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.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

BRIEF OF UNITED STATES SENATORS TED CRUZ, MARSHA BLACKBURN, JOHN CORNYN, TOM COTTON, JAMES M. INHOFE, JAMES LANKFORD, AND MIKE LEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 2

Argument 5

I. VRA § 2's Plain Text And Legislative Record Confirm That Congress Enacted An Equal "Opportunity" Requirement—Not A Disparate Impact Statute. 5

II. The Ninth Circuit's VRA § 2 Interpretation Threatens Many Legitimate Time, Place, And Manner Voting Laws Across The Country. 10

III. VRA § 2 Would Be Unconstitutional Under The Ninth Circuit's Interpretation 18

Conclusion 23

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. *Cooper*,
140 S. Ct. 994 (2020) 20

Arizona v. *Inter Tribal Council of Ariz., Inc.*,
570 U.S. 1 (2013) 21

Bd. of Trustees of Univ. of Ala. v. *Garrett*,
531 U.S. 356 (2001) 4, 19, 20

Brown v. *Post*,
279 F. Supp. 60 (W.D. La. 1968) 21

Bruni v. *Hughes*,
No. 5:20-cv-35 (S.D. Tex.) 15

Burdick v. *Takushi*,
504 U.S. 428 (1992) 11

Burson v. *Freeman*,
504 U.S. 191 (1992) 11

Bush v. *Vera*,
517 U.S. 952 (1996) 18

Chisom v. *Roemer*,
501 U.S. 380 (1991) 19, 22

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 3, 19

City of Mobile v. *Bolden*,
446 U.S. 55 (1980) 2, 7

Crawford v. *Marion County Election Bd.*,
553 U.S. 181 (2008) 1, 3, 11, 12

Farrakhan v. *Washington*,
359 F.3d 1116 (9th Cir. 2004)..... 19

Food Mktg. Inst. v. *Argus Leader Media*,
139 S. Ct. 2356 (2019) 5

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

Greater Birmingham Ministries v.
Alabama,
161 F. Supp. 3d 1104 (N.D. Ala. 2016)..... 14

Griffin v. *Roupas*,
385 F.3d 1128 (7th Cir. 2004).....11, 12

Hayden v. *Pataki*,
449 F.3d 305 (2d Cir. 2006) (en banc) 19

Holder v. *Hall*,
512 U.S. 874 (1994) 18

Husted v. *A. Philip Randolph Inst.*,
138 S. Ct. 1833 (2018) 21

Johnson v. *De Grandy*,
512 U.S. 997 (1994) 18, 22

Johnson v. *Governor of Fla.*,
405 F.3d 1214 (11th Cir. 2005) (en banc)..... 19

League of Women Voters of N.C. v. *North Carolina*,
769 F.3d 224 (4th Cir. 2014).....13, 14

League of Women Voters of Va. v. *Va. State Bd. of Elections*,
No. 6:20-CV-00024, 2020 WL 2190793
(W.D. Va. May 5, 2020) 13

Lee v. *Va. State Bd. of Elections*,
843 F.3d 592 (4th Cir. 2016).....3, 15, 16

Lewis v. *Bostelmann*,
No. 3:20-cv-00284 (W.D. Wis.)..... 13

Michigan State A. Philip Randolph Inst. v. *Johnson*,
326 F. Supp. 3d 532 (E.D. Mich. 2018) 15

Miller v. *Johnson*,
515 U.S. 900 (1995) 4, 22

Miss. Republican Exec. Comm. v. *Brooks*,
469 U.S. 1002 (1984) 7, 8

N.C. State Conference of NAACP v. *Cooper*,
No. 1:18-CV-1034, 2019 WL 7372980
(M.D.N.C. Dec. 31, 2019) 14

Nader v. *Keith*,
385 F.3d 729 (7th Cir. 2004)..... 12

Navajo Nation Human Rights Comm'n v. *San Juan County*,
281 F. Supp. 3d 1136 (D. Utah 2017) 14

Ne. Ohio Coal. for the Homeless v. *Husted*,
837 F.3d 612 (6th Cir. 2016)..... 13

Nw. Austin Mun. Util. Dist. No. One v.
Holder,
557 U.S. 193 (2009) 18, 21

Ohio Democratic Party v. *Husted*,
834 F.3d 620 (6th Cir. 2016).....14, 15, 16

Ohio Org. Collaborative v. *Husted*,
189 F. Supp. 3d 708 (S.D. Ohio 2016) 13

One Wis. Inst., Inc. v. *Thomsen*,
198 F. Supp. 3d 896 (W.D. Wis. 2016) 13, 14, 15

Operation Push, Inc. v. *Mabus*,
932 F.2d 400 (5th Cir. 1991)..... 22

Oregon v. *Mitchell*,
400 U.S. 112 (1970) 5

Power Coal. for Equity & Justice v.
Edwards,
No. 3:20-cv-00283 (M.D. La.)..... 13

