Nos. 19-1257 & 19-1258

In The
Supreme Court of the United States

MARK BRNOVICH, 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 Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF PETITIONERS

JOSHUA P. THOMPSON
CHRISTOPHER M. KIESER*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
JThompson@pacificlegal.org
CKieser@pacificlegal.org
Counsel for Amici Curiae

QUESTIONS PRESENTED

The questions presented are:

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Petitioners.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. In support of its Equality Under the Law practice group, PLF advocates for a color-blind interpretation of the United States Constitution and opposes race-based decisionmaking by government. PLF has participated as amicus curiae in this Court's major Voting Rights Act decisions. *See, e.g.*, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980).

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, immigration, and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences in areas such as employment, education, and voting. CEO has participated as amicus curiae in past significant voting rights cases. *See, e.g.*, *Shelby Cty.*, 570 U.S. 529; *Bartlett*, 556 U.S. 1; *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).

Project 21, the National Leadership Network of Black Conservatives, is an initiative of the National Center for Public Policy Research to promote the views of African Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 has participated as amicus curiae in past significant voting rights cases. *See, e.g.*, *Shelby Cty.*, 570 U.S. 529; *Bartlett*, 556 U.S. 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

Eleven years ago, Justice Scalia predicted that "the war between disparate impact and equal protection will be waged sooner or later." *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring). These cases represent the latest front of that war. The questions presented require the Court to choose between two fundamentally different interpretations of the Voting Rights Act. One proposed interpretation, endorsed by the Ninth Circuit below and urged by Respondents here, would prohibit enforcement of practically any state election

law merely on a showing of some statistical impact on a particular racial group. As in other contexts, such disparate impact liability "place[s] a racial thumb on the scales" by requiring decisionmakers "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.* at 594. These cases demonstrate the deep conflict between disparate impact laws and the fundamental constitutional guarantee of equality before the law—the Equal Protection Clause is an individual right, but disparate impact theory treats individuals simply as members of a racial group. The court below effectively transformed Section 2 from an individual right to equal treatment under the law into a group right to a particular outcome.

Fortunately, the text of the Voting Rights Act does not require such a result. Section 2 of the Act prohibits the enforcement of 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 (b) explains that a violation occurs only when the political processes "are not equally open to participation by members of a class of citizens protected" by the Act. *Id.* § 10301(b). This means that individuals in protected groups must have demonstrably "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* Notably, nothing in the text authorizes an inquiry into the effect of state election laws on the voting power of various racial groups. *Cf.* JA 658 ("Arizona's OOP policy imposes a significant disparate burden on its American Indian, Hispanic, and African American

citizens . . . ."). The text instead speaks of equality of opportunity, prohibiting those election regulations that deprive protected individuals equal *access* to the polls. Put another way, Section 2 is an "equal-treatment requirement," not an "equal-outcome command." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

Even if these two readings were equally persuasive, constitutional avoidance counsels in favor of rejecting the disparate-impact-only interpretation. Any statute that requires government decisionmakers to draw racial classifications is inherently suspect and must satisfy strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). "Disparate impact doctrine's operation requires people to be classified into racial groups, and liability hinges on a comparison of the statuses of those groups." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 564 (2003). It follows that interpreting Section 2 to prohibit the enforcement of all election provisions that might lead to a disparate racial outcome would place the statute in significant constitutional jeopardy. There is no way to reconcile a constitutional provision that protects individual rights with a statutory provision that demands equal group-based outcomes.

Aside from the potential equal protection problem, such a broad reading of the Act would potentially render it ultra vires. Congress' power to enforce the Fourteenth and Fifteenth Amendments is remedial in nature, and those Amendments prohibit only intentional discrimination. Absent a Congressional finding of pervasive race-based voting discrimination nationwide, it is doubtful Congress could impose such

a broad provision on the States. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The Voting Rights Act was enacted in response to pervasive racial discrimination, particularly across the South. *See Shelby Cty. v. Holder*, 570 U.S. 529, 536–37 (2013). Yet Section 2's national prohibition on racially discriminatory voting practices or procedures is now often employed to enjoin race-neutral election administration measures. These cases concern two particular Arizona election regulations—its policy prohibiting the counting of ballots cast in the wrong precinct on Election Day and its law against third-party ballot delivery. Reasonable minds can and do differ as to whether these policies are advisable or necessary. But neither policy imposes a racially discriminatory burden on voting. And neither policy deprives any Arizona voter of the equal opportunity to cast a legal ballot. The Voting Rights Act should prohibit racial discrimination, not encourage race-based decisionmaking.

