealth of Va.*, 100 U.S. 339, 345-46 (1879).

This Court has repeatedly held that a "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment." *City of Rome*, 446 U.S. at 177. Congress may therefore enact legislation, like §2, that "guard[s] against both discriminatory animus and the potentially harmful *effect* of neutral laws." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283 (1999).[11] Indeed, in summarily affirming §2's constitutionality in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002

---

[11] While *Lopez* involved covered jurisdictions under §5, its reasoning is equally applicable here.

(1984), the Court let stand the opinion of a three-judge panel "reject[ing] the contention . . . that [§2], if construed to reach discriminatory results, exceeds Congress's enforcement power under the fifteenth amendment." *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984).

Notwithstanding these precedents, Petitioners argue that the two-part §2 test applied here is not a "congruent and proportional" means of enforcing the Fifteenth Amendment's ban on *intentional* discrimination. This argument fails.

First, it ignores this Court's many cases holding that Congress may "prohibit state action that, though in itself not violative of [the Fifteenth Amendment], perpetuates the effects of past discrimination." *City of Rome*, 446 U.S. at 176. Congress therefore "need not limit itself to legislation coextensive with the Fifteenth Amendment." S. Rep. No. 97-417, at 39. Here, Congress determined that an intent test would not achieve its aims, even if plaintiffs were allowed to use "circumstantial and indirect evidence" to show invidious intent. *Id.* at 37.

While DNC disagrees, even if "the results test must be limited to those cases in which constitutional violations are most likely," as Petitioners contend, Brnovich.Br.39, the two-part test applied here is so limited. Though it does not *quantify* the size of the racial disparity that must be proven, neither do the tests offered by Petitioners.

What matters is that the two-part test makes clear that the disparity must be present and allows courts to consider the significance of the disparity as part the totality-of-the-circumstances analysis. The test also imposes a causation requirement, requiring plaintiffs to show that the challenged practice interacts with social and historical conditions to cause an inequality in voting opportunities. *Supra* at 6-7. This gives §2 a limiting construction putting it comfortably within permissible enforcement legislation under the Fifteenth Amendment.

Second, Petitioners apply the wrong standard. The Court articulated its "congruent-and-proportional" test in examining religious-liberty legislation enacted under the *Fourteenth Amendment*. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). But that test has never applied to legislation enacted under the *Fifteenth Amendment*, which focuses particularly and exclusively on race and voting.[12] That focus constrains Congress's

---

[12] *See Shelby Cnty.*, 570 U.S. at 554 (reviewing VRA §4 for "irrational[ity]"); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (leaving open the question of what standard of review applies to §5's preclearance requirements); *Tennessee v. Lane*, 541 U.S. 509, 555, (2004) (Scalia, J., dissenting) (observing that prophylactic enforcement legislation enacted under the Fourteenth Amendment is more prone to overbreadth because the "Fourteenth Amendment, unlike the Fifteenth, is not limited

enforcement to the intersection of those subjects, thereby rendering the concerns addressed in *Boerne* inapposite. Just two years after *Boerne*, the Court reaffirmed Congress's Fifteenth-Amendment authority to prohibit voting restrictions with discriminatory effects without mentioning *Boerne*'s congruent-and-proportional test. *See Lopez*, 525 U.S. at 283.[13]

Third, *Boerne* and its progeny confirm that the §2 results test raises no constitutional concerns. In invalidating the Religious Freedom Restoration Act (RFRA) in *Boerne*, the Court was careful to distinguish the VRA, which it held up as the model for appropriate prophylactic legislation. *Boerne*, 521 U.S. at 518, 525-26, 530, 532-33. The Court observed that the VRA's "strong remedial and preventive measures"—including provisions banning voting regulations that create discriminatory *effects*—are an appropriate response "to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial

---

to denial of the franchise and not limited to the denial of other rights on the basis of race").

