No. 18-15845

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC, AKA Democratic Senatorial Campaign Committee; THE ARIZONA DEMOCRATIC PARTY,

Plaintiffs–Appellants,

v.

MICHELE REAGAN, in her official capacity as Secretary of State of Arizona; MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General,

Defendants–Appellees

THE ARIZONA REPUBLICAN PARTY; BILL GATES, Councilman; SUZANNE KLAPP, Councilwoman; DEBBIE LESKO, Sen.; TONY RIVERO, Rep.,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Hon. Douglas L. Rayes, District Judge

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the American Civil Liberties Union and the American Civil Liberties Union of Arizona have no parent corporations. The organizations are not a subsidiary or affiliate of any publicly owned corporations, and no publicly held corporation holds ten percent of their stock.

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 1.75 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Arizona is a statewide affiliate of the national ACLU, with thousands of members throughout the state. The ACLU Voting Rights Project has litigated more than 300 voting rights cases since 1965, including voting rights cases before this Court in which the ACLU served as an amicus, *e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

Amici have a significant interest in the outcome of this case and in other cases concerning laws that present unnecessary barriers to individuals exercising their fundamental right to vote. The ACLU and its affiliates have litigated vote denial claims under Section 2 of the Voting Rights Act throughout the country, including in North Carolina and Wisconsin. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

(2015); *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated in light of stay order*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

Counsel for all parties have indicated that they consent to the filing of this brief.

ARGUMENT

En banc review of the panel's decision is necessary to maintain the uniformity of this Court's decisions, and to prevent a circuit split on an issue of exceptional importance: the proper standard for vote denial claims under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 ("Section 2").

As the Supreme Court recognized more than 50 years ago, interference with the right to vote takes different forms: "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). "[I]n voting rights parlance, '**[v]ote denial'** refers to practices that prevent people from voting or having their votes counted . . . 'such as literacy tests, poll taxes, white primaries, and English-only ballots,'" while "**vote dilution** challenges involve 'practices that diminish minorities' political influence,'" such as at-large elections and redistricting plans that either weaken or keep minorities' voting strength weak. *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (quoting Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691 (2006)) (emphasis added).

Every Court of Appeals that has articulated a test for vote denial challenges under the discriminatory results standard of Section 2 has employed a two-part framework, in which Plaintiffs must show: (1) that a challenged practice

"impose[s] a discriminatory burden" on voters of color, and (2) that the burden is "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017) (internal quotation marks & citation omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) ("*LWV NC*"), *cert. denied*, 135 S. Ct. 1735 (2015); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016) ("*ODP*"); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367, 400 (9th Cir. 2016) (en banc), *stay granted*, 137 S. Ct. 446 (2016) (mem.).

With the exception of the panel decision in this case, every Circuit that has applied this two-part framework—including the Fourth, Fifth, Sixth, Seventh Circuits, and an *en banc* panel of this Court at an earlier stage of this case—has held that plaintiffs can establish the first prong by showing that a restriction on voting "places a disproportionate burden on the opportunities of minorities to vote." *Feldman*, 843 F.3d at 401; *see also LWV NC*, 769 F.3d at 245; *ODP*, 834 F.3d at 627; *Frank*, 768 F.3d at 753. That requirement is consistent with the text of Section 2, which prohibits the "denial or *abridgement* of the right to vote," and any practices that result in minority voters having "less opportunity" to participate in the political process, 52 U.S.C. § 10301.

But in this case, the panel majority imposed an additional requirement that is essentially impossible to satisfy in the vote denial context: that plaintiffs alleging denial of the right to vote in violation of Section 2 must demonstrate disenfranchisement of minority voters that is so widespread as to change multiple election "outcomes," beyond "the mere loss of an occasional election," slip. op. at 39, 42 (internal quotation marks and citation omitted). Apparently, according to the panel majority, restrictions that make voting substantially harder and fall disproportionately on minority voters, or that disenfranchise large numbers of voters of color, or that even change the outcome of "an occasional election," fall outside the ambit of Section 2's discriminatory results standard unless they are regularly responsible for changing election outcomes.

No other Circuit has adopted the panel's frequent-elections-outcomes requirement, which runs counter to the text of Section 2 and would effectively foreclose relief in vote denial cases under Section 2's discriminatory results standard. All other Circuits to have considered this issue—including a previous *en banc* panel in this case—have held that plaintiffs can satisfy the first step of the two-part framework for vote denial liability based solely on evidence of a disproportionate burden on minority voters, without evidence that the restriction frequently changes election outcomes.