ARGUMENT

I. Section 2 Protects Equality of Opportunity—It Does Not Require a Particular Racial Outcome

After nearly a century of failure to adequately enforce the Fifteenth Amendment's guarantee of racial nondiscrimination in voting, Congress enacted the Voting Rights Act in 1965. *See id*. The core of the Act was a nationwide prohibition on the use of any "qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1976). After this

Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that the statute required proof of discriminatory intent, Congress amended it to prohibit any regulation that "*results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Citing a Senate Report, the Court remarked that Congress in 1982 "substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*, 412 U.S. 755 (1973), and by other federal courts before *Bolden*." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). But until now, the Court has never had the occasion to interpret the new statute in this context.

The Court's prior Section 2 cases have thus far been of the "vote dilution" variety—that is, challenges to the drawing of electoral districts or other mechanisms, like multimember districts, that affect the *weight* of an individual's vote. *See Gingles*, 478 U.S. 30; *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). These cases, on the other hand, are what courts have dubbed "vote denial" cases. *See Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc). In fact, the very existence of that term explains why the Court must decide these cases; "vote denial" assumes that a statistical disparity in the usage of a particular device by race means that taking such a device away results in the "denial" of votes. As the foregoing analysis will demonstrate, this is mistaken.

A. The "Results" Test Does Not Require Disparate Impact Analysis

Interpreting the 1982 amendment, courts have understandably focused on the "results" language Congress added to Section 2. But the so-called "results test" derived from vote dilution cases—including this Court's decision in *White*, which the Senate Report cited as an example of how the amendment should be applied. It is particularly tailored to those circumstances. In *White*, for example, this Court upheld an order directing two Texas counties to replace multimember legislative districts with single-member ones, because the effect of the multimember districts was to exclude Black (in one county) and Mexican-American (in the other county) voters from political power. 412 U.S. at 765–69. Whether or not the Court's vote dilution cases are correct, *see Holder*, 512 U.S. at 944 (Thomas, J., concurring in the judgment); *LULAC*, 548 U.S. at 512 (Scalia, J., concurring in the judgment in part and dissenting in part), they are different in kind from the species of cases presented here. The Senate Report cited in *Gingles* did not contemplate the type of claim brought in these and other recent Section 2 cases. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 709 (2006) ("The legislative history of the 1982 amendments, however, provides little guidance on how Section 2 should apply to practices resulting in the disproportionate denial of minority votes.").

The primary reason these cases are so different from *White* and *Gingles* is the lack of causation present here. In a challenge to district lines or structure, there is no doubt that the officials who drew

the lines or authorized the structure *caused* the racial result. After all, voters can only vote in the districts they are placed in—the racial composition of those districts is up to those who draw the maps. But where the challenge is based on the racial effect of some election regulation that applies to all voters, that is far from clear. Early cases brought under this theory generally failed for precisely that reason. For example, the Third Circuit rejected a Section 2 challenge to the enforcement of a statute requiring the purging of nonvoters from the voter rolls because "registered voters are purged—without regard to race, color, creed, gender, sexual orientation, political belief, or socioeconomic status—because they do not vote, and do not take the opportunity of voting in the next election or requesting reinstatement." *Ortiz v. City of Philadelphia*, 28 F.3d 306, 314 (3d Cir. 1994). The Ninth Circuit agreed, as it flatly rejected a challenge to a property ownership requirement for voting in a utility district while noting that "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595-96 (9th Cir. 1997); *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989) (rejecting a Section 2 challenge to Virginia's choice to pick school board members through appointment, rather than election, because there was no evidence the appointive system caused the observed racial disparity).

These cases are consistent with the principle that a government entity is not responsible for racial disparities that it did not cause. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (school districts may only seek to remedy

racial disparities "traceable to segregation"); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (rejecting interdistrict remedy when the plaintiffs failed to show that any government actions "have been a substantial cause of interdistrict segregation"). Were it otherwise, the use of race to avoid disparate impact liability would be "pervasive," and "'would almost inexorably lead' governmental . . . entities to use 'numerical quotas.'" *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

The theory adopted below stretched the "results" test beyond any recognizable limits, sweeping in racial disparities not caused by the challenged regulation. The Fourth, Fifth, and Sixth Circuits have all held that Section 2 required plaintiffs to demonstrate only that the statistically disparate effect of a particular voting regulation is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (adopting same test); *Veasey v. Abbott*, 830 F.3d 216, 264–65 (5th Cir. 2016) (en banc) (same).[2] The Ninth Circuit below followed its sister circuits in

[2] The Sixth Circuit later vacated its opinion as moot following an order of this Court. *See Ohio State Conf. of NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). A different panel repudiated much of the initial panel's reasoning two years later, but not before the Fourth Circuit had already adopted the initial panel's analysis. *See Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

sweeping away any meaningful causation requirement.

