Nos. 19-1257 & 19-1258

IN THE

Supreme Court of the United States

MARK BRNOVICH,
ATTORNEY GENERAL OF ARIZONA, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

REPLY BRIEF FOR PRIVATE PETITIONERS

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ARGUMENT

I. THE VRA IS AN EQUAL-OPPORTUNITY STATUTE, NOT A RACIAL-PROPORTIONALITY MANDATE.

The parties' competing accounts of § 2's results test could hardly be more different. Respondents maintain that if any voting practice is linked to lower voting rates by minorities, it imposes a "disparate burden" and the VRA presumptively forbids it. Hence, because minorities are more likely to vote in the wrong precinct, Arizona cannot enforce its in-precinct voting rule. Conversely, if a voting practice would be used disproportionately by minorities, § 2 presumptively *compels* the state to adopt it. Hence, because more minorities have their ballots targeted for collection by partisan operatives, Arizona must authorize that widely condemned practice. In short, states must restructure every detail of their voting systems, under the watchful eye of the federal courts, until racially proportionate voting is achieved.

That account is wrong. Section 2 does not mandate proportionality or require states to tailor their rules to equalize voter convenience in light of socioeconomic disparities. The statute requires only that states offer all citizens an equal "opportunity" to participate, by not "den[ying] or abridg[ing]" the right to vote on account of race. Race-neutral time, place, and manner rules that impose only the usual burdens of voting—like the two rules here—do not run afoul of that law. They do not exclude anyone from the franchise. They do not treat any citizens differently. And they do not impose any burdens beyond the inherent, usual ones. They therefore do not result in any "denial or abridgement" and do not violate § 2.

Respondents barely engage with our arguments. Instead they distort them, constructing strawmen to avoid grappling with § 2's plain language. And they try just as hard to obscure their own positions, by disclaiming their theory's implications and inventing limiting principles that are both ineffectual in practice and baseless in theory. They ultimately fail to identify any meaningful limit on their racial-proportionality mandate, pointing only to an illusory second step consisting of an atextual and indeterminate balancing test that would leave no law safe from invalidation.

A. Respondents Attack Strawmen While Ignoring the Statutory Text.

Respondents only briefly address our textual arguments. (DNC.Br.42-46; Hobbs.Br.27-33.) And what little they do say is non-responsive.

1. Respondents begin by saying we would render time, place, and manner regulations "immune from §2 review." (DNC.Br.42.) Not so. The Act governs "*all* voting standards, practices, or procedures." (DNC.Br.43.) The question is how to determine when those regulations *violate* the Act.

Section 2 forbids practices that result in "denial or abridgement" of the right to vote based on race. 52 U.S.C. § 10301(a). Unlike voter qualifications, rules setting the time, place, or manner of voting do not *deny* anyone the right to vote. They simply define—as the state must—when, where, and how the right can be exercised. Such a rule can *abridge* minorities' right to vote, but only if their right is reduced relative to non-minorities because the state offers them fewer voting opportunities (*e.g.*, closes polls in their neighborhoods earlier), or severely truncates that right through

extraordinary burdens (*e.g.*, the dissent's hypothetical in *Chisom v. Roemer*, 501 U.S. 380, 408 (1991)).

Secretary Hobbs ignores § 2's limitation to "denial or abridgement"; she never explains how an ordinary, race-neutral regulation of the time, place, or manner of voting could meet that description. The DNC, for its part, says any racial disparity in voting rates proves an "abridgement." (DNC.Br.45.) But that is plainly wrong. The right to vote is not "abridged" just because one racial group *exercises* that right less frequently. Disparate outcomes do not establish that a race-neutral time, place, or manner rule "abridge[s]" the right to vote, because they do not show that the right has been reduced relative to non-minorities (or any other objective benchmark). *See Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). And because § 2 prohibits only "denial[s] or abridgement[s]," no claim can be asserted without this threshold showing.

Subsection (b) confirms and independently proves Respondents' error. As it explains, a violation occurs if the "political processes" are not "equally open," and instead afford minorities "less opportunity" than non-minorities to participate. 52 U.S.C. § 10301(b). The focus is squarely on the *process* and *opportunities* to participate—not the *outcome* or equal *exercise* of those opportunities. If the state does not impose a genuine barrier to voter "opportunity," it cannot be liable for any racial disparity in voting rates. Neutral laws that merely define the where, when, and how of voting, treat all voters equally, and impose nothing more than the usual burdens of casting a ballot, do not create any cognizable barrier to voter "opportunity." They do not result in any racial group having "less opportunity" to vote than any other, and do not violate § 2.