The panel purported to borrow its frequent-elections-outcomes requirement from vote dilution case law, and asserted that its use in the vote denial context was compelled by Supreme Court precedent. *See* slip op. at 38–41. But that is incorrect, as the Supreme Court has never decided a Section 2 vote denial claim, let alone held that vote denial and vote dilution claims are subject to the same analytical framework.

Ultimately, the panel's decision inflicts significant damage on minority voters' ability to obtain relief for voting discrimination, likely rendering relief for vote denial practices unobtainable under Section 2's results standard. Because the panel's decision conflicts with a previous *en banc* decision of this Court, rehearing *en banc* "is necessary to ensure . . . uniformity of [this] court's decisions," Fed. R. App. P. 35(a)(1). Rehearing *en banc* is also appropriate because this case "presents a question of exceptional importance . . . involv[ing] an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals." Fed. R. App. P. 35(a)(2), (b)(1)(B); *see also* Ninth Cir. R. 35-1 (direct conflict with another court of appeals "is an appropriate ground for petitioning for rehearing *en banc*").

THE PANEL'S REQUIREMENT THAT A CHALLENGED VOTING RESTRICTION HAS REGULARLY CHANGED THE OUTCOME OF ELECTIONS CONFLICTS WITH THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, AND SEVENTH CIRCUITS, AND THE LAW OF THIS CIRCUIT, REGARDING VOTE DENIAL CLAIMS UNDER SECTION 2 OF THE VRA

In requiring plaintiffs bringing vote denial claims under Section 2's results standard "to show that the state election practice has some material effect on elections and their outcomes" that goes beyond "the mere loss of an occasional election," slip. op. at 39, 42 (internal citation and quotation marks omitted), the panel majority directly contradicted rulings of every Court of Appeals that has articulated a Section 2 vote denial framework, including a decision of an *en banc* panel at an earlier stage of this case.

Section 2 of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a). Subsection 2(b) provides that a violation of Section 2's prohibition on discriminatory results "is established if . . . [minority voters] 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(b). The Supreme Court has explained 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 v. Roemer*, 501 U.S. 380, 397 (1991) (emphasis added).

The Fourth, Fifth, Sixth, and Seventh Circuits—as well as a previous *en banc* panel in this case—have employed a two-part framework for assessing vote denial claims under Section 2:

> [1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and]
>
> [2] [T]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

Veasey, 830 F.3d at 244 (alterations in original) (internal quotation marks and citation omitted); *see also LWV NC*, 769 F.3d at 240; *ODP*, 834 F.3d at 637; *Frank*, 768 F.3d at 754–55; *Feldman*, 843 F.3d at 400; *also id.* at 367 (adopting Chief Judge Thomas's dissent from the panel opinion, which employed the two-part framework for vote denial liability).

As applied by every Circuit to have considered the appropriate framework for vote denial liability (other than the panel here), "[t]he first part of this two-part framework inquires about the nature of the burden imposed and whether it creates a disparate effect" on minority voters. *Veasey*, 830 F.3d at 244; *see also LWV NC*, 769 F.3d at 245; *ODP*, 834 F.3d at 627; *Frank*, 768 F.3d at 752–53; *Feldman*, 843

F.3d at 400-01. In applying this prong, the *Feldman en banc* panel held at an earlier stage of this case that "[t]he relevant question is whether the challenged practice, viewed in the totality of the circumstances, places a disproportionate burden on the opportunities of minorities to vote." *Feldman*, 843 F.3d at 401; *see also Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 895 F.2d 516, 518 (9th Cir. 1989) (explaining *en banc* decision is "law of th[e] circuit").

Here, however, the panel majority held that, for purposes of satisfying the first step in the two-part inquiry, it is "not enough that the burden of the challenged practice falls more heavily on minority voters." Slip op. at 42. Instead, it held that plaintiffs must also show that a challenged law disproportionately imposes burdens on minority voters that are so severe and widespread that the law regularly affects election "outcomes," beyond "the mere loss of an occasional election," *id.* at 39, 42 (internal quotation marks and citation omitted). In other words, it is not enough to show that the law has made voting more difficult for minorities, has disproportionately disenfranchised minority voters, or even that it has changed the outcome of a "mere" single election; rather, plaintiffs must demonstrate that a challenged voting restriction has disenfranchised so many minority voters as to regularly tip the outcome of elections. In a footnote, the panel majority asserted that this rule was "consistent with the two-step framework adopted by the Fourth, Fifth, and Sixth Circuits." *Id.* at 42 n.19.

