No. 19-1257

In the Supreme Court of the United States

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

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

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

MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
Deputy Solicitor General
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae State of Ohio
(additional counsel listed at the end of the brief)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF AMICI INTEREST

States across the country, including the *amici* States, have added new voting options to make voting easier than ever.* Ohio, for example, allows all its citizens to vote early—either in person or by mail—for any reason. And it allows them to do so for almost a full month before Election Day.

Despite these efforts to make voting as easy as possible, the States face a steady barrage of lawsuits in which plaintiffs "ask[] the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016); *see also Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Mich. State A. Philip Randolph Inst. v. Johnson,* 833 F.3d 656 (6th Cir. 2016); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

These suits often arise under Section 2 of the Voting Rights Act. That section prohibits election laws that "result[] in a denial … of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. §10301(a). By the statute's terms, a law "results in a denial" of the right to vote *only when* it causes minority voters to have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at §10301(b). In other words, Section 2 guarantees all voters, regardless of race, an equal opportunity to participate in the elec-

---

* The *amici* States complied with Rule 37.2 by notifying all parties' counsel of record of their intent to file this brief more than ten days before its due date.

toral process. Notwithstanding these limits, some courts, including the Ninth Circuit below, have interpreted Section 2 to prohibit almost any alteration to voting laws that, viewed in isolation, decreases the odds that minority voters will *in fact* vote or *in fact* succeed in electing "representatives of their choice." In addition to creating a circuit split, this reading transforms Section 2 from an equal-opportunity guarantee into an equal-outcome guarantee. That, in addition to misconstruing Section 2, creates serious constitutional problems.

The confusion persists because this Court has never heard a Section 2 vote-denial case. This case provides an ideal opportunity to do so. The *amici* States join Arizona in urging the Court to grant *certiorari* and bring clarity to this area.

SUMMARY OF ARGUMENT

I. In recent years, States have expanded early and absentee voting opportunities. *See State Laws Governing Early Voting*, Nat'l Conf. of State Legislatures, https://bit.ly/2vY5qpd. These new opportunities beget new regulations; when States create new voting methods, they must enact new rules governing the manner in which those methods are to be carried out.

These regulations often end up in court, often in a lawsuit accusing the State of violating Section 2 of the Voting Rights Act. That section prohibits voting rules and procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. §10301(a). To determine whether a law denies anyone the right to vote on the basis of race, courts must ask whether the law causes minority voters to have

"less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at §10301(b).

The circuits have struggled to fashion any uniform approach for litigating these vote-denial claims. To be sure, all courts require litigants to show that the challenged laws disparately impact minority voters. But they disagree regarding what this showing entails. Some courts recognize that Section 2 prohibits only those election laws that deny minority voters an equal opportunity to participate in the election process. These courts require plaintiffs to prove a causal relationship between the challenged practice and *systemwide* disparate impacts on minority voters' opportunity to participate in elections and elect their preferred candidates. *Frank v. Walker*, 768 F.3d 744, 753–54 (7th Cir. 2014) (per Easterbrook, J.). In these courts, it does not matter whether a discrete provision is more likely to benefit a particular group of voters, as long as minority voters have an equal *opportunity* to participate in the political process when one considers the State's entire election system.

In contrast, other courts hold that the existence of a disparate impact is to be assessed on a provision-by-provision basis—that is, by viewing discrete practices in isolation. In the Ninth Circuit, for example, any law that disparately impacts a non-*de minimis* number of minority voters may violate Section 2, *regardless* of whether the law causes the election system as a whole to deny minority voters an equal opportunity to participate and elect candidates of their choice. Pet.App.44–45, 86–87.

Plaintiffs and defendants alike need guidance. So do courts; they candidly admit that applying Section 2 "to vote-denial claims is challenging, and a clear standard for its application has not been conclusively established." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636 (6th Cir. 2016); *accord Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (*en banc*). The Court should grant *certiorari* to conclusively establish a standard governing Section 2's application to vote-denial claims.