[13] In fact, the Court quoted *Boerne* for the proposition that "'[l]egislation which 'deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.'" *Id.* at 282-83 (quoting *Boerne*, 521 U.S. at 518).

discrimination." *Id.* at 526; *see also id.* at 518, 527, 532.[14] The Court contrasted the VRA's legislative record, which demonstrated the enduring "blight of racial discrimination in voting," with that of RFRA, which mentioned no episodes of religious bigotry occurring within the previous forty years. *Id.* at 525, 530. And "[t]he Court's subsequent congruence-and-proportionality cases have continued to rely on the [VRA] as the baseline for congruent and proportionate legislation." *United States v. Blaine Cnty.,* 363 F.3d 897, 904-05 (9th Cir. 2004).[15]

Fourth, the Fifteenth Amendment does not *limit* Congress's powers elsewhere in the Constitution. Multiple constitutional provisions grant Congress the authority to proscribe racially discriminatory voting laws. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 468-73 (2015). The Fourteenth Amendment, for example, which Congress also cites as a basis for codifying §2 's results test, both protects the right to

---

[14] *See also United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1557 (11th Cir. 1984) ("Congress conducted extensive hearings and debate on all facets of the Voting Rights Act and concluded that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination.") (footnote omitted).

[15] *See, e.g., Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373-74 (2001); *United States v. Morrison*, 529 U.S. 598, 626 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999).

vote and prohibits racial discrimination. *Id.* Congress's power under that amendment "is broadest when directed 'to the goal of eliminating discrimination on account of race.'" *Lane*, 541 U.S. at 563 (Scalia, J., dissenting) (citing *Oregon*, 400 U.S. at 130).

Properly read, §2 invalidates laws only when they cause a disparate impact on minority voters as a result of social and historical factors, which is within the boundaries of what this Court has found to be appropriate in curbing racially discriminatory voting practices. *See, e.g.*, *Gingles*, 478 U.S. 30. For that reason, courts have broadly agreed that §2 falls well within Congress' enforcement powers. *See Veasey*, 830 F.3d at 253 n.47 (collecting cases).

B. The §2 results test does not impermissibly intrude on powers reserved to the states.

For largely the same reasons, the two-part §2 results test does not *impermissibly* intrude on powers reserved to the states. To be sure, the VRA, "by its nature, intrudes on state sovereignty." *Lopez*, 525 U.S. at 284. But that intrusion is authorized by the Reconstruction Amendments. *Id.* at 282-283. "Those Amendments were specifically designed as an expansion of federal power" that necessarily "supersedes contrary exertions of state power" in appropriate circumstances. *City of Rome*, 446 U.S. at 179-80.

Nor does the test overstep state legislatures' authority under the Elections Clause. While the Elections Clause allows state legislatures to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," it specifies that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Thus, Congress has the "authority to provide a complete code for congressional elections, not only as to times and places," but also as to all other aspects of the voting process. *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also, e.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 24-26 (1972); *United States v. Gradwell*, 243 U.S. 476, 481-82 (1917).

Congress thus has broad power over federal elections, which it has used in enacting the National Voter Registration Act of 1993 and the Help America Vote Act of 2002. *See* Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 Ala. L. Rev. 349, 365-66 (2006). Indeed, "Congress expressly cited the Elections Clause as one source of authority" in enacting the original VRA. *Id.* Pursuant to the Elections Clause, Congress could require all states to count out-of-precinct votes for federal offices or allow third-party ballot collection; that the VRA instead imposes an anti-discrimination standard simply highlights Congress's restrained approach in enacting §2.

C. The §2 results test does not mandate an excessive focus on race.

Petitioners' contention that the results test would require state voting legislation to "become overwhelmingly race conscious," thereby "violat[ing] the Equal Protection Clause's 'central mandate' of 'racial neutrality in governmental decisionmaking,'" is also without merit. Brnovich.Br.27 (quoting *Miller v. Johnson*, 515 U.S. 900, 904, 916 (1995)); *see also* Republicans.Br.41.