Reno v. *Bossier Par. Sch. Bd.*,
520 U.S. 471 (1997) 3, 7, 19

Shelby County v. *Holder*,
570 U.S. 529 (2013) 21

Simmons v. *Galvin*,
575 F.3d 24 (1st Cir. 2009)..... 18

South Carolina v. *Katzenbach*,
383 U.S. 301 (1966) 5, 6

Storer v. *Brown*,
415 U.S. 724 (1974) 11

Tex. Dep't of Hous. & Cmty. Affairs v.
Inclusive Cmtys. Project, Inc.,
135 S. Ct. 2507 (2015) 17, 22

Thomas v. *Andino*,
No. 3:20-cv-01552 (D.S.C.)..... 13

Thornburg v. *Gingles*,
478 U.S. 30 (1986) 5, 9, 17

Toney v. *White*,
488 F.2d 310 (5th Cir. 1973) (en banc).....20, 22

United States v. *Post*,
297 F. Supp. 46 (W.D. La. 1969) 20, 22

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

Veasey v. *Perry*,
71 F. Supp. 3d 627 (S.D. Tex. 2014)..... 17

White v. *Regester*,
412 U.S. 755 (1973) 2, 6, 10

Wrinn v. *Dunleavy*,
440 A.2d 261 (Conn. 1982)..... 12

Zimmer v. *McKeithen*,
485 F.2d 1297 (5th Cir. 1973) (en banc).....7, 10

STATUTES

52 U.S.C. § 10101 5

52 U.S.C. § 10301 ..... *passim*

52 U.S.C. § 10306 5

52 U.S.C. § 10307 6

52 U.S.C. § 20503 21

52 U.S.C. § 20901 22

LEGISLATIVE HISTORY

H.R. Rep. No. 97-227, 97th Cong., 1st Sess. (1981) 8

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 8, 9, 20, 22

OTHER AUTHORITIES

Thomas M. Boyd & Stephen J. Markman, *The 1982 Voting Rights Act Amendments: A Legislative History*, 40 Wash. & Lee L. Rev. 1347 (1983) 5, 7, 8

Carter-Baker Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections (2005) ..... *passim*

Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377 (2012) 9, 20

Nat'l Conf. of State Legs.,
Straight Ticket Voting States 15

N.C. State Board of Elections,
State Board Unanimously Orders New
Election in 9th Congressional District
(Feb. 25, 2019)..... 12

INTEREST OF *AMICI CURIAE*[*]

Amici curiae are United States Senators concerned about an aggressive wave of litigation aimed at massively expanding Section 2 of the Voting Rights Act (VRA § 2) in contravention of its plain text. If VRA § 2 is incorrectly interpreted, this will jeopardize neutral time, place, and manner voting laws that States have adopted to deter and prevent voter fraud.

"[T]he risk of voter fraud [is] real." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 196 (2008) (controlling op. of Stevens, J.). As this Court has repeatedly confirmed, States have the authority and responsibility to ensure the integrity of their elections. Such measures do not deny anyone the equal "opportunity" to vote guaranteed by VRA § 2. 52 U.S.C. § 10301.

Yet the VRA § 2 interpretation adopted by the Ninth Circuit below would jeopardize legitimate voting laws across the country. The Ninth Circuit held that any neutral voting law "results" in an unequal "opportunity" to vote, "on account of race or color," whenever a plaintiff identifies some minimal statistical racial disparity related to the law—and then points to completely separate, long past, invidious voting discrimination. *Ibid.*

Not only does this novel VRA interpretation threaten legitimate election-integrity laws, but it would render VRA § 2 unconstitutional. Accordingly, *amici* respectfully urge the Court to grant review and reverse.

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[*] Pursuant to this Court's Rule 37.2(a), *amici* affirm that timely notice of intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

I. The plain text and legislative record regarding the "results" component of Section 2 of the Voting Rights Act foreclose the Ninth Circuit's erroneous interpretation. Congress enacted an equal "opportunity" requirement—not a disparate impact statute. 52 U.S.C. § 10301.

When amending VRA § 2 in 1982, Congress was focused almost exclusively on claims that multi-member districts resulted in vote dilution. The legislative record barely said anything about time, place, and manner voter participation regulations. Rather, Congress sought to supplant *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and reinstitute vote-dilution claims without requiring discriminatory purpose. The compromise proposed by Senator Dole, which Congress adopted, codified almost verbatim this Court's previous articulation of the vote-dilution test from *White* v. *Regester*, 412 U.S. 755, 765-766 (1973).

Congress thus amended VRA § 2 to provide for equal "opportunity" in the political process. 52 U.S.C. § 10301. And Congress rejected a broad "discriminatory effects" test or one requiring racially proportional outcomes. The "results" test Congress enacted to ensure equal "opportunity" does not invalidate laws that impose mere disparate inconveniences on voters. *Ibid.* Otherwise, VRA § 2 would "dismantle every state's voting apparatus." *Frank* v. *Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

II. The Ninth Circuit, however, adopted an interpretation of VRA § 2 that would do exactly that. According to the Ninth Circuit, any neutral voting law "results" in an unequal "opportunity" to vote, "on account of race or color," whenever a plaintiff identifies some minimal statistical racial disparity related to the law—and then points to completely separate, long past, invidious voting discrimination. 52 U.S.C. § 10301.