II. This case presents an opportunity to make two important clarifications about what plaintiffs must prove to prevail in a Section 2 vote-denial case.

First, challengers must show that minority voters have "less opportunity" to vote when accounting for the State's *entire election system*. 52 U.S.C. §10301(b). This follows from the text of subsection (b) of Section 2, which dictates the means of proving a Section 2 violation. It requires proof that "the political processes leading to nomination or election in the State" give minority voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* The subsection's reference to "the political processes leading to nomination or election" requires scrutiny not of discrete provisions, but rather of the election system as a whole. If the system as a whole does not deny the protected class of voters an equal "opportunity … to participate in the political process and to elect representatives of their choice," there is no Section 2 violation.

Second, a plaintiff must show that the challenged election rule or procedure, not something else, *causes* the alleged disparity in a protected group's oppor-

tunity to participate in the political process and elect representatives of its choice. This follows from subsection (a) of Section 2, which prohibits any voting rule that "*results in* a denial … 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). The phrase "results in" imposes a causation requirement. *See Burrage v. United States*, 571 U.S. 204, 210–11 (2014). By requiring proof of causation, courts will ensure that Section 2 is treated as "an equal-treatment requirement," which is "how it reads," rather than "an equal-outcome command." *Frank*, 768 F.3d at 754.

III. Quite a bit rides on how courts interpret Section 2 in the vote-denial context. The Act is constitutional only insofar as it enforces the Fifteenth Amendment, which prohibits voting laws with a discriminatory *purpose*. In doctrinal terms, the Voting Rights Act must be "congruent and proportional" to the Fifteenth Amendment's prohibition. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). If the Section 2 test "is too easy to satisfy"—if, practically speaking, it forbids a great many state voting procedures that cause some statistical disparity *without regard* to any discriminatory purpose—that "widens the gap" between the Voting Rights Act and the Fifteenth Amendment. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1590 (2019). If the gap is too wide, then Section 2 is *not* congruent and proportional—it is, in other words, unconstitutional. The Court can avoid this lurking constitutional problem by giving Section 2 a measured interpretation along the lines suggested in this brief.

ARGUMENT

The Court should grant *certiorari* to decide how Section 2 applies to vote-denial claims. This brief explains why, argues for two needed clarifications that the Court could provide in this case, and shows that failing to rein in the circuits' capacious reading of Section 2 risks making Section 2 unconstitutional.

I. The circuits are split regarding the standard applicable to vote-denial claims under Section 2 of the Voting Rights Act.

Voting has never been easier. In the last few decades, States have enacted early- and absentee-voting options available to all voters who cannot, or do not want to, go to the polls on Election Day. But in election law, as in life, no good deed goes unpunished: having created these generous processes, the States are consistently sued for failing to be *even more* generous. In recent years, litigants have started to invoke Section 2 of the Voting Rights Act—which forbids election laws that deny voters an equal opportunity to participate in elections on the basis of race—to challenge even the most benign regulations of the election process. Ohio, for example, has *twice* been sued under Section 2 for providing four weeks, rather than five, of early-in-person voting. Despite this flood of litigation, the circuits have not developed a uniform approach to adjudicating Section 2 vote-denial claims. This Court should grant *certiorari* to bring clarity to this area.

A. Litigants often challenge the States' election reforms under Section 2 of the Voting Rights Act.

1. American voting practices have changed quite a bit over the nation's history. At the founding, "voters would voice their choices on courthouse steps, out loud and very much not in secret." *Voting Outside the Polling Place*, Nat'l Conf. of State Legislatures, https://bit.ly/2URC9VM. Elections often occurred over multiple days. Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 Fordham L. Rev. 965, 971 n.41 (2016). But the States eventually moved to paper ballots. *See Voting Outside the Polling Place*, Nat'l Conf. of State Legislatures, https://bit.ly/2URC9VM. And Congress, in 1845, set a national Election Day on which the States would appoint presidential electors. Goldfeder, *Election Law and the Presidency*, 85 Fordham L. Rev. at 971 n.41.