It has been seven years since the Court decided *Shelby County*, and there have been numerous §2 vote-denial cases since then that have applied the same two-part results test applied here. *Supra* at 6. There is no evidence that legislatures have been hamstrung by racial considerations in regulating elections.

Moreover, the Fourteenth Amendment does not command race *blindness* in government decision-making. It subjects racial considerations to heightened scrutiny where benefits are conferred or denied based on race *(e.g.*, certain types of affirmative action),[16] or where the decision-making involves potential racial stigmatizing based on race

---

[16] *See Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016).

(*e.g.*, using race as the predominant factor in drawing district lines),[17] but it does not forbid legislatures from considering the impact of supposedly neutral laws on minorities. *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 Ala. L. Rev. 653, 671 (2015). ("[G]overnment may engage in race-conscious state action to remedy past discrimination, promote equal opportunity, and achieve diversity, in cases where the law is facially neutral in form.").

Several of this Court's recent cases illustrate the point. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), for example, the Court held that disparate-impact claims are cognizable under the Fair Housing Act (FHA). In so holding, the Court explained that "race may be considered in certain circumstances and in a proper fashion." *Id.* at 545. Specifically, "[w]hen setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset." *Id.*

Likewise, in *Fisher*, 136 S. Ct. 2198, no member of the Court questioned the use of a racially neutral "Top Ten Percent Plan" to achieve racial diversity at

---

[17] *See Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017).

a university. *Id.* at 2206. The Top Ten Percent Plan was undoubtedly *race conscious*; it was designed to "boost minority enrollment" by admitting the top ten percent of students from racially segregated—and often under-resourced—public schools. *Id.* at 2213. Yet even the dissent praised this "facially race-neutral law" as a legitimate effort to equalize competition between affluent and poor students, thereby disproportionately benefitting "African-American and Hispanic students." *Id.* at 2218 (Alito, J., dissenting). The dissent observed that a university is free to "adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups," so long as it employs "race-neutral" means like the Top Ten Percent Plan. *Id.* at 2242.

These cases build on earlier opinions observing that government need not be race-blind; rather, it may employ *race-neutral* means to foster racial diversity, promote equality of opportunity for all races, and undo the effects of past discrimination. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (explaining that a public employer may undertake "affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy J., concurring in part and concurring in judgment) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general

policies to encourage a diverse student body, one aspect of which is its racial composition."); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . ."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989) ("Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."); *id.* at 526 (Scalia, J., concurring) ("A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race.").

Under this precedent, the mere awareness that a race-neutral electoral change will reduce burdens that fall disproportionately on minority voters raises no constitutional concerns, because making it easier to vote neither stigmatizes anyone based on race nor confers or denies a benefit based on race. Removing the ballot-collection ban, for example, does not confer a benefit on minorities that is denied to others; rather, it ensures that they have equal opportunity to vote in light of the law's interaction with the state's unique history of discrimination. *See* Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 Ohio St. L.J. 763, 779 n.88 (2016).

It is not true, as Petitioners maintain, that the §2 results test applied in this case would require state

legislatures to reconfigure their electoral systems to maximize minority voting opportunities. There is a big difference between eliminating a voting method that minorities have come to rely upon (or removing a barrier that imposes a disparate burden on minorities) and requiring a state to adopt an entirely new voting method. The careful two-part test applied here has not yet and will not lead to the latter, extreme outcome. Indeed, in every §2 vote-denial case, courts must perform the "intensely localized analysis" required by *Gingles* and the VRA that often leads courts to uphold the challenged policy or practice. *Supra* at 14.

Finally, Petitioners' assertion that the test would advantage Democrats is immaterial. Even if it were true that minority voters currently favor Democrats, §2 is supposed to protect minority voting rights regardless of which party minority voters may favor at any given historical moment. *See, e.g.*, *Katzenbach*, 383 U.S. at 308, 337.