In short, it is not enough for Respondents to say that race-neutral time, place, or manner regulations are not "immune." They must also explain how those rules constitute a denial or abridgement of the right to vote and deprive minorities of equal opportunity to exercise that right. Respondents cannot do so.

2. In a similar vein, Respondents argue that our reading would immunize literacy tests, poll taxes, or other voting qualifications. Not so. Those devices "deny" the "right to vote" and are thus barred by § 2's plain text if they "disproportionately disenfranchise minorities" (DNC.Br.44) because minorities then have "less opportunity" than non-minorities to exercise the franchise. But time, place, and manner rules do not "deny" anyone the right to vote and therefore implicate only § 2's "abridgement" prohibition—which only reaches electoral systems that provide minorities "less opportunity" in the manners described above (whether or not motivated by racial discrimination).

When a state limits the pool of eligible voters, it is by definition *denying* certain voters the right to vote, affording them "less opportunity" to participate in the political process. If that exclusion has a disparate impact based on race, it violates § 2, because the voter qualification "results" in "denial" of the right to vote and carries a proscribed racial impact. It also renders the electoral process not "equally open" to minorities, since they are disproportionately excluded. Under such a regime, minorities lack the "same free and open access to the ballot as other citizens." *Holder v. Hall*, 512 U.S. 874, 925 (1994) (Thomas, J., concurring in the judgment).

Neutral and ordinary time, place, or manner rules, by contrast, do not "disenfranchise" or "deny" anyone the "right to vote"—just as setting the time and place of a hearing does not deny anyone's due-process right to one. If the state directs that a voter must register 30 days before the election, or show up at a certain place to vote, or mail a ballot by a given date, it is not *denying or abridging* the right to vote or excluding anyone from the *opportunity* to vote—regardless of whether racial groups comply with those rules and exercise their rights at equal rates.

The Secretary claims there is no basis to distinguish rules governing *who* can vote from those on *where* and *when* to vote. (Hobbs.Br.28 n.7.) But that distinction flows directly from the statutory term "denial" and is a well-recognized distinction in all aspects of voting law. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8, 16 (2013). It would be extraordinary if § 2 did *not* have a more flexible standard for where-when-and-how rules than for voter qualifications that literally exclude people from voting.

3. Respondents next argue that we ignore the statutory reference to "totality of the circumstances." No, we have only construed that language correctly.

a. Textually, the "totality of circumstances" inquiry focuses only on whether the state's "political processes" are "equally open to participation ... in that" they give minorities an equal "opportunity" to participate. 52 U.S.C. § 10301(b). That language directs courts to consider the entirety of the state's political system, rather than any one voting procedure in isolation. That is why § 2 asks whether the "political processes," *plural*, are "equally open" to

determine whether a voting "standard, practice, or procedure," *singular*, abridges the right to vote. For example, the ballot-harvesting ban exists only because Arizona dramatically *expanded* voting opportunities, beyond anything contemplated in 1982, by allowing no-excuse absentee voting. The ban thus cannot be considered an *abridgement* of voting rights at all, but rather must be seen as a (necessary) component of a larger system that *increases* opportunities for all.

Respondents nevertheless claim that "totality of the circumstances" means that an "equally open" system that gives everyone the same "opportunity" to vote somehow provides "less opportunity" to minorities if social and historical conditions make it less convenient for them to *avail themselves* of that same opportunity. (Hobbs.Br.31-33; DNC.Br.32-39.) That view cannot be reconciled with the text. *First*, requiring the state's "political processes" to be "equally *open*" cannot be redefined to mean that the state must ameliorate socioeconomic disparities to make voting equally *convenient*. It would have been easy to use "equal results" language if that is what Congress intended. *Second*, § 2 reaches only disparate opportunities that "result" from—*i.e.*, are caused by—the challenged "standard, practice, or procedure," not those caused by extrinsic socioeconomic conditions. Thus, the question is whether the *voting practice* caused less opportunity for minorities, not whether external socioeconomic factors outside the electoral system make it less convenient for minorities to take advantage of that equally open system. If the state has imposed nothing more than ordinary race-neutral rules defining when, where, and how ballots must be cast, it cannot possibly have *caused* any disparity in voter opportunity.