Soon thereafter, the country began experimenting with absentee voting. In its earliest form, absentee voting applied only if the voter had a recognized excuse for being unable to reach the polls on Election Day. The practice "began during the Civil War as a means of providing soldiers the ability to vote." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). State laws soon formalized absentee voting, with each State deciding for itself what excuses to honor. *Id.*; *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 803–04 (1969).

Over the past forty years, States have overwhelmingly moved to no-excuse early and absentee voting. In the 1980s, only a few States allowed these options. Paul Gronke, *Early Voting and Turnout*, PS Online

641 (2007), https://bit.ly/3dOoMOU. The number steadily grew in the 1990s, but early voting remained the minority approach. *Id.* Then, in the 2000s, a majority of states began allowing early voting. *Id.* Today, thirty-nine States allow some form of early voting for all voters, with Delaware and Virginia poised to join the club. *State Laws Governing Early Voting*, Nat'l Conf. of State Legislatures, https://bit.ly/2vY5qpd.

These new voting options required new election rules; "there must be a substantial regulation of elections if they are to be fair and honest." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation omitted). States that adopted early voting had to decide, among other things, which methods to allow, when to begin the early-voting period, how best to avoid voter fraud, and so on. And absentee voting—the "take-home exam" of elections, which occurs outside the presence of election officials—requires regulations all its own. *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

2. Today, litigants frequently challenge the States' new rules and procedures under Section 2 of the Voting Rights Act. This is a relatively new trend. It is worth exploring how it came to be.

When Congress wrote the Voting Rights Act in 1965, it divided the Act into different sections that serve distinct purposes. Sections 4 and 5 of the Act worked together as "strong medicine" for certain parts of the country that had a history of using "tests or devices" to deny minority voters the franchise. *Shelby County v. Holder*, 570 U.S. 529, 535, 537 (2013). Section 4 set a coverage formula, establishing which jurisdictions needed close scrutiny by the

federal government. *Id.* at 537. Section 5 required jurisdictions captured by the Section 4 formula to obtain preclearance from federal authorities before making any changes to their voting procedures. *Id.*

Section 2, in contrast, applied to all States. As originally enacted, it prohibited laws passed with discriminatory intent—laws "imposed or applied" to deny the right to vote. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (Kennedy, J., op.) (internal quotation omitted). In 1982, Congress amended Section 2's application to remove the requirement of *actual* intent. *Id.* It now forbids laws that are discriminatory in effect, without regard to intent. It provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. §10301.

Historically, most Section 2 cases addressed "vote dilution" claims—claims that a given practice, like redistricting, diminished minorities' voting strength and thus denied them an equal "opportunity" to "participate in the political process and to elect representatives of their choice." *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986). That has changed in recent years. As the *amici* States will discuss momentarily, litigants now regularly raise vote-*denial* claims under Section 2, arguing that election reforms outright deny citizens the right to vote "on account of" race.

The Voting Rights Act "proved immensely successful." *Shelby County*, 570 U.S. at 548. It reduced or eliminated registration gaps in all six of the States originally subjected to preclearance obligations by Section 4. *Id.* Despite this progress, Congress failed to ease Section 4's coverage formula. *Id.* at 549. In fact, it did just the opposite; it *raised* "the bar that covered jurisdictions" had to "clear" to amend their voting laws. *Id.* at 549–50.

In *Shelby County*, this Court held Section 4's coverage formula unconstitutional. *Id.* at 557. The Fifteenth Amendment prohibits denying any citizen the right to vote "on account of race," U.S. Const., Am 15 §1, and gives Congress the "power to enforce" the Amendment "by appropriate legislation," *id.* at §2. Section 4, the Court held, was not "appropriate legislation," because its coverage formula treated the States differently than one another based on outdated data rather than "current conditions." *Shelby County*, 570 U.S. at 557. So the Court invalidated Section 4. And without a formula under Section 4, no State is made eligible for Section 5's preclearance obligations. Section 5 is thus inoperative, and will

remain so unless and until Congress "draft[s] another formula based on current conditions." *Id.* at 557.