III. The Ninth Circuit correctly held that the ballot-collection ban was enacted with intentional discrimination.

Based on the district court's factual findings, the Ninth Circuit correctly determined that the ballot-collection ban was enacted with invidious intent. Applying the *Arlington Heights* analysis, the court held that racial discrimination was a motivating factor in enacting the ballot-collection ban, and that Arizona failed to show it would have enacted the law

without that motivation. In doing so, the court largely relied on the district court's own factual findings, but held that the district court clearly erred by failing to draw conclusions that followed from those findings. JA.674.

Petitioners' criticisms of the court's decision are meritless. *First*, Petitioners mischaracterize the court's discussion of the "cat's paw" doctrine, incorrectly implying that the court used the doctrine to impute the discriminatory intent of a single legislator and a "private citizen" to the entire Legislature. Republicans.Br.44. That is not accurate. Instead, the district court expressly found that Senator Shooter's demonstrably false allegations, as well as the "racially-charged" video and accompanying commentary by then-Republican Party Chair LaFaro, infused the debate over ballot collection and were "successful in convincing" *other* legislators "that ballot collection was a problem that needed to be solved." JA.352. Given these facts, the court's analogy to the "cat's paw" doctrine was apt: demonstrably false and racially-motivated allegations peddled by influential actors *tainted the whole process*. While some legislators may have had "a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection," that belief resulted from uncritical reliance upon "far-fetched" and "demonstrably false" allegations and explicit racial appeals. JA.677; *cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-30 (2018) (failure of members of adjudicatory body to object to

discriminatory statements by other members cast doubt on fairness of hearing).

Second, Petitioners argue that the court "had no justification for inferring that *race* rather than *partisanship* was at play." Republicans.Br.48. But even if the ballot-collection ban targeted minorities for *partisan* reasons, it would still be unconstitutional. Targeting "voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics" and even if "the end goal [is] advancing [] partisan interests." *Cooper*, 137 S. Ct. at 1473, n.7. And unlike in the redistricting cases Petitioners cite, "where states may consider race and partisanship to a certain extent, legislatures cannot restrict voting access on the basis of race." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016).[18] "[I]intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *Id.* "This is so even absent any evidence of race-based hatred and despite the obvious political dynamics." *Id.* at 222-23.

Petitioners also argue that, under *Crawford*, 553 U.S. 181, the Ninth Circuit was required to ignore

---

[18] Nor "can legislatures restrict access to the franchise based on the desire to benefit a certain political party." *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983)).

the complete absence of fraud connected to third-party ballot collection in Arizona. Not so. Because *Crawford* was not a §2 or Fifteenth Amendment case, it did not apply the standards at issue here. Nor did it hold that a court is forbidden from inferring that an anti-fraud rationale is pretextual when there is zero evidence of fraud. This is especially true where, as here, there is independent evidence of invidious intent.

Petitioners seek cover in the 2005 Carter-Baker Report, which recommended against extensive ballot collection. But there is no evidence that the Arizona Legislature considered the report during the legislative process. And both the Carter Center and President Carter have recently cautioned that the Report must be viewed in context, especially since "many states have gained substantial experience in vote-by-mail and have shown how key concerns can be effectively addressed through appropriate planning, resources, training, and messaging."[19]

The Ninth Circuit's finding of intentional racial discrimination was amply supported by the facts and the law.

---

[19] Caroline Kelly, CNN Politics, *Carter affirms safety of mail-in voting after Barr and White House cite him to diminish it* (Sept. 4, 2020), https://www.cnn.com/2020/09/04/politics/carter-vote-by-mail-safety-barr-white-house/index.html.

*   *   *

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

RESPECTFULLY SUBMITTED, this 13th day of January, 2021

PERKINS COIE LLP

Marc E. Elias
Counsel of Record
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
Lalitha D. Madduri
Alexander G. Tischenko
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 800
Washington, D.C. 20005-3960
202.654.6200
MElias@perkinscoie.com

Sarah R. Gonski
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012
602.351.8000

Lauren P. Ruben
PERKINS COIE LLP
1900 Sixteenth Street
Suite 1400
Denver, CO 80202
303.291.2385

Counsel for DNC Respondents