Respondents claim to respect the causation element because, under their theory, § 2 still requires showing that the challenged voting practice is a but-for cause of a racial disparity in voting rates. (Hobbs.Br.18-20.) But asking whether a voting practice causes disparate outcomes simply embodies Respondents' mistaken view of § 2's substance, as mandating proportionate results rather than equal opportunities. Since they are fundamentally mistaken about what a voting procedure must cause in order to violate § 2—unequal *opportunity*, not unequal *outcomes*—their extended discussion of "but for" versus "proximate" causation is beside the point (though *Thornburg v. Gingles* does expressly require proximate causation, 478 U.S. 30, 50 n.17 (1986)).

b. Notwithstanding this plain language, Respondents point to this Court's statement, in the vote-dilution context, that § 2 "prohibits any practice or procedure that, '*interact[ing] with social and historical conditions*,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." (Hobbs.Br.20 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993))); *see also Gingles*, 478 U.S. at 47. Importing that principle to the time, place, and manner context, Respondents contend that if private social conditions "interact" with an ordinary voting rule to make voting less convenient for minorities, it violates § 2.

That is plainly wrong. In vote-dilution cases, the opportunity to *elect* necessarily depends on *private* activity—how people vote. Minority groups do not have equal opportunity to "elect" their candidates if white bloc voting consistently defeats them. Private activity thus must be examined because it determines

whether minorities have an equal opportunity to elect. That is why two *Gingles* preconditions ask how minorities and non-minorities tend to vote. *See* 478 U.S. at 51-52. But in vote-denial cases like this, the opportunity to *cast a ballot* involves only how the *state* treats the individual voter; the behavior of other private citizens plays no role. In this context, it makes no sense to say that an "equally open" system gives minorities less "opportunity" to cast a ballot just because private social factors make voting less convenient for them.

Voinovich and the other vote-dilution cases are thus irrelevant here for the same reason that the *Gingles* preconditions are. They speak to issues of racial group dynamics that matter only for *electing* candidates but have no bearing on whether the state deprives minorities of an equal opportunity to vote.

* * *

We have offered a straightforward, workable, and textually rooted construction of § 2. Setting aside the strawmen, Respondents' principal objection is that our test would preclude them from using the VRA to attack every ordinary election rule as a means of maximizing minority (and Democratic) turnout. But that is a feature of our test, not a bug. Section 2 is not—and should not be construed as—a wholesale federal takeover of state election rules or a mandate to equalize voter convenience. By adopting our test, the Court would put an end to the partisan abuse of this statute that has plagued our courts.

B. Respondents Cannot Avoid the Dramatic Implications of Their Theory.

In addition to distorting our position, Respondents devote substantial effort to obscuring their own. They are compelled to do so because the unavoidable but untenable implications of their construction of § 2 are powerful evidence that it is mistaken. If neutral time, place, and manner rules presumptively violate § 2 simply because they lead to disparate outcomes in light of socioeconomic differences among racial groups, it necessarily follows that states are compelled by federal law to restructure their voting systems in whatever ways would better achieve racial proportionality in results—which everyone agrees is *not* a mandate Congress imposed. Respondents accordingly try to hide the ball, disclaiming proportionality and maximization even as they defend a test that requires it. They then try to soften the edges by pointing to potential limits on liability, but those limits have no legal basis and are worthless in practice—as this case demonstrates.

1. Respondents admit that § 2 cannot be read as forcing states to adopt whatever voting processes would maximize minority participation. As Secretary Hobbs agrees, § 2's "text" cannot be read to mandate "equality of *outcomes*," and "expressly disclaim[s]," proportionality. (Hobbs.Br.30.) And the DNC denies that § 2 "requires states to equalize racial turnout rates." (DNC.Br.28.) But while Respondents exploit ambiguity in the terms "opportunity" and "disparate impact" to try to distance themselves from such a reading, their application of § 2 to this case belies that effort. Their interpretation of the "results" test would do exactly what they admit the statute does not.

Starting with the in-precinct requirement, the DNC says it satisfies "step one" because "a substantially higher percentage of minority votes than white votes [were] discarded" pursuant to that rule. (DNC.Br.30 (quoting JA.622).) Secretary Hobbs agrees: Step one is violated because "minority voters were twice as likely as white voters to have their ballots thrown out." (Hobbs.Br.39.) Their analysis of ballot-harvesting is equally facile: The ban violates step one because "third parties collected thousands of early ballots from minority voters" but "white voters did not similarly rely on" harvesting. (Hobbs.Br.45; DNC.Br.32.)