But VRA § 2 "does not sweep away all election rules that result in a disparity in the *convenience of voting*." *Lee* v. *Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (emphasis added). This Court, lower courts, and the respected bipartisan Carter-Baker Commission have recognized that "the risk of voter fraud [is] real," and "the usual burdens of voting" do not deny anyone an equal opportunity to vote. *Crawford*, 553 U.S. at 196, 198 (controlling op. of Stevens, J.).

That is particularly true here regarding Arizona's ballot-collection law. As the Carter-Baker Commission found, "Absentee ballots remain the largest source of potential voter fraud." Carter-Baker Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections 46 (2005) (hereinafter Carter-Baker).

Nevertheless, the Ninth Circuit's VRA § 2 interpretation would eviscerate scores of legitimate time, place, and manner voting laws that prevent and deter fraud. In the past decade, plaintiffs have pushed an aggressive VRA § 2 theory seeking to invalidate voting laws regulating absentee voting, precinct voting, early voting, voter ID, election observer zones, voter registration, durational residency, and straight-ticket voting. See *infra* pp.12-15. These election-integrity provisions are entirely unlike the draconian, invidious voting restrictions the original VRA was designed to address. And they do not deny anyone an equal "opportunity" to vote. 52 U.S.C. § 10301.

III. The Ninth Circuit's sweeping interpretation of VRA § 2 would also render the statute unconstitutional.

Congress's Enforcement Clause powers extend only to laws that are "congruen[t] and proportional[]" to remedying *constitutional* violations. *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Here, constitutional violations require a showing of discriminatory *purpose*. *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997). But VRA

§ 2, as interpreted by the Ninth Circuit, would sweep far more broadly, prohibiting scores of neutral time, place, and manner voting laws that were unquestionably enacted for legitimate election-integrity purposes.

Moreover, Congress's "legislative record" from amending VRA § 2 in 1982 did not "identify a pattern" of constitutional violations from neutral time, place, and manner voting laws. *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001). In the vast legislative record, Congress identified only three cases holding that States abridged voter participation—and none of those cases found a discriminatory purpose.

Congress's compromise VRA § 2 amendment in 1982 sought to avoid imposing racial proportionality. But that is required by the Ninth Circuit's interpretation, which would mandate that States consider racial proportionality every time they enact new voting laws. This would unconstitutionally "subordinate[] traditional race-neutral * * * principles" to "racial considerations." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995).

ARGUMENT

I. VRA § 2's Plain Text And Legislative Record Confirm That Congress Enacted An Equal "Opportunity" Requirement—Not A Disparate Impact Statute.

By codifying this Court's decision in *White* v. *Regester*, the plain text of the "results" component of VRA § 2 guarantees equal "opportunity"—not racial proportionality. 52 U.S.C. § 10301.

Congress's legislative record also confirms this. Reflecting a "bygone era of statutory construction," *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), this Court's VRA § 2 jurisprudence has relied heavily on the legislative history of the 1982 amendments. See *Thornburg* v. *Gingles*, 478 U.S. 30, 44-45 (1986). But even if that legislative history were examined here, it confirms that Congress never intended to invalidate neutral time, place, and manner voting laws that impose merely some disparate impact on different racial groups.

A. 1. Before 1982, VRA § 2 was "a little-used provision that tracked the language of the Fifteenth Amendment." Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1352 (1983).

In contrast, Congress enacted separate VRA provisions targeting particular voting laws where "Congress had before it a long history of the discriminatory use of [these laws] to disenfranchise voters on account of their race." *Oregon* v. *Mitchell*, 400 U.S. 112, 132 (1970) (op. of Black, J.); see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333-334 (1966) (banned tests "have been administered in a discriminatory fashion for many years"); 52 U.S.C. § 10101(a)(2)(C) (ban on literacy tests); *id.* § 10306(b) (authorizing Attorney General to challenge

poll taxes under the Constitution); *id.* § 10307 (prohibiting refusal to count duly cast votes and intimidating or threatening voters under color of state law).

The wide disparities these pernicious laws created for minority voting participation were so great that they could be explained only as discrimination on the basis of race. See, *e.g.*, *Katzenbach*, 383 U.S. at 313 (before the original VRA, African-American voter registration was 4.2% in Alabama and 4.4% in Mississippi—each more than "50 percentage points" lower than Anglo registration).

2. Separately, throughout the 1970s, this Court addressed whether multi-member or at-large districts unconstitutionally diluted minority votes.

White v. *Regester* recognized that such districts "are not *per se* unconstitutional," while fashioning a test for determining if they could be unconstitutional under certain circumstances:

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings *that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*

412 U.S. at 765-766 (emphasis added). This italicized language was later codified at VRA § 2(b) to limit the "results" test that Congress created in 1982.

After *Regester*, the Fifth Circuit summarized a list of factors that could show "the existence of dilution." *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc).

3. But this Court in *City of Mobile* v. *Bolden* overturned *Zimmer*, reasoning it "was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." 446 U.S. at 71 (plurality op.).

Bolden held that the pre-1982 VRA § 2 "no more than elaborate[d] upon that of the Fifteenth Amendment"—which only prohibits facially neutral laws "motivated by a discriminatory *purpose*." *Id.* at 60, 62 (emphasis added). So "a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment," must "establish that the State or political subdivision acted with a discriminatory purpose." *Bossier Par.*, 520 U.S. at 481.