With Section 5 rendered impotent, opponents of new election laws "shifted the[ir] focus" to Section 2. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 440 (2015). Plaintiffs now routinely argue that election laws violate Section 2 if they disparately impact minority voters. Laws with a disparate impact, the argument goes, "result[] in a denial … of the right" to vote "on account of race or color." 52 U.S.C. §10301(a). In a short time, these "vote denial" theories have migrated across the country, from North Carolina and Virginia, to Ohio and Wisconsin, to Texas and Arizona.

3. Ohio has been on the front lines of this litigation. That might seem strange, as Ohio was never a covered jurisdiction subject to preclearance under Section 5 of the Voting Rights Act. And again, Ohio makes it "[v]ery easy" to vote—so much so that the Sixth Circuit has described the State as "a national leader when it comes to early voting opportunities." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623, 628 (6th Cir. 2016); *accord Mays v. LaRose*, 951 F.3d 775, 779–80 (6th Cir. 2020). But Ohio is a frequent target anyway.

For some litigants, these suits apparently arise from a good-faith, though misguided, objection to the State's election laws. For example, in 2014, Ohio reduced its early-voting period from five weeks to four weeks based in part on bipartisan suggestions from election officials. *Ohio Democratic Party*, 834 F.3d at 624. In response, the Ohio NAACP filed a Section 2 case. It argued that this change illegally denied minority voters their right to vote on account of race.

Remarkably, the Sixth Circuit held that the NAACP was likely to succeed and affirmed preliminary injunctive relief. *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 549–60 (6th Cir. 2014). This Court stayed that ruling, *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014), and Ohio settled the case, agreeing to an early-voting schedule starting twenty-nine days before Election Day. *See* Ohio Election Manual at 5-8 n.19, https://bit.ly/2SjNfCs.

Other groups target Ohio's voting laws for partisan advantage. In cable-news speak, Ohio is an electoral "battleground." Thus, political parties, and groups aligned with these parties, have incentive to invoke Section 2 whenever they think a favorable ruling might give them whatever minimal advantage could swing an election. For example, after the NAACP and Ohio settled their suit, the Ohio Democratic Party sued Ohio, arguing that twenty-nine days of early voting *still* were not enough to satisfy Section 2's ban on denying the right to vote on account of race. (Said differently, the Ohio Democratic Party accused *the NAACP* of consenting to a racially discriminatory early-voting schedule that violated Section 2 of the Voting Rights Act.) The Sixth Circuit eventually rejected the Section 2 claim as baseless—though only after the State dedicated a great deal of taxpayer resources to a ten-day bench trial and the appeal of the district court's adverse ruling. *Ohio Democratic Party*, 834 F.3d at 623–24, 636–40.

During the same election cycle, Ohio faced separate Section 2 claims challenging the intricacies of absentee and provisional voting. *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 625–29 (6th Cir. 2016). After another multi-week trial, and another unfavorable district-court ruling,

the Sixth Circuit once again rejected the Section 2 claims. *Id.* With each case, litigants dive further into the weeds of the State's election processes. For example, Ohio has repeatedly been made to defend its laws setting a deadline by which voters must request an absentee ballot—a generous deadline that allows voters to seek a ballot until just *three days* before Election Day. *See Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014); *Mays*, 951 F.3d 775.

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

As these cases show, no law, no matter how unobjectionable, is safe from being challenged in federal court. And these cases, far from being unique, exemplify what is happening in courts from sea to shining sea. *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (*en banc*); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Gonzalez v. Ariz.*, 677 F.3d 383 (9th Cir. 2012) (*en banc*); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019); *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018); *Navajo Nation Human Rights Comm'n v. San Juan Cnty.*, 281 F.