This works by substituting present socioeconomic disparities—and their link to past official discrimination—for the traditional causation analysis. *See Husted*, 768 F.3d at 556 ("African Americans in Ohio tend to be of lower-socioeconomic status because of 'stark and persistent racial inequalities . . . [in] work, housing, education and health,' inequalities that stem from 'both historical and contemporary discriminatory practices.'" (quoting expert testimony)); *Veasey*, 830 F.3d at 259 ("[T]he history of State-sponsored discrimination led to . . . disparities in education, employment, housing, and transportation."). Because these racial disparities exist in almost every state, and public and private discrimination was once widespread, the same analysis would invalidate election laws nationwide without regard to contemporary state action. Indeed, that is what has happened in states as different as North Carolina, Texas, Arizona, and Ohio. But that cannot be the law; "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not in itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Bolden*, 446 U.S. at 74 (plurality opinion)). At some point, it becomes absurd to suggest that state action decades ago has caused a disparate effect upon the implementation of a voting regulation today. After all, "history did not end in 1965." *Shelby County*, 570 U.S. at 552.

Section 2 demands more than a simple statistical showing coupled with general socioeconomic disparities. While the "results" language of the 1982 amendment abrogated *Bolden*'s interpretation of the

original statute that required plaintiffs to prove discriminatory intent, it did not absolve plaintiffs of the obligation to prove that state law caused the alleged disparity. In short, the "results" test is not simply a prohibition of all state election regulations that might disproportionately affect a racial group.

B. Equal Opportunity Is the Touchstone of Section 2

What, then, does it mean for an election law to "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). Subsection (b) of Section 2 provides the answer: a plaintiff must show that the political processes in the jurisdiction "are *not equally open* to participation by members of a class of citizens protected" by the Act, such that the protected group has "*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). The inquiry into equality of opportunity must consider "the totality of circumstances," *id.*—that is, the entirety of a State's voting apparatus—and then determine whether the existence of the challenged provisions effectively deprives members of a protected group the equal opportunity to participate in elections. *See Frank*, 768 F.3d at 753 ("To the extent outcomes help to decide whether the state has provided an equal opportunity, we must look not at Act 23 in isolation but to the entire voting and registration system.").

Equality of opportunity goes hand-in-hand with causation. If a statistical impact is observed, but a State's election laws provide equal opportunity for everyone to participate in the process, it follows that

the State's election laws have not caused the disparate impact. The cause of the disparity in such a case is simply the "failure to take advantage of political opportunity." *Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992). The same was true in *Ortiz*, where voters could have avoided being purged from the rolls simply by voting or requesting reinstatement, *see* 28 F.3d at 314, and *Irby*, where the lack of Black school board members was the result of lack of interest, not any state-imposed barriers, 889 F.2d at 1358. If it were otherwise, simple failure to turn out and vote would transform the implementation of an otherwise legal provision into a Section 2 violation. Of course, "a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage" than other voters. *Salas*, 964 F.2d at 1556.

Rather than mere disparate impact, the statute demands the Court focus on the overall climate for voting to determine whether the State has deprived any particular group of the equal opportunity to participate. With respect to Arizona's policy against votes cast in the wrong precinct, it turns out that this is a simple task. The precinct system is used only during in person voting on Election Day, but Arizona does not require voters to vote in person on Election Day. Indeed, *most* Arizona voters do not do so. JA 119 (O'Scannlain, J., dissenting below). That is because "Arizona law permits all registered voters to vote early by mail or in person at an early voting location in the 27 days before an election." *Id.* And Arizona has online voter registration, along with an option to request automatic delivery of a mail-in ballot. *Id.* What is more, less than one percent of all ballots in recent elections have been cast in the wrong precinct

on Election Day. *Id.* at 43 (majority opinion below). On these facts, it is hard to see how Arizona's policy against counting votes cast in the wrong precinct on Election Day has deprived *anyone* of the opportunity to cast a vote. *See Frank*, 768 F.3d at 753 ("Although these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as § 2(a) requires . . . ."). That some voters choose to vote on Election Day and arrive at the wrong precinct does not render Arizona's policy illegal—even if those voters are disproportionately members of a particular racial group.