B. *Bolden* "galvanized" support to amend VRA § 2 and reinstate the Court's *Regester* test for vote-dilution. Boyd & Markman, 40 Wash. & Lee L. Rev. at 1348. So in 1982, Congress amended VRA § 2 to create the new "results" component of VRA § 2(a). Crucially, however, Congress clarified—in the new VRA § 2(b)—that the "results" component is assessed under the same vote-dilution test previously used by *Regester*. Consequently, the 1982 VRA amendments were designed to address *vote-dilution claims* about electoral districts—not massively expand the scope of banned voting regulations.

Initially, the House passed an amendment that "would prohibit all discriminatory 'effects' of voting practices," under which "intent would be 'irrelevant.'" *Miss. Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002, 1010

(1984) (Rehnquist, J., dissenting) (quoting H.R. Rep. No. 97-227 at 29, 97th Cong., 1st Sess. (1981)).

But in the Senate, the House's proposal "met stiff resistance." *Ibid.* Senator Hatch was the leading advocate against the House's broad "discriminatory effects" test, arguing it imposed a disparate-impact test remediable exclusively through racial proportionality. See S. Rep. No. 97-417 at 98-99, 97th Cong., 2d Sess. (1982) (hereinafter S. Rep.) (statement of Sen. Hatch: "Disparate impact can ultimately be defined only in terms that are effectively indistinguishable from those of proportional representation. Disparate impact is not the equivalent of discrimination.").

Senator Dole proposed the compromise that would eventually become law. It was "designed to reconcile the two competing viewpoints"—by (1) retaining the "results" test from the House bill, thus supplanting *Bolden*, (2) but "describ[ing] its parameters in greater detail" by adopting the vote-dilution test from *Regester* "with particular emphasis on whether the *political processes are* '*equally open*.'" Boyd & Markman, 40 Wash. & Lee L. Rev. at 1414-1415, 1422 (emphasis added); accord *Miss. Republican Exec. Comm.*, 469 U.S. at 1010 (Rehnquist, J., dissenting) ("The compromise bill retained the 'results' language but also incorporated language directly from this Court's opinion in [*Regester*] and strengthened the caveat against proportional representation."); *id.* at 1011 (Senator Dole argued "that 'access' only was required by amended § 2").

Notably, the legislative record repeatedly confirms that Congress was focused almost exclusively on vote-dilution claims about multi-member or at-large districts. See, *e.g.*, S. Rep. at 6 (identifying "dilution schemes" like "at-large elections [being] substituted for election by single-member districts"); *id.* at 8 (same); *id.* at 27 ("The

'results' standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote.").

In fact, the Senate Report included a lengthy discussion adopting the Fifth Circuit's nine *Zimmer* factors for vote-dilution claims. See *id.* at 28-29. This Court, in turn, then relied on the Senate Report to adopt these factors as "particularly" relevant to the "totality of the circumstances" for vote-dilution claims under the amended VRA § 2. *Gingles*, 478 U.S. at 44-45.

But in this vast legislative record, Congress did not identify any pattern of unconstitutional time, place, and manner voter participation laws. There was no "body of participation law analogous to the *White/Zimmer* dilution jurisprudence" for Congress to codify. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 416 (2012). Instead, as discussed below (on pp.20-21), Congress identified only three voter participation cases involving "episodic * * * denial of equal access" to voting—but not any "permanent structural barriers." S. Rep. at 30 & n.119.

This legislative record therefore shows that VRA § 2 was not designed to target election-integrity provisions that have a mere disparate impact on different racial groups. Congress did not intend to "completely prohibit a widely used prerequisite to voting which is not facially discriminating." *Id.* at 43. And Congress believed the results test "is not an easy test." *Id.* at 31. The Senate Report expressly disavowed a "discriminatory effects" standard. See, *e.g.*, *id.* at 68 & n.224 ("[T]he amendment distinguishes the standard for proving a violation under section 2 from the standard for determining whether a proposed change has a discriminatory 'effect' under Sec-

tion 5 of the Act."). And Congress's reliance on *Regester* and *Zimmer* makes clear that Congress did not intend to impose a mere disparate-impact test. See *Regester*, 412 U.S. at 764 ("relatively minor population deviations" do not dilute votes); *Zimmer*, 485 F.2d at 1305 ("Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.") (citation omitted).

Ultimately, the plain text of VRA § 2 shows Congress created an equal "*opportunity*" law—not a disparate-impact or "discriminatory effects" test requiring racial proportionality. VRA § 2(a) prohibits any "voting qualification or prerequisite to voting" that "results in a denial or abridgement of the right * * * to vote on account of race or color." 52 U.S.C. § 10301(a). And Congress dictated that such a violation is shown if, as a result of the voting practice and "based on the totality of circumstances," "the political processes * * * are *not equally open* to participation by members of a [racial group] 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) (emphases added). VRA § 2(b)'s plain text is almost a verbatim recitation of *Regester*'s test for vote dilution.

II. The Ninth Circuit's VRA § 2 Interpretation Threatens Many Legitimate Time, Place, And Manner Voting Laws Across The Country.