This is not subtle. Respondents are looking only at disparate *outcomes* of these voting rules to determine if they violate § 2. They do not ask, and do not care, whether the state imposed burdens beyond those usually associated with voting, or whether the rules offer minority voters disparate opportunities. Rather, they simply look to the bottom line: If more minorities fail to comply with a voting rule, it "disenfranchises" them and must be stricken. If more minorities prefer to vote using a certain method, proscribing it would "disparately burden" them and so must be authorized. (The only caveat is the prospect that "step two" may, for some reason, excuse the state from liability for disenfranchising minorities. *Infra* pp. 13-17.)

If that is the law, it follows (Respondents' denials notwithstanding) that § 2 compels states to adopt any voting regime that would increase minority turnout. Take the requirement of advance registration. That neutral rule does not result in any threshold denial or abridgement of the right to vote under our approach; but for Respondents, a racial disparity in registration is a "disparate effect" leaving the rule presumptively

unlawful. No rule is safe from attack, because until racial proportionality is achieved for every voting method, it will always be possible to hypothesize ways to narrow the gap—by eliminating registration, allowing ballot-harvesting, expanding early or mail voting, or even sending state employees door-to-door to collect ballots.

Indeed, Respondents prove the point by analogizing to school busing. As they see it, the "opportunity" to attend public school is not truly "equal" unless the state provides buses to eliminate social disparities in transportation options. (Hobbs.Br.31.) Applying that to § 2, Respondents would evidently require states to bus people to the polls to ensure that minorities with disproportionately fewer cars do not suffer "less opportunity" to vote. That is a perfect illustration of the never-ending proportionality mandate that flows from Respondents' construction.

It also shows why Secretary Hobbs is disingenuous in purporting to embrace the United States' view of the statute. (Hobbs.Br.16.) To the contrary, the United States agrees with us that § 2 is not implicated by a "differential ability to comply with ordinary voting practices," as that disparity in convenience "stem[s] from socioeconomic and other factors," not the state. (U.S.Br.23) As explained, that is just another way of articulating why race-neutral ordinary voting rules comply with § 2. Unlike Respondents, the United States would require a showing that minorities disproportionately *cannot* find the correct precinct or vote without harvesting, not just that they disproportionately fail to do so.

2. Recognizing the untenable breadth of their own theory, Respondents now try to offer narrower bases for the decision below, suggesting that the disparate turnout associated with the in-precinct rule and HB 2023 can be directly attributed to state discrimination. Even putting aside their legal flaws, those new arguments are factually baseless.

On the in-precinct rule, Respondents now contend that Arizona caused the disparate burden by moving minorities' polling places more often, creating confusion. (DNC.Br.16; Hobbs.Br.40.) But, in the district court, they "d[id] not challenge ... the manner in which Arizona and its counties allocate or relocate polling places." JA.302. For good reason: The record does not support the claim. Between 2010 and 2012, Plaintiffs' expert did not find any disparity in polling-place continuity between whites and Hispanics, and a less than 3% difference between whites and African Americans. JA.110 & n.31.[1] Since whites and minorities experienced roughly the same level of polling-place continuity, that cannot be the cause of any disparity in out-of-precinct voting. Plaintiffs' expert did find a racial disparity in polling-place continuity as between the *presidential primary* and *general* elections in 2012, but with no Democratic presidential primary that year, that is a highly misleading and inapposite comparison.[2]

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[1] Even this small gap is questionable, as the expert "concede[d] measurement error exists, especially as it pertains to African American probabilities." JA.257.

[2] Nor, according to the district court's findings, did Plaintiffs "show[] that precincts tend to be located in areas where it would be more difficult for minority voters to find them." JA.336.

As to ballot-harvesting, Respondents make much of their expert's finding of home mail-service disparities in non-metropolitan counties. But the expert did not consider Arizona's two most populous counties, which account for 75% of its population and nearly half its Native American population. U.S. Census Bureau, *2015–2019 ACS 5-Year Data Profile*. His analysis thus "does not reveal whether, on a statewide basis, minorities have disparate access to home mail service." JA.252. Moreover, even that limited analysis found African Americans are *more* likely than whites to have access to home mail, with Hispanics only slightly less so. JA.183. In all events, the district court correctly found that "mail access is an imprecise proxy for" a voter's reliance on a ballot collector who does not fit one of HB 2023's exceptions. JA.252.