Supp. 3d 1136 (D. Utah 2017); *Voters Organized for the Integrity of Elections v. Balt. City Elections Bd.*, 214 F. Supp. 3d 448 (D. Md. 2016); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016); *Poor Bear v. Cnty. of Jackson*, No. 5:14-CV-5059, 2015 U.S. Dist. LEXIS 57762 (D.S.D. 2015); *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012); *Brown v. Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012).

B. The circuits are deeply divided over the proper application of Section 2 to vote-denial claims.

This flood of litigation has produced a great deal of uncertainty. Indeed, the circuits are split—amongst each other, and internally to boot—regarding the test for evaluating vote-denial claims under Section 2.

Most circuits have *nominally* adopted a two-step test, under which courts consider: (1) whether the challenged practice "impose[s] a discriminatory burden on members of a protected class," and, if it does, (2) whether the burden is "linked to social and historical conditions that have or currently produce discrimination." *Veasey*, 830 F.3d at 244 (internal quotation omitted). (The Seventh Circuit considered this test "for the sake of argument," but expressed skepticism. *Frank*, 768 F.3d at 755.) This surface agreement, however, "masks a number of fierce disagreements" about how Section 2 really works. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1580 (2019). Step one of this two-part test has proven especially divisive. And that step is crucial, since it serves as a "near-perfect" predictor of outcome. *Id.* at 1592. After all,

when a discriminatory burden exists, it can "almost always" be linked in some manner to "social and historical discrimination," meaning the test's second step is mostly a formality. *Id.* Thus, the question of what challengers must prove at the first step matters a great deal. And the answer to that question varies by circuit.

The key disagreement concerns what it takes to prove a discriminatory burden. Some courts have recognized that this first-step inquiry requires proof that the challenged law causes *systemwide* inequality. In the Seventh Circuit, for instance, challengers must go beyond "document[ing] a disparate *outcome*"; they must show that minority groups do not have "the same *opportunity*" to vote considering the "entire [election] system." *Frank*, 768 F.3d at 753, 755 (emphasis added). Under this test, it does not matter if one particular regulation has a disparate impact if the election system, viewed as a whole, does not disparately impact voters in protected classes. The Sixth Circuit has at times taken a similar approach. *Ohio Democratic Party*, 834 F.3d at 637–40. And the Third Circuit, at least at one point, was in accord. *See Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 311–15 (3d Cir. 1994).

Other courts, instead of viewing the challenged law in the context of the entire state voting apparatus, consider whether the law, *viewed in isolation*, disparately impacts minority voters. The Fourth Circuit, for example, has said that litigants can satisfy the first step by finding a disparate impact as to "even one" voter—an impact that, by definition, does not extend systemwide. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244–45 (4th

Cir. 2014). In some cases, the Sixth Circuit has likewise held that the discriminatory-burden analysis requires isolating discrete aspects of the voting process—for example, the number of days of early-in-person voting—and asking whether that discrete aspect, viewed in isolation, is less favorable to minority voters than to non-minority voters. *Ohio State Conf. of the NAACP*, 768 F.3d at 555; *see also Mich. State A. Philip Randolph Inst.*, 833 F.3d at 668. In its decision below, the *en banc* Ninth Circuit took a similar approach. It reasoned that, whenever a discrete voting practice "adversely affects" more than some unspecified "de minimis number of minority voters," step one of the two-part test is satisfied, and courts may begin considering societal and historical considerations. Pet.App.44–45; *accord* Pet.App.86–87.

* * *

The Section 2 case law will never stabilize until this Court resolves the standard applicable to vote-denial claims. And without stabilization, everyone can expect frequent Section 2 litigation in whichever States happen to be the battlegrounds of the moment. States like Ohio have grown weary of being sued over neutral, reasonable election laws enacted with bipartisan support, and having to defend those laws against an everchanging set of malleable standards.

II. The Court should clarify that a voting procedure violates Section 2 only if the procedure, viewed in light of the State's entire voting system, causes inequality in voting opportunities.