This still leaves ample room for courts to find a violation of Section 2 without proof of discriminatory intent. Were a State to make it "*needlessly* hard" to register or vote, it could still run afoul of Section 2 by denying equal opportunity to those who could not complete the process or comply with the requirements. *See id.*[3] And a State that maintains

[3] It is here where courts might consider, as a part of the totality of the circumstances analysis, the strength of the asserted state interest in maintaining the challenged practice. *See Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426–27 (1991) (noting in vote dilution context that "[a] State's justification for its electoral system is a proper factor for the courts to assess"). After all, even statutes that authorize disparate impact liability often provide that legitimate, nondiscriminatory reasons for enforcing the challenged practice may defeat liability. *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (an unlawful employment practice under Title VII of the Civil Rights Act is established only if the plaintiff demonstrates disparate impact and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"). Section 2 analysis cannot be divorced from the significant interest states have in regulating elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and

different rules in various counties, so as to make it harder for residents of one county to vote than those of another, also runs the risk of violating Section 2. *See Brooks v. Gant*, No. CIV-12-5003-KES, 2012 WL 4482984, at *1, *6-7 (D.S.D. Sept. 27, 2012) (finding a Section 2 "results" violation where a substantially Native American county offered far fewer early voting days than majority-white counties). These examples involve state action denying the equal opportunity to participate in the political process, which is precisely what Section 2 prohibits. As Judge Easterbrook observed, Section 2 is an "equal-treatment requirement," not an "equal-outcome command." *Frank*, 768 F.3d at 754.

In short, while the 1982 amendment did substantially broaden the scope of Section 2 liability, it did not go as far as Respondents or the Ninth Circuit would have it. Just as the Voting Rights Act provides no right to proportional representation by race, *see* 52 U.S.C. § 10301(b), it does not require that States consider the racial effect of every regulation of elections. Instead, the statute simply requires each jurisdiction to provide every voter, regardless of race, the same opportunity to participate in the political process.

C. Disparate Impact Is Indistinguishable from Section 5 Retrogression

There is still another reason why Respondents and the court below must be wrong about the interpretation of Section 2. Under the standard applied below, there effectively exists a one-way

---

honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

ratchet for voting regulations. Inevitably, disparate impact analysis involves a comparison between the previous standard and the current one—the old law provides the reference point by which the effect of the new law is measured. So a state which has had a law requiring voters to show photo identification could eliminate that requirement without Section 2 scrutiny, and a jurisdiction which had three weeks of in-person early voting may increase to four weeks without trouble. But were those jurisdictions to attempt to shift back to their previous laws, or enact new regulations, they might run into a Section 2 problem. *See League of Women Voters of N.C.*, 769 F.3d at 232–33, 248–49 (directing the district court to issue a preliminary injunction requiring North Carolina to maintain same-day registration and count out-of-precinct votes—both policies the State attempted to repeal after less than a decade on the books). The one-way ratchet demonstrates that the broad disparate impact interpretation of Section 2 is contrary to the statutory text—and indeed, more consistent with an inquiry under Section 5 of the Voting Rights Act.

Unlike Section 2, Section 5 does not apply nationally—it is instead targeted at certain covered jurisdictions determined to have a "specified history of voting discrimination." *Young v. Fordice*, 520 U.S. 273, 276 (1997). It requires these jurisdictions to obtain the "preclearance" of the Attorney General or a three-judge district court in Washington, D.C., before enforcing any law that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). While the Court at the time acknowledged that Section 5's

preclearance requirement, which deviated from the typical understanding of federalism and equal sovereignty of the States, *Shelby County*, was an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), it nevertheless upheld its constitutionality. But in *Shelby County*, the Court invalidated Section 4(b)'s formula for determining covered jurisdictions, finding it not tailored to the present realities in the covered states. 570 U.S. at 556 ("If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story."). Because Congress has yet to enact a new formula, Section 5's strong medicine is not currently enforceable.