Without any showing that voters lacked equal opportunity to vote, the Ninth Circuit invalidated Arizona's (1) ballot-collection law—recommended by the bipartisan Carter-Baker Commission and "substantially similar to the laws in effect in many other states," No. 19-1257 Pet.App.164 (Bybee, J., dissenting) (hereinafter Pet.App.); and (2) precinct-voting requirement—similar to the laws of 26 other States, see *id.* at 155.

The Ninth Circuit's interpretation of VRA § 2 jeopardizes scores of neutral voting laws that prevent and deter fraud. And the Ninth Circuit entrenched a circuit split on an exceptionally important issue that has generated a wave of recent litigation.

A. "[T]he risk of voter fraud [is] real." *Crawford*, 553 U.S. at 196 (controlling op. of Stevens, J.). "Voting fraud is a serious problem in U.S. elections." *Griffin* v. *Roupas*, 385 F.3d 1128, 1130-1131 (7th Cir. 2004) (citations omitted). And while it "is difficult to measure, it occurs." Carter-Baker at 45. In fact, "election fraud [is] successful precisely because [it is] difficult to detect." *Burson* v. *Freeman*, 504 U.S. 191, 208 (1992). Given the difficulties in detecting voter fraud, States may enact preventive measures even when the "record contains no evidence of any such fraud." *Crawford*, 553 U.S. at 194 (controlling op. of Stevens, J.).

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Id.* at 196. So "there must be a substantial regulation of elections if they are to be fair and honest." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974); see *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.").

"Election laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. And "the usual burdens of voting" do not deny anyone an equal opportunity to vote. *Crawford*, 553 U.S. at 198 (controlling op. of Stevens, J.).

B. But in the past few years, many recommended election-integrity regulations—which impose no more than "the usual burdens of voting," *ibid.*—have been challenged in a wave of novel VRA § 2 litigation. These

laws being challenged now are nothing like the poll taxes and grandfather clauses that invidiously blocked minorities from voting decades ago.

Absentee Voting. As part of its comprehensive recommendations to modernize the Nation's electoral system after the 2000 presidential election, the bipartisan Carter-Baker Commission observed: "Absentee ballots remain the largest source of potential voter fraud." Carter-Baker at 46. To "reduce the risks of fraud and abuse in absentee voting," the Commission recommended "prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.*

Courts have recognized for decades that fraud is *especially* "facilitated by absentee voting," *Griffin*, 385 F.3d at 1130-1131 (citations omitted), because "voting by mail makes vote fraud much easier to commit," *Nader* v. *Keith*, 385 F.3d 729, 734 (7th Cir. 2004) (citation omitted). See, *e.g.*, *Veasey* v. *Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc) (recognizing the "reality of fraud * * * in the mail-in ballot context"); *Wrinn* v. *Dunleavy*, 440 A.2d 261, 270 (Conn. 1982) ("[T]here is considerable room for fraud in absentee voting."); see also *Crawford*, 553 U.S. at 225 (Souter, J., dissenting) ("absentee-ballot fraud * * * is a documented problem").

The States' ability to deter and prevent absentee voter fraud will become even more important as States recently have considered expanding absentee voting—especially after States have also recently uncovered sophisticated absentee voter fraud schemes. North Carolina, for instance, discovered a "coordinated, unlawful and substantially resourced [fraudulent] absentee ballot scheme." N.C. State Board of Elections, State Board Unanimously Orders New Election in 9th Congressional

District (Feb. 25, 2019), https://www.ncsbe.gov/Press-Releases?udt_2226_param_detail=229.

Nevertheless, limits on absentee voting, like Arizona's ballot-collection law here, have been challenged multiple times in recent years. See, *e.g.*, *Ne. Ohio Coal. for the Homeless* v. *Husted*, 837 F.3d 612, 628-629 (6th Cir. 2016) (overturning district court's permanent injunction of law reducing period for corrections to absentee ballots from ten to seven days); *League of Women Voters of Va.* v. *Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2190793 (W.D. Va. May 5, 2020) (witness-signature requirement on absentee ballots); *Lewis* v. *Bostelmann*, No. 3:20-cv-00284 (W.D. Wis.) (same); *Power Coal. for Equity & Justice* v. *Edwards*, No. 3:20-cv-00283 (M.D. La.) (witness-signature requirements and the permissible "excuses" to vote absentee); *Thomas* v. *Andino*, No. 3:20-cv-01552 (D.S.C.) (same).

Precinct Voting. Arizona and 26 other States limit voting outside a voter's own precinct. Pet.App.155 (Bybee, J., dissenting). The Carter-Baker Commission recommended that States provide voters the opportunity to "check their proper precinct for voting." Carter-Baker at 14. But see Pet.App.116 (decision below invalidating precinct-voting law); *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014).

Early Voting. The Carter-Baker Commission noted that early voting has various "drawbacks," so the Commission suggested limiting early voting periods to "15 days prior to the election." Carter-Baker at 35-36.