But no other Court of Appeals has come close to adopting such an onerous requirement for vote denial liability. Instead, all other Circuits to have considered this question have held that the first prong of the two-part framework for vote denial liability is satisfied where a restriction on voting imposes significant and disproportionate burdens on minority voters, without requiring a showing that the practices challenged had affected multiple (or any) election outcomes.

For example, the *en banc* Fifth Circuit found that Texas's restrictive voter identification requirements imposed a "discriminatory burden" based on evidence that African-American and Hispanic voters are "more likely than their Anglo peers to lack [one of the forms of] ID," and are overrepresented among poor voters, who had particular difficulty with "the cost of underlying documents necessary to obtain an [ID card]" (more than $80 for one plaintiff), and the logistical hurdles of obtaining ID in Texas ("a 60-mile roundtrip to the nearest [ID office] for some plaintiffs). *See Veasey*, 830 F.3d at 250–55. The *en banc* Fifth Circuit did not require evidence that Texas's identification requirements affected election "outcomes," slip op. at 39. *See also LWV NC*, 769 F.3d at 243, 245; *Feldman*, 843 F.3d at 400–01.

Even where Courts of Appeals have rejected Section 2 vote denial claims, they have done so by finding that the challenged practice did not impose a significant burden on voting rights, rather than a failure to show changed election

"outcomes." Slip. op. at 39. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (rejecting Section 2 claim because Virginia provided free IDs, giving "every voter an equal opportunity to vote"); *ODP*, 834 F.3d at 639–40 (holding plaintiffs failed to "meet their burden of establishing that [early voting reduction] results in a racially disparate impact"); *Frank*, 768 F.3d at 755 (rejecting claim because "everyone has the same opportunity to get a qualifying photo ID" in Wisconsin).[2]

All of these rulings focus the first step of the two-part framework on whether a law disproportionately burdens minority voters, and flow from the text of Section 2, which states that a violation occurs where voters of color have "less opportunity" to participate in the political process, 52 U.S.C. § 10301(b)—not that minority voters have "no" such opportunity. The statute prohibits not only the "denial" of the right to vote; rather "Section 2 also explicitly prohibit[s]

[2] Although there is some disagreement amongst other Circuits as to whether a reduction in minority turnout is necessary to establish a "discriminatory burden"—*compare Veasey*, 830 F.3d at 260 and *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016) (holding that no turnout evidence is necessary) *with ODP*, 834 F.3d at 639 and *Frank*, 768 F.3d at 747 (assuming that the burdensome nature of a voting restriction will manifest itself in reduced turnout)—no court other than the panel here has gone so far to suggest that plaintiffs bringing a vote denial claim must show that the challenged restrictions reduces minority turnout so much so as to have an effect on multiple election "outcomes." Slip op. at 39.

abridgement of the right to vote." *Veasey*, 830 F.3d at 253.[3] The panel majority's frequent-elections-outcomes rule, by contrast, departs from the plain text of the statute, and runs directly contrary to the weight of Circuit precedent.

THE PANEL'S TREATMENT OF VOTE DENIAL CLAIMS AS SUBJECT TO THE SAME ANALYTICAL FRAMEWORK AS VOTE DILUTION CLAIMS IS CONTRARY TO THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, AND SEVENTH CIRCUITS, AND MISINTERPRETS SUPREME COURT PRECEDENT

In applying a frequent-election-outcomes requirement in this case, the panel majority improperly imported a requirement from vote dilution case law into the vote denial context, a doctrinal leap that no other Circuit has made, and one that is not compelled by Supreme Court precedent.

The panel majority correctly noted that the Supreme Court's seminal Section 2 vote dilution case, *Thornburg v. Gingles*, 478 U.S. 30 (1986), held that plaintiffs bringing a vote dilution claim must show that, as a result of a practice such as an at-large electoral scheme, the majority will "*usually* be able to defeat

[3] Although the panel majority asserted that its election "outcomes" requirement was necessary because "a bare statistical showing of disproportionate impact" is insufficient to establish liability under Section 2, slip. op. at 40 (quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)), that objection ignores the fact that a disproportionate burden constitutes only the first part of the two-step framework for vote denial liability; plaintiffs must also satisfy the second step, *i.e.*, that the disproportionate burden is "caused by or linked to social and historical conditions that have or currently produce discrimination," *Veasey*, 830 F.3d at 244.

candidates supported by a . . . minority group." Slip. Op. at 40 (quoting *Gingles*, 478 U.S. at 48–49). But the panel majority erred by applying this requirement in the vote denial context, based on its assertion that "[t]he Supreme Court flatly rejected" the notion that vote denial and vote dilution claims are subject to different analytical frameworks under Section 2. *Id.* at 38 (citing *Chisom*, 501 U.S. at 397).