We are therefore left only with the Ninth Circuit's rationale: These regulations violate § 2 because they are associated with disproportionately lower minority turnout. And that creates the racial proportionality mandate even Respondents renounce.

3. To downplay the inevitable consequences of their approach, Respondents point to the "second step" of the *Gingles* vote-dilution test. Measuring disparate impact based on outcome disparities will not lead to a proportionality mandate, the DNC insists, because "§2 does not stop at the first step." (DNC.Br.27.) The court must consider "the context of that impact at step two," through the so-called Senate Factors. (*Id.*; *see also* Hobbs.Br.34.)

Respondents cannot identify a *single case* in which those factors excused a state from liability for a statistical disparity. (ARP.Br.33.) That is because the

factors—which bear no relation to § 2's text, and are drawn instead from discussion of vote-dilution in legislative history—are an inapposite laundry list that will *always* allow for some tenuous basis to confirm liability. This "totality of the circumstances" inquiry is the legal embodiment of confirmation bias.

Respondents barely try to justify the relevance of the Senate Factors. The DNC simply treats "step two" as settled law (DNC.Br.32-33), even though this Court has neither applied nor referenced the Senate Factors outside the vote-dilution context and the circuits have split over the question. *See Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). Secretary Hobbs defends only three of the nine factors as "indicia of intentional discrimination," confirming the irrelevance of the rest. (Hobbs.Br.32.)

Respondents' arguments also demonstrate the manipulable nature of their ostensible "step two." The Secretary emphasizes that the Senate Factors are "neither comprehensive nor exclusive" and not "*all*" of them "*always* apply." (Hobbs.Br.33.) That is one of the reasons this test is unhelpful: It never prescribes an objective result. And the DNC's articulation of why "logic" supports the application of the Senate Factors reveals exactly the foggy, outcome-driven analysis they engender: The factors "illuminate" whether an election law "operates in a climate of inequality and discrimination that carries over to the electoral arena." (DNC.Br.36-37.) That is not a rule of law.

This case illustrates the point best; it belies the notion that the "Senate Factors" are a meaningful limiting principle. The Ninth Circuit found that disparate voting rates under Arizona's in-precinct rule

and ballot-harvesting ban were sufficiently linked to "social and historical conditions" of discrimination to violate § 2. (JA.658-59, 670-71.) But the cited conditions, like century-old anti-miscegenation laws and funding for health insurance and public schools, are patently irrelevant to whether voters can find their precinct or cast a ballot. (ARP.Br.34.)

Even Respondents ignore most of this "puffery." *Holder*, 512 U.S. at 939 (Thomas, J., concurring in the judgment). The DNC focuses on the findings that minorities have lower home-ownership, education, and literacy rates, and less transportation and work flexibility. (DNC.Br.33-34.) Those socioeconomic disparities purportedly make it harder to be aware of, and follow, "technical" election rules. (*Id.*) But even if it could be accepted that these factors make it difficult to handle the mundane tasks of finding one's precinct or casting one's ballot, that would only confirm our point: The same "findings" could be used to negate *any* ordinary time, place, or manner rule.

Emphasizing the ninth Senate Factor, Secretary Hobbs highlights the "tenuousness" of the justification for the two rules. Nothing in § 2's text hinges liability on whether there is a good policy basis for the practice. In any case, her arguments reflect the imprudence of asking federal courts to second-guess policy judgments of state legislatures on details of election procedure. Her arguments insult the reader's intelligence—yet, in a hyper-partisan environment, were enough to convince an *en banc* majority of the Ninth Circuit that there was no good reason for two of the most obvious, commonsense voting rules one could imagine.

As to in-precinct voting, nobody disputes there are important reasons for assigning voters to precincts. As the district court found and Ninth Circuit accepted, a precinct-based system "allows for better allocation of resources and personnel, improves orderly administration of elections, and reduces wait times." (JA.654-55.) It also ensures that each voter receives "a ballot reflecting only the races for which that person is entitled to vote." (JA.655.) Still, the Secretary argues that there is no basis for the state to *enforce* this beneficial rule, by discarding ballots cast in the wrong precinct, because it is feasible to count them. (Hobbs.Br.43-44.) Obviously, however, if there are no consequences for *violating* a rule, the rule is worthless. A rule that cannot be enforced will not be followed; if a rule is not followed, it will not advance its purposes. So if the ubiquitous precinct system is justified (as all agree), so too must be rejecting out-of-precinct ballots.