Yet laws limiting early voting periods have been challenged successfully in the district courts. See *One Wis. Inst., Inc.* v. *Thomsen*, 198 F. Supp. 3d 896, 952, 956-957 (W.D. Wis. 2016) (appeal pending after successful challenge based on "anecdotal and circumstantial evidence"); *Ohio Org. Collaborative* v. *Husted*, 189 F. Supp. 3d 708,

768 (S.D. Ohio 2016) (successful challenge to five-day reduction in early voting period), rev'd sub nom. *Ohio Democratic Party* v. *Husted*, 834 F.3d 620 (6th Cir. 2016); see also *Navajo Nation Human Rights Comm'n* v. *San Juan County*, 281 F. Supp. 3d 1136, 1143 (D. Utah 2017).

Voter ID. Because fraud and multiple voting "both occur" and "could affect the outcome of a close election," the Carter-Baker Commission recommended that States require voters to present REAL ID to "deter, detect, or eliminate several potential avenues of fraud." Carter-Baker at 18-19.

Yet voter-ID laws are frequent targets of VRA § 2 litigation. See *Veasey*, 830 F.3d at 250; *Frank*, 768 F.3d at 753; *N.C. State Conference of NAACP* v. *Cooper*, No. 1:18-CV-1034, 2019 WL 7372980, at *1 (M.D.N.C. Dec. 31, 2019); *One Wis. Inst.*, 198 F. Supp. 3d at 951; *Greater Birmingham Ministries* v. *Alabama*, 161 F. Supp. 3d 1104, 1108, 1116 (N.D. Ala. 2016).

Election Observer Zones. The Carter-Baker Commission recommended that "interested citizens * * * should be able to observe the election process, although limits might be needed." Carter-Baker at 65. But see *One Wis. Inst.*, 198 F. Supp. 3d at 944.

Registration. "Effective voter registration and voter identification are bedrocks of a modern election system." Carter-Baker at 9. But see *League of Women Voters*, 769 F.3d at 245 (restriction on same-day registration); *One Wis. Inst.*, 198 F. Supp. 3d at 906, 954 (proof-of-residence requirements, elimination of corroboration as alternative for proof of residence, and elimination of statewide deputies "who could register voters on a statewide basis").

Durational Residency. Challengers have targeted requirements that voters reside within the State for a prescribed period of time before an election. See *One*

Wis. Inst., 198 F. Supp. 3d at 956 (increase in durational-residency requirement from 10 days to 28 days).

Straight-Ticket Voting. In 2020, only six States will offer straight-ticket voting. Nat'l Conf. of State Legs., Straight Ticket Voting States, https://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx. Yet eliminating straight-ticket voting has similarly been challenged. See *Michigan State A. Philip Randolph Inst.* v. *Johnson*, 326 F. Supp. 3d 532, 572 (E.D. Mich. 2018) (invalidating prohibition on straight-ticket voting because communities with higher percentages of African-American residents had higher rates of straight-ticket voting; later vacated as moot); see also *One Wis. Inst.*, 198 F. Supp. 3d at 951; *Bruni* v. *Hughes*, No. 5:20-cv-35 (S.D. Tex.).

C. The Ninth Circuit—like the Fifth Circuit before it—has adopted a sweeping VRA § 2 interpretation that would invalidate these recommended laws and other neutral time, place, and manner voting laws. This has entrenched a circuit split with the Fourth, Sixth, and Seventh Circuits.

1. By VRA § 2's plain text, the prohibited "result" is an unequal "*opportunity to participate* in the political process"—so "the existence of a disparate impact, in and of itself," cannot be "sufficient to establish the sort of injury that is cognizable and remediable under Section 2." *Ohio Democratic Party*, 834 F.3d at 637 (emphasis added); accord *Frank*, 768 F.3d at 753 (VRA § 2 "does not condemn a voting practice just because it has a disparate effect on minorities"). Otherwise, "[v]irtually any voter regulation that disproportionately affects minority voters can be challenged successfully." *Veasey*, 830 F.3d at 310 (Jones, J., dissenting in part).

Plaintiffs must do more than show "election rules that result in a disparity in the *convenience of voting*." *Lee*,

843 F.3d at 601 (emphasis added); see *Ohio Democratic Party*, 834 F.3d at 631 (VRA § 2 does not ban a voting law simply because certain minority groups use particular methods "at higher rates than other voters"). After all, the means by which a State regulates its elections will necessarily "filter[] out some potential voters." *Frank*, 768 F.3d at 749; see *id.* at 754 ("No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system.").

Rather, plaintiffs must show that an election regulation "is an obstacle to a significant number of persons who otherwise would cast ballots." *Id.* at 749.

2. The Ninth Circuit, however, concluded that plaintiffs need only show that "more than a de minimis" number of "minority voters are disparately *affected*" by the challenged laws. Pet.App.44, 46 (emphasis added). For both Arizona laws at issue, the court erroneously equated a disparate impact on "convenience"—that higher rates of minority voters cast out-of-precinct votes or availed themselves of ballot collection—with a "denial or abridgement of the right to vote." *Lee*, 843 F.3d at 600-601 (emphasis omitted).