No other Circuit has reached that conclusion, likely because the case on which the panel majority relied—*Chisom*, a more than 25-year-old vote dilution case—says no such thing. There, Louisiana argued that Section 2 applied to the denial of the right to vote in judicial elections, but not to the dilution of minority voting strength in such elections. *See id.* at 396–97. The Supreme Court rejected that contention, holding that Section 2 "does not create two separate and distinct rights" that apply to different *categories* of electoral practices. Slip Op. at 38 (quoting *Chisom*, 501 U.S. at 397–98). But in so holding, *Chisom* did not purport to address the framework for vote denial claims under Section 2, admonishing that its decision was "limited in character" and involved "only the *scope* of the coverage of § 2 of the Voting Rights Act as amended in 1982"—namely, the question whether Section 2 applies to vote dilution in judicial elections (the Court ruled it does)—and not "any question concerning the *elements* that must be proved to establish a violation of the Act." 501 U.S. at 390 (emphasis added).

To be sure, the panel majority correctly recited *Chisom*'s statement that all Section 2 claims "must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice." Slip op. at 38 (quoting *Chisom*, 501 U.S. at 398). But this does not mean that vote denial plaintiffs must show a frequent effect on election outcomes. In fact, *Chisom* suggests the opposite, holding 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). Thus, in the vote denial context, evidence that a voting restriction substantially and disproportionately interferes with minority voters' right to participate in an election *a fortiori* establishes that minority voters "have less opportunity . . . to elect representatives of their choice" for purposes of establishing Section 2 liability. 52 U.S.C. § 10301(b).

At bottom, the panel majority's frequent-elections-outcomes requirement misapprehends the fundamental differences between vote dilution and vote denial cases. Vote dilution claims "implicat[e] the value of representation: a group's members being able to aggregate their votes to elect candidates of their choice." Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 442 (2015). The fundamental harm alleged is the frustration of a minority group's ability to aggregate sufficient voting strength to elect its preferred

candidates—and, as such, evidence of election outcomes is a necessary aspect of a vote dilution claim. Vote dilution plaintiffs must also establish various preconditions, including that a group of minority voters "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 49–51, which is necessary to show that an existing electoral arrangement that weakens the voting power of a minority group could be replaced by an alternative arrangement that would enable the group to elect its preferred candidates. *See Bartlett v. Strickland*, 556 U.S. 1, 19 (2009).

Vote denial claims, by contrast, "implicate the value of participation: specifically, being able to register, vote, and have one's vote counted." Tokaji, *supra*, at 12. As Professor Karlan (who successfully argued *Chisom*) has explained, an "essential feature" of vote denial claims "is that they are wholly outcome-independent"—it "is no answer to a citizen's claim that she was improperly prevented from casting her ballot that the candidates she prefers are unlikely to win." Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 Ohio St. L.J. 763, 769–70 (2016). Thus, as the First Circuit has recognized, the question whether minority voters could constitute a majority in a single-member district is "of little use in vote denial cases." *Simmons*, 575 F.3d at 42 n.24; *see also Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 556 (6th Cir. 2014) ("vote denial claims inherently provide a clear,

workable benchmark . . . . under the challenged law or practice, how do minorities fare in their ability 'to participate in the political process' as compared to other groups of voters?"). Other Circuits have thus not imposed vote dilution requirements in the vote denial context, recognizing that a different framework must be employed for analyzing vote denial claims under Section 2. *See Veasey*, 830 F.3d at 244; *see also LWV NC*, 759 F.3d at 239; *ODP*, 834 F.3d at 636-37; *Frank*, 768 F.3d at 755.

THE PANEL'S FREQUENT-ELECTION-OUTCOMES REQUIREMENT IGNORES THE SUPREME COURT'S GUIDANCE THAT THE VRA SHOULD BE INTERPRETED BROADLY, AND EFFECTIVELY IMMUNIZES VOTE DENIAL PRACTICES FROM SECTION 2 LIABILITY

The panel majority also ignored the Supreme Court's directive that the VRA should be interpreted to provide "the broadest possible scope in combating racial discrimination." *Chisom*, 501 U.S. at 403 (internal quotation marks and citation omitted). Under the panel majority's rule, Section 2 is only triggered in the vote denial context if a restriction disenfranchises so many minority voters as to regularly change the outcome of elections. That requirement would eviscerate Section 2 in the vote denial context.