The non-retrogression standard of Section 5 is a bare disparate impact provision which "necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997). The non-retrogression standard was never meant to apply nationwide; after all, Section 2 and Section 5 "combat different evils." *Id.* at 477. Nevertheless, cases like the one below have effectively "concoct[ed] a version of Section 2 that mirrors the retrogression standard in Section 5 and mobilizes Section 2 to undertake what *Shelby County* ended, except nationwide." J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act Into Something It Is Not*, 31 Touro L. Rev. 297, 325 (2015).

It is hard to understand the results of many recent Section 2 cases except as applications of the non-retrogression principle. In the case below, for example, the Ninth Circuit found disparate impact simply by observing that the ballots cast in the improper precinct were disproportionately cast by racial minorities. JA 617–22. The Fourth and Sixth Circuits measured the effect of a limited rollback of early-voting days by noting that black voters disproportionately use early voting. *See Husted*, 768 F.3d at 533 ("African Americans will be disproportionately and negatively affected by the reductions in early voting in SB 238 and Directive 2014–17."); *League of Women Voters*, 769 F.3d at 245 (finding disparate impact based on black voters' disproportionate use of early voting). The comparison of racial effects of the old and new laws is a quintessential Section 5 non-retrogression inquiry. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1251 (M.D. Fla. 2012) (denying a preliminary injunction against Florida's reduction of early-voting days and noting that the court was "not conducting a 'retrogression' analysis," but instead determining "whether, under the totality of the circumstances, application of the 2011 Early Voting Statute serves to deny African American voters equal access to the political process"). It has no place in Section 2's equal opportunity analysis.

If adopted, the transformation of Section 2 would all but render *Shelby County* a dead letter by extending Section 5's non-retrogression analysis nationwide. The Court should reject Respondents' attempt to graft Section 5's standard onto the text of Section 2.

II. A Disparate Impact Interpretation of Section 2 Presents Significant Constitutional Concerns

Even if the statutory interpretation question were close, there is an independent reason to reject the interpretation of Section 2 proposed by Respondents and the Ninth Circuit—it would threaten to render the statute unconstitutional. It is an "elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted." *The Abby Dodge v. United States*, 223 U.S. 166, 175 (1912). Here, Respondents' proposed interpretation would call into doubt both Section 2's consistency with the Equal Protection Clause *and* whether Congress had the power to enact such a broad statute under its power to enforce the Fourteenth and Fifteenth Amendments. The Court can avoid this problem by adhering to the statutory text.

A. The Ninth Circuit's Interpretation Presents the Conflict Between Disparate Impact and Equal Protection

The recent spate of Section 2 decisions invalidating state voting regulations on a disparate impact theory come at a time when courts and commentators are beginning to grapple with the conflict between laws that premise liability solely on impact to a racial group and the individual's right to equal protection of the laws. Equal protection should ensure that government decisionmaking is free from the taint of racial considerations, but disparate impact liability

does not allow racial impartiality. Indeed, "[d]isparate impact doctrine's operation requires people to be classified into racial groups, and liability hinges on a comparison of the statuses of those groups." Primus, *supra*, 117 Harv. L. Rev. at 564. It necessarily places a "racial thumb on the scales, often requiring" governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring); *see also Wards Cove*, 490 U.S. at 652–53 (1989) (noting that employers would be compelled to establish racial quotas in response to a disparate impact provision). That sort of decisionmaking is usually recognized as discriminatory. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Failing to correct an interpretation of Section 2 that effectively requires race-based decisionmaking would place Section 2 itself on shaky constitutional ground. *See* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, 85 Miss. L.J. 1357, 1363–66 (2017).

That is especially true because Respondents' interpretation—echoed by the Fourth, Fifth, Sixth, and Ninth Circuits—eschews any traditional causation requirement. *See supra* I.A. Not long ago, this Court was asked whether the Fair Housing Act countenances disparate impact liability. It answered in the affirmative, but with an important caveat. A "robust causality requirement" was necessary even at the prima facie stage to "protect[] defendants from being held liable for racial disparities they did not create." *Tex. Dep't of Housing*, 576 U.S. at 542. Without such a requirement, the Court said, governments might have to resort to "numerical quotas," which would raise "serious constitutional

questions." *Id.*; *see also id.* at 540 ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity."). But that is precisely what we have here—potential liability untethered to any recent state action, linked to the state based only on the combination of socioeconomic conditions and past discrimination, which in many cases occurred decades ago. Such a hand-waving causation requirement is not "robust" by any stretch, and if adopted would leave Section 2 vulnerable to constitutional attack.