Specifically, the Ninth Circuit concluded that the disparate rates of out-of-precinct voting "result in a disparate burden on minority voters." Pet.App.47. But the effect the court identified was minimal: In 2016, approximately 1% of Hispanic, African-American, and Native-American voters cast an out-of-precinct ballot, as compared to approximately 0.5% of "nonminority" voters. Pet.App.20. Stated differently, 99.5% of nonminority voters and 99.0% of minority voters complied with this law.

The Ninth Circuit inflated this small disparity's magnitude by erroneously "[d]ividing one percentage by another," *Frank*, 768 F.3d at 752 n.3, to conclude that minority voters "are overrepresented" by "a ratio of two to

one," Pet.App.43. This ratio "produces a number of little relevance to the problem" because it "mask[s] the fact that the populations were effectively identical." *Frank*, 768 F.3d at 752 n.3.

Furthermore, to invalidate Arizona's ballot-collection law, the court relied on testimony that "many thousands of early ballots were collected from minority voters by third parties" and "white voters did not significantly rely on third-party ballot collection." Pet.App.86.

Likewise, the Fifth Circuit concluded that Texas's voter-ID law violated VRA § 2 based on a small disparity in preexisting ID possession: 98% of Anglo voters already had the requisite ID, compared to 94.1% of Hispanic voters and 91.9% of African-American voters. *Veasey*, 830 F.3d at 311 n.56 (Jones, J., dissenting in part). Texas offered free voter IDs, and the challengers did not "demonstrate[] that any particular voter * * * cannot get the necessary ID or vote by absentee ballot" (which does not require voter ID in Texas). See *Veasey* v. *Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014) (recounting evidence).

3. The Fifth and Ninth Circuits also failed to conduct a proper causation analysis.

VRA § 2 covers only those laws that "result" in an unequal "opportunity" to vote "*on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). A statistical disparity alone shows only correlation—not that race was the cause for enacting the law. See *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) ("A robust causality requirement ensures that '[r]acial imbalance * * * does not, without more, establish a prima facie case of disparate impact'") (citation omitted); *Gingles*, 478 U.S. at 55-58 (repeatedly emphasizing that challengers in vote-dilution cases must

show "*legally* significant" racial bloc voting) (emphasis added).

This is especially true when the disparate impact is as minimal as in the Fifth and Ninth Circuits' decisions. In contrast, past invidious practices like literacy tests produced such large racial disparities in actual voter participation that they could only be explained as preventing minorities from voting rather than actually addressing voter fraud. See *supra* pp.5-6.

The Fifth and Ninth Circuits skipped a proper causation inquiry by analyzing only the *Gingles*/Senate Report factors for vote-dilution claims. Pet.App.38-41; *Veasey*, 830 F.3d at 257-266. These factors were created to analyze whether retaining a multi-member district constitutes vote dilution, so they were not calibrated to ask whether a voting regulation legitimately furthered the State's interest in deterring voter fraud. This is precisely why other circuits have held that the factors are not useful in voter-participation cases. See *Frank*, 768 F.3d at 754 (Fourth, Sixth, and Seventh Circuits found "*Gingles* unhelpful" in voter-participation cases); *Simmons* v. *Galvin*, 575 F.3d 24, 42 n.24 (1st Cir. 2009) ("[T]he Supreme Court's seminal opinion in *Gingles* * * * is of little use in vote denial [*i.e.*, participation] cases.") (citation omitted).

III. VRA § 2 Would Be Unconstitutional Under The Ninth Circuit's Interpretation.

The Ninth Circuit's interpretation of VRA § 2 raises serious constitutional concerns and should be rejected under the constitutional avoidance doctrine. See *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009). Multiple Members of this Court have recognized that VRA § 2's constitutionality is an open question. See *Bush* v. *Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *Johnson* v. *De Grandy*, 512 U.S. 997, 1028-1029 (1994) (Kennedy, J., concurring); *Holder* v. *Hall*,

512 U.S. 874, 891 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment); *Chisom* v. *Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

A. As interpreted by the Ninth Circuit, VRA § 2 is not "congruent and proportional" to the Constitution's prohibition on voting laws enacted "with a discriminatory purpose." *Bossier Par.*, 520 U.S. at 481. At least 24 circuit judges have joined opinions explaining that a disparate-impact interpretation of VRA § 2 raises congruence-and-proportionality problems. See *Veasey*, 830 F.3d at 317 (Jones, J., dissenting in part); *Hayden* v. *Pataki*, 449 F.3d 305, 329-337 (2d Cir. 2006) (en banc) (Walker, C.J., concurring); *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1230-1234 (11th Cir. 2005) (en banc); *Farrakhan* v. *Washington*, 359 F.3d 1116, 1122-1225 (9th Cir. 2004) (Kozinski, J., dissenting from denial of reh'g en banc).

Under this Court's established Enforcement Clause precedents, preventive legislation limiting otherwise constitutional conduct requires "a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520 (emphasis added). Evaluating such legislation first requires "identify[ing] with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. A "disparate impact" theory of statutory liability lacks "congruence and proportionality" to a constitutional prohibition of laws enacted with a "racially discriminatory purpose." *Id.* at 372-373.

B. The "legislative record" in 1982 also "fail[ed] to show that Congress did in fact identify a pattern" of unconstitutional time, place, and manner voter participation laws. *Id.* at 368. This is unsurprising given Congress's focus on vote-dilution claims. And when Congress previously identified voting practices with a pattern of uncon-

stitutional discrimination (like literacy tests), it directly banned those practices. See *supra* pp.5-6.