For example, as the panel majority acknowledged, its rule would effectively immunize any restrictions on voting from Section 2 liability in jurisdictions with minority populations "so small that they would on no hypothesis be able *to elect*

their own candidate." Slip. op. at 39 (internal quotation marks and citation omitted). No other Circuit has adopted a rule permitting disenfranchisement of minority voters wherever they are insufficiently numerous to play a decisive role in elections; indeed, the Fourth Circuit expressly rejected the notion that the number of minority voters affected is always dispositive of a Section 2 vote denial claim. *See LWV NC*, 769 F.3d at 244 (rejecting the district court's holding that claim was unlikely to succeed on the merits "because 'so few voters'" were affected).

An additional consequence of the panel majority's frequent-elections-outcomes requirement is that plaintiffs can only successfully prove vote denial *after* a challenged practice has gone into effect and disenfranchised so many minority voters as to change the results of multiple elections, effectively prohibiting all pre-enforcement vote denial challenges. Notably, the relative paucity of Section 2 vote denial case law until recently is due in large measure to "the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions," *LWV NC*, 769 F.3d at 239, in states including Arizona. The Supreme Court's ruling immobilizing the preclearance regime, *Shelby County v. Holder*, 570 U.S. 529 (2013), was based in part on the understanding that, under Section 2, plaintiffs may still bring pre-election challenges to "block voting laws from going into effect."

Id. at 537. But the panel majority's rule perversely prohibits preenforcement relief for vote denial claims under Section 2.

It is precisely for this reason that the *en banc* Fifth Circuit, and the *en banc Feldman* panel in this case, rejected any requirement that vote denial plaintiffs quantify the turnout effects of a challenged restriction. *See Veasey*, 830 F.3d at 260 ("Requiring a showing of lower turnout also presents problems for pre-election challenges to voting laws, when no such data is yet available."); *Feldman*, 843 F.3d at 401 (noting that "quantitative measurement of the effect of a rule on the voting behavior of different demographic populations must necessarily occur after the election," and that a requirement of such a showing would prevent "successful pre-election challenge of the burdens placed on minority voting opportunity."). Given that "[a] restriction on the fundamental right to vote . . . constitutes irreparable injury" that cannot be compensated after the fact, *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012), the panel majority's rule prohibiting pre-enforcement challenges would effectively leave minority voters without an effective remedy for disenfranchisement until it is too late.

Indeed, the panel majority's frequent-elections-outcomes rule may leave minority voters without any vote denial remedy *at all*. It is difficult—if not impossible—to assess whether a voting restriction has reduced turnout levels so as to have altered election outcomes. As the Fifth Circuit has explained, turnout rates

may not reflect the true impact of a restriction on voting: "[a]n election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason. That does not mean the voters kept away were any less disenfranchised." *Veasey*, 830 F.3d at 260. By contrast, in a vote dilution case, vote totals from past elections can simply be recalculated along different district lines, to determine whether, if previous elections had been held in differently-configured districts, the outcomes would have been different. But there is no analogous exercise through which to measure the ballots that were *not* cast due to a voting restriction challenged in a vote denial case. Given the many factors that affect turnout rates,[4] establishing that a particular voting restriction was outcome-determinative in multiple elections, is an all-but-impossible exercise. The panel majority's rule imposing such a requirement would likely render Section 2 relief for vote denial unobtainable.

CONCLUSION

The panel majority's decision conflicts with the decisions of other Circuits concerning the Section 2 vote denial framework, contradicts law of this Circuit, and ignores the Supreme Court's guidance on applying the VRA. This is an issue

[4] *See, e.g.*, Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 177-88 (1996); Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate*, 1964-2004, 69 J. Pol. 430 (2007).

of exceptional importance, as the panel's vote denial standard is essentially impossible to satisfy. The Court should grant the motion for rehearing *en banc*.

Dated: September 24, 2018

Respectfully submitted,

/s/ Dale E. Ho

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° *Not yet admitted in the Ninth Circuit Court of Appeals.*

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

This document complies with the word limit of Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,197 words.

Dated: September 24, 2018 */s/ Dale E. Ho*

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing through the Court's CM/ECF system upon all counsel registered with that system.

Dated: September 24, 2018 */s/ Dale E. Ho*