This case gives the Court an opportunity to clarify that a voting law violates Section 2 only if the law,

when viewed in light of the State's entire voting system, causes minority voters to have less opportunity to participate in the political process and elect representatives of their choice. This follows from the text of Section 2. But many circuits are ignoring the relevant textual limits.

Section 2's first subsection provides:

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

52 U.S.C. §10301(a) (emphasis added). Subsection (a) thus creates a "results" test for adjudicating Section 2 claims, and directs the reader to subsection (b) for further information. What does subsection (b) say? It "provides guidance about how the results test is to be applied." *Chisom v. Roemer*, 501 U.S. 380, 395 (1991). It says:

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

> members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Combined, this statutory text points the way toward two needed clarifications.

The first clarification derives from subsection (b): plaintiffs, to prevail on a vote-denial claim, must show that the State's *entire election system* results in minority voters' having "less opportunity" to vote and to elect representatives of their choice. States violate Section 2 only when their "political processes" are "not equally open to" protected classes of voters. *Id.* And the "political processes" are not equally open if these voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* It follows from this focus on the State's "political processes" that the question whether a State has denied minority voters an equal opportunity to vote and to elect representatives of their choice must be answered with respect to the "entire voting and registration system." *Frank*, 768 F.3d at 753. After all, the State has not denied any group of voters an equal opportunity to "participate in the political process and to elect representatives of their choice" if any disparities associated with one isolated provision are offset by another. *Ohio Democratic Party*, 834 F.3d at 639–40.

Requiring Section 2 plaintiffs to prove a systemwide inequality of opportunity is consistent with Section 2's objective purpose. Section 2 exists to assure equal opportunity, not "electoral advantage." *Bartlett*, 556 U.S. at 20 (Kennedy, J., op.); *accord Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). If, on the whole, protected classes of voters and everyone else are able to participate equally, it makes no sense to invalidate particular regulations due to disparities offset by other provisions of the election code. Imagine, for example, that voters of one race disproportionately prefer one voting method (in-person early voting, maybe) and that voters of another race disproportionately prefer another method (mail-in voting, perhaps). Expanding one group's preferred method will automatically put the other group at a relative disadvantage. If a state legislature passes an act that expands *both* methods, a provision-by-provision analysis would lead a court to strike down whatever method is preferred by non-minority voters. Thus, perversely, legislation that makes voting easier *for everyone* would be deemed an illegal vote *denial* that violates Section 2. This provision-by-provision analysis turns Section 2 into a tool for securing "electoral advantage" rather than equal opportunity. And since few voting methods are likely to be used completely equally across all groups of voters, this provision-by-provision approach would likely "dismantle every state's voting apparatus." *Frank*, 768 F.3d at 754. That cannot be what Congress had in mind when it passed Section 2.

The second clarification derives from subsection (a): the plaintiff must prove that the challenged regulation, not something else, is what "results in" the denial of the right to vote "on account of race." 52

U.S.C. §10301(a). The phrase "results in" connotes causation, *Burrage v. United States*, 571 U.S. 204, 210–11 (2014), which in this context means proof that the challenged practice causes unequal opportunities at the polls. This causal requirement ensures that Section 2 is "an equal-treatment requirement," which is "how it reads," *not* "an equal-outcome command." *Frank*, 768 F.3d at 754. Stated in the negative, correlation is not enough. If factors other than the State's challenged practice "result[] in" the inequality—such as the "societal effects of private discrimination that affect … potential voters," *id.* at 753—then a vote-denial claim under Section 2 fails.

The upshot of this is that Section 2 challenges to a voting procedure are almost certain to fail if the "challenged election practice is not burdensome or the state offers easily accessible alternative means of voting." *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 714 (9th Cir. 2018) (per Ikuta, J.), *vacated by Democratic Nat'l Comm. v. Reagan*, 911 F.3d 942 (9th Cir. 2019). In these circumstances, any alleged disparate impact associated with the challenged practice will be incapable of having any "material effect on elections and their outcomes." *Democratic Nat'l Comm.* 904 F.3d at 713. And any law incapable of having such an effect is incapable of *causing* any group of voters to be denied an equal "opportunity to participate in the political process and to elect representatives of their choice."