The concern about race-based decisionmaking is not hypothetical. Already, the debates in state legislatures surrounding election regulations are sordidly consumed with race. To take one example from Texas, the Fifth Circuit was forced to clarify that a finding of discriminatory intent in a voting rights case could not be based on speculation by the bill's *opponents* that the *supporters* had a racially discriminatory motive. *Veasey*, 830 F.3d at 233–34. Reading Section 2 as imposing liability for every statistically disparate effect will only exacerbate this trend, making race the primary consideration in many legislative debates and "effectively assur[ing]" that "the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race,' will never be achieved." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)). This Court should avoid a reading of

Section 2 that would bring it into conflict with the text and ultimate goal of the Equal Protection Clause.

B. Respondents' Interpretation Would Place Section 2 Beyond Congress' Power To Enforce the Reconstruction Amendments

The Voting Rights Act was an exercise of Congress' enforcement power granted under the Fourteenth and Fifteenth Amendments. Both enforcement provisions grant Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. But such legislation must be remedial in nature. *City of Boerne*, 521 U.S. at 519, 532. And "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.* at 530. The Fourteenth and Fifteenth Amendments prohibit only intentional discrimination, *see Washington v. Davis*, 426 U.S. 229, 239 (1976) (Fourteenth Amendment), *Bossier Parish*, 520 U.S. at 481 (Fifteenth Amendment), so if the Voting Rights Act authorized liability based on statistical disparities, it would certainly qualify as a preventive rule which "must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530.

The last time this Court considered such a question, it held that Congress lacked the authority to impose the Religious Freedom Restoration Act (RFRA) on the States. That is because RFRA, in purporting to require that even generally applicable laws that substantially burden religious exercise must pass strict scrutiny, provided greater protection than the First Amendment. That is why the Court looked for real-world evidence of intentional religious

discrimination in the States in order to justify RFRA as a preventive measure. It found none. *See City of Boerne*, 521 U.S. at 530 ("The history of persecution in this country detailed in the [RFRA] hearings mentions no episodes occurring in the past 40 years."). Without any "reason to believe that many of the laws affected by" RFRA would be unconstitutional under *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held RFRA was "a substantive change in constitutional protections," rather than a remedial statute. *Id.* at 532. After all, "[l]egislation which alters the meaning of [a constitutional clause] cannot be said to be enforcing [that] Clause. Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519.

City of Boerne contrasted its holding with cases upholding the Voting Rights Act's constitutionality as a remedial measure. *See id.* at 530 ("In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."); *see also id.* at 518 (collecting cases upholding the VRA). But in the early days of the VRA, the evidence of widespread discrimination was staggering, justifying even an extraordinary remedy like Section 5's preclearance provision. *See Shelby County*, 570 U.S. at 555; *Katzenbach*, 383 U.S. at 334–35. At that point, Congress *did* have the authority to "prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." *City of Boerne*, 521 U.S. at 529. A similar record of religious discrimination likely would have given Congress the authority to enact RFRA, too. But none existed.

Now, however, things have changed. As the Court recognized seven years ago, the conditions that prompted the Voting Rights Act's passage are largely gone. *See Shelby County*, 570 U.S. at 535. As a result, were Section 2 of the Act interpreted to prohibit all voting regulations that might disproportionately affect minority voters, acting as a one-way ratchet prohibiting states even from repealing relatively new election laws, it would no longer be a remedial statute. This version of Section 2 would instead be a substantive expansion of the rights guaranteed by the Fourteenth and Fifteenth Amendments, and therefore not remedial. And unfortunately, such an expansive reading of these guarantees against racial discrimination would not even protect anyone from racial discrimination; it would instead encourage *more* race-based decisionmaking.

Given the current evidence considered by the *Shelby County* Court, Section 2, read as Respondents and the Ninth Circuit would have it, would be unconstitutional. For obvious reasons, this Court should reject any interpretation of the Voting Rights Act that would render it unconstitutional. Therefore, constitutional avoidance counsels strongly against adopting the Ninth Circuit's interpretation and in favor of reversal or remand.

CONCLUSION

This Court should either reverse the judgment below or vacate it and remand the cases to the Ninth Circuit for application of the proper Section 2 standard.

DATED: December 2020.

Respectfully submitted,

JOSHUA P. THOMPSON
CHRISTOPHER M. KIESER*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
JThompson@pacificlegal.org
CKieser@pacificlegal.org

Counsel for Amici Curiae