The 1982 Senate Report essentially conceded that Congress found nothing close to a pattern of unconstitutional time, place, and manner voting restrictions. See S. Rep. at 42 (Congress "can use its Fourteenth and Fifteenth amendment powers to enact legislation whose reach includes those *without a proven history of discrimination*") (emphasis added).

To be sure, the Senate Report contains a footnote referencing three voter-participation cases—rather than vote-dilution cases. *Id.* at 30 n.119; see Elmendorf, 160 U. Pa. L. Rev. at 416 ("The authors of the Senate Report identified only three previous participation cases under the VRA.").[1]

But the legislative record must contain more than a handful of examples, or else it "fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which [Enforcement Clause] legislation must be based." *Garrett*, 531 U.S. at 369-370 ("half a dozen" examples is insufficient). As this Court just reiterated, "only a dozen possible examples" is far from enough. *Allen* v. *Cooper*, 140 S. Ct. 994, 1006 (2020).

Moreover, the courts in these three cases *rejected* assertions of an unconstitutional discriminatory purpose. See *Toney* v. *White*, 488 F.2d 310, 312-313 (5th Cir. 1973) (en banc) (State's actions were "not racially motivated"); *United States* v. *Post*, 297 F. Supp. 46, 50 (W.D. La. 1969)

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[1] The Senate Report also recounted various efforts to amend laws that raised scrutiny under VRA § 5's preclearance requirements—although those were predominantly vote-dilution cases too. See S. Rep. at 10 (listing "annexations; the use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines").

(defendants "at all times acted in good faith"); *Brown* v. *Post*, 279 F. Supp. 60, 63 (W.D. La. 1968) ("Defendants at all times acted in good faith.").

C. In all events, regardless of whatever the legislative record showed in 1982, "the Act imposes current burdens and must be justified by current needs." *Shelby County* v. *Holder*, 570 U.S. 529, 536 (2013) (quoting *Nw. Austin*, 557 U.S. at 203).

Since 1982, Congress has enacted additional voting legislation. For example, Congress enacted the National Voter Registration Act of 1993 (NVRA)—"a complex superstructure of federal regulation atop state voter-registration systems." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5 (2013). "The Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). To achieve the former goal, the NVRA requires States to permit voter registration in elections for federal office "by any of three methods: simultaneously with a driver's license application, in person, or by mail." *Inter Tribal Council*, 570 U.S. at 4; see 52 U.S.C. § 20503. "To achieve the latter goal, the NVRA requires States to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence," and the NVRA then provides fair procedures for this (including "prior notice" and sending a "return card"). *Husted*, 138 S. Ct. at 1838-1839.

The NVRA thus would have ameliorated problems raised in various voter-participation cases. For example, the NVRA would have closed the wide "25%" racial disparity in voter registration in the 1980s caused by Mississippi's "dual voter registration law and limited registration offices." *Veasey*, 830 F.3d at 312 (Jones, J., dis-

senting in part) (discussing *Operation Push, Inc.* v. *Mabus*, 932 F.2d 400 (5th Cir. 1991)). And it would have pretermitted the hypothetical posed by Justice Scalia's dissent in *Chisom* v. *Roemer* (a county limiting "voter registration to one hour a day three days a week"). *Ibid.* (discussing 501 U.S. at 408). The NVRA's prescribed procedures for maintaining accurate voter registration rolls would have addressed the concerns in *Toney*, 488 F.2d at 312. And funds from the Help America Vote Act of 2002 could have fixed the voting-machine failure at issue in *United States* v. *Post*, 297 F. Supp. at 48-49; see 52 U.S.C. § 20901.

D. The decision below also raises significant Equal Protection Clause problems, validating Senator Hatch's concern that VRA § 2's results test "would make race the over-riding factor in public decisions in this area." S. Rep. at 94.

The Ninth Circuit's interpretation of VRA § 2 will "inject racial considerations" into government decisionmaking, *Inclusive Cmtys.*, 135 S. Ct. at 2524, and "subordinate[] traditional race-neutral * * * principles" to "racial considerations," *Miller*, 515 U.S. at 916. If the validity of every voting regulation turns on mere disparate racial impacts, the VRA would *require* States to consider race each time they enact or amend election laws. See *Veasey*, 830 F.3d at 317 (Jones, J., dissenting in part) ("Using VRA § 2 to rewrite racially neutral election laws will force considerations of race on state lawmakers who will endeavor to avoid litigation by eliminating any perceived racial disparity in voting regulations.").

Interpreting VRA § 2 to *compel* "race-based" decisionmaking "embarks [courts] on a most dangerous course" and can "entrench the very practices and stereotypes the Equal Protection Clause is set against." *De Grandy*, 512 U.S. at 1029, 1031 (Kennedy, J., concurring).

This Court should avoid interpreting the VRA to require race-based decisionmaking, especially when the entire point of the VRA was to prohibit government actions "on account of race." 52 U.S.C. § 10301(a).

CONCLUSION

The petitions for writs of certiorari should be granted.

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