Requiring a causal showing squares with how this Court treats disparate-impact theories elsewhere. For example, in the fair-housing context, the Court recently explained that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or poli-

cies causing that disparity." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015). Keeping a "robust causality requirement" ensures that defendants are not blamed for "disparities they did not create." *Id.* As discussed below, causation also safeguards against the "serious constitutional questions" that come about from liability "based solely on a showing of a statistical disparity." *Id.* at 2522.

III. Decisions like the one below place Section 2's constitutionality in jeopardy.

Courts interpret statutes to avoid constitutional problems when it is reasonably possible to do so. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988). This principle applies here: the lower courts' lax reading of Section 2 risks making the law unconstitutional.

To see the danger, recall that Congress's power to enact the Voting Rights Act stems from the Fifteenth Amendment. That amendment empowers Congress to enforce its guarantee with "appropriate legislation." U.S. Const., Am. 15, §2. To be "appropriate," legislation must be "adapted to carry out the objects" of the Fifteenth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (quoting *Ex parte Va.*, 100 U.S. 339, 345 (1879)). The power to enact appropriate legislation is, in other words, the Necessary and Proper Clause of the Fifteenth Amendment: it permits laws derivative of, and in service to," the Fifteenth Amendment, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 521 (2012) (Roberts, C.J., dissenting), but not laws that regulate a significant amount of activity beyond the Amend-

ment's reach, *see Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). It follows from this that Section 2's constitutionality becomes dubious if it is read to forbid a great number of practices that do not violate the Fifteenth Amendment.

What, exactly, does the Fifteenth Amendment prohibit? It provides that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Am. 15, §1. "The Amendment's command and effect are wholly negative." *Mobile v. Bolden*, 446 U.S. 55, 61–62 (1980) (plurality). Therefore, the right it confers is the "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *United States v. Reese*, 92 U.S. 214, 218 (1875). Thus, properly understood, the Fifteenth Amendment prohibits laws that facially or purposefully discriminate based on race. But it *does not* protect against neutral, non-discriminatory laws that just so happen to have a disparate impact. *Mobile*, 446 U.S. at 62.

In light of all this, Section 2's status as "appropriate" Fifteenth Amendment legislation is in grave danger if it is read to permit claims resting on "little more than a disparate impact." Nicholas O. Stephanopoulos, *Disparate Impact*, 128 Yale L.J. at 1590. Such an interpretation makes Section 2 "too easy to satisfy," and thus "widens the gap" between the Voting Rights Act and the Fifteenth Amendment. *Id.* And as *Shelby County* shows, Congress exceeds its Fifteenth Amendment authority when it passes legislation that strays too far beyond the Fifteenth Amendment's bounds.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
Deputy Solicitor General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

Additional counsel listed on the following page.

MAY 2020

Additional Counsel

Steve Marshall
Attorney General
State of Alabama

Kevin G. Clarkson
Attorney General
State of Alaska

Leslie Rutledge
Attorney General
State of Arkansas

Christopher M. Carr
Attorney General
State of Georgia

Lawrence G. Wasden
Attorney General
State of Idaho

Aaron Negangard
Chief Deputy
Attorney General
State of Indiana

Daniel Cameron
Attorney General
State of Kentucky

Jeff Landry
Attorney General
State of Louisiana

Lynn Fitch
Attorney General
State of Mississippi

Douglas J. Peterson
Attorney General
State of Nebraska

Mike Hunter
Attorney General
State of Oklahoma

Alan Wilson
Attorney General
State of South Carolina

Jason Ravnsborg
Attorney General
State of South Dakota

Herbert H. Slatery III
Attorney General
State of Tennessee

Ken Paxton
Attorney General
State of Texas

Patrick Morrisey
Attorney General
State of West Virginia