Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF AMICI INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. State laws violate Section 2 only if, when viewed in light of the State's entire system of voting and registration, they cause a racial group to have an unequal opportunity to vote. 8

A. States violate Section 2 only if their election systems provide unequal voting opportunities. 11

B. Plaintiffs must prove that the challenged procedure causes the systemwide inequality. 15

II. The Ninth Circuit erred in holding that Section 2 forbids all laws that, viewed in isolation, disparately impact a protected class in connection with voting. 19

A. The Ninth Circuit's test violates the federalism canon. 20

B. If Section 2 means what the Ninth Circuit said it means, the law is unconstitutional. 27

CONCLUSION 32

TABLE OF AUTHORITIES

Cases **Page(s)**

Atl. Richfield Co. v. Christian,
140 S. Ct. 1335 (2020) 21

Bartlett v. Strickland,
556 U.S. 1 (2009) 11, 15

Bd. of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 6, 29

Bond v. United States,
572 U.S. 844 (2014) .....*passim*

Burdick v. Takushi,
504 U.S. 428 (1992) 17, 21, 26

Burrage v. United States,
571 U.S. 204 (2014) 4, 15

Chiafalo v. Washington,
140 S. Ct. 2316 (2020) 21

Chisom v. Roemer,
501 U.S. 380 (1991) 4, 10, 16

City of Mobile v. Bolden,
446 U.S. 55 (1980) 9, 28

Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund,
138 S. Ct. 1061 (2018) 27

Democratic Nat'l Comm. v. Reagan,
904 F.3d 686 (9th Cir. 2018) 13, 14, 15

Democratic Nat'l Comm. v. Wisconsin State Legislature,
590 U.S. __, No. 20A66, 2020 U.S. LEXIS 5187 (Oct. 26, 2020) 26

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 6, 27

EEOC v. Arabian American Oil Co.,
499 U.S. 244 (1991) 21

Fair Elections Ohio v. Husted,
770 F.3d 456 (6th Cir. 2014) 24

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019) 8

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

Guinn v. United States,
238 U.S. 347 (1915) 28

Holder v. Hall,
512 U.S. 874 (1994) 12

Husted v. Ohio State Conf. of the NAACP,
573 U.S. 988 (2014) 23

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 24, 25

Lee v. Va. State Bd. of Elections,
843 F.3d 592 (4th Cir. 2016) 14

Luft v. Evers,
963 F.3d 665 (7th Cir. 2020) 13, 28

Mays v. LaRose,
951 F.3d 775 (6th Cir. 2020) 22

McDonald v. Bd. of Election Comm'rs,
394 U.S. 802 (1969) 25

Mich. State A. Philip Randolph Inst. v. Johnson,
833 F.3d 656 (6th Cir. 2016) 25

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 29, 30, 31

Ne. Ohio Coal. for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016) 24

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

Ohio State Conf. of the NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014) 23

Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.,
28 F.3d 306 (3d Cir. 1994)..... 16

Shelby County v. Holder,
570 U.S. 529 (2013) 22

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 28

Tex. League of United Latin Am. Citizens v. Hughs,
No. 20-50867, 2020 U.S. App. LEXIS 32211 (5th Cir. Oct. 12, 2020) 26

Thornburg v. Gingles,
478 U.S. 30 (1986) 9, 16

United States v. Comstock,
560 U.S. 126 (2010) 29

Washington v. Davis,
426 U.S. 229 (1976) 27

Statutes, Rules, and Constitutional Provisions

U.S. Const. amend. IX 20

U.S. Const. amend. X..... 20

U.S. Const. amend. XV 3, 6, 7, 28

52 U.S.C. §10301.....*passim*

Ohio Rev. Code §3501.10 13

Ohio Rev. Code §3509.03 22

Ohio Rev. Code §3509.05 23

Sup. Ct. Rule 37.4 3

Other Authorities

Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566 (2019) .....*passim*

Paul Gronke, *Early Voting and Turnout*, PS Online 639 (2007)..... 25

Quinn Scanlan, *Here's how states have changed the rules around voting amid the coronavirus pandemic*, ABC News (Sept. 22, 2020) 26

Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* §16 (2012) 9

State Laws Governing Early Voting, Nat'l Conf. of State Legislatures..... 26

STATEMENT OF AMICI INTEREST

The Voting Rights Act is among the most important laws that Congress ever passed. Today, Section 2 is the Act's most important piece. That section prohibits States from adopting laws that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. §10301(a). Laws violate that prohibition when they keep "the political processes leading to nomination or election in the State" from being "equally open to participation by members of" a racial group. *Id.*, §10301(b). These processes are not equally open when members of one race "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. §10301.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Court should reverse the Ninth Circuit's judgment.

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