The Secretary's argument about ballot-harvesting is equally incredible: Because Arizona already forbids voter fraud, and there has been no documented fraud in connection with ballot-harvesting in Arizona, there is no valid reason to enact HB 2023. (Hobbs.Br.47.) But nobody disputes that ballot-harvesting heightens the *risk* of fraud. (ARP.Br.8-10.) Arizona can regulate to *prevent* that risk, including by prophylactic means to minimize the *opportunities* for wrongdoing that will otherwise be challenging to prove. (How does one detect and prove that a ballot-harvester disposed of Republican ballots?) By analogy, states may require voter identification, even if voter impersonation is already illegal. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008).

Ultimately, the Senate Factors are a mirage that barely disguise Respondents' goal of turning § 2 into a proportionality mandate, while also inviting federal courts to decide *de novo* the wisdom of state election policy. If a chief goal of federal election law is to set clear, objective, predictable standards that can be fairly applied without the perception of judicial bias, Respondents' "step two" only makes matters worse.

4. Respondents cannot hide that their reading would put § 2 in serious constitutional doubt. It would require race-based action to *favor* minorities, mandating a sweeping overhaul of ordinary and important election rules without any plausible nexus to "enforcing" the ban on intentional discrimination.

Respondents retort that enforcement legislation under the Fifteenth Amendment—unlike under the Fourteenth—need not be "congruent and proportional" to the constitutional prohibition. (Hobbs.Br.34-35; DNC.Br.49-50.) That makes little sense. The text of both enforcement clauses is "virtually identical." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373, n.8 (2001). And this Court has "always treated" these powers "as coextensive." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 & n.6 (1999) (Thomas, J., dissenting); *see also id.* at 282-83 (majority op.) (enforcement power, under both amendments, authorizes "[l]egislation which deters or remedies constitutional violations").

Respondents note that this Court once upheld § 5 of the VRA, which prohibited actions with the "effect" of retrogressing from the state-created *status quo ante*. (Hobbs.Br.33; DNC.Br.47.) But that is only because § 5 was geared to combat then-extant unconstitutional discrimination. In the 1960s, Congress confronted a

persistent effort to "undo[] or defeat[] the rights recently won" by minorities, and so § 5's pre-clearance regime was a proper means of avoiding "purposeful discrimination." *City of Rome v. United States*, 446 U.S. 156, 177-78 (1980). But as time passed, both the "preclearance requirement and its coverage formula raise[d] serious constitutional questions" because they were no longer tied to the "current needs" of fighting intentional discrimination. *Shelby Cnty. v. Holder*, 570 U.S. 529, 555-56 (2013). So too here, Respondents do not even try to show how their sweeping reading of § 2 would serve any "current need." Indeed the problem here is even worse, as § 5 prohibited only *diminishing* minority opportunities from the *status quo*, whereas Respondents' test would require affirmative action to *change* longstanding rules, such as in-precinct voting, to maximize minority turnout.

Regardless, Respondents' reading cannot be justified under *any* plausible standard. Obliterating ordinary race-neutral election laws for the sake of racial proportionality is not a "rational" means of enforcing the constitutional ban on intentional discrimination. (Hobbs.Br.35; DNC.Br.47.) This case proves the point, as in-precinct voting has no possible link to invidious discrimination.

Respondents next say that § 2 can be alternatively justified under the Elections Clause. (Hobbs.Br.35-36; DNC.Br.53.) That cannot be: Section 2 applies to all state and federal elections, while the Elections Clause extends only to the latter. U.S. Const. art. I, § 4, cl. 1.

Finally, Respondents deny that there is any Equal Protection problem with compelling states to achieve racial proportionality in voting. They say they would

let states preserve their voting rules "if they can prove [they are] necessary to achieve a valid interest." (Hobbs.Br.34.) That has things precisely backwards—states must justify *race-conscious* actions, not race-neutral ones. Anyway, this case again gives the lie to Respondents' assurance, because their test armed the court below to invalidate two ordinary, easily justified election rules. *See supra* pp. 15-16. And even if states could sometimes prevail, the burden of justifying every ordinary voting rule in litigation is itself a cudgel that will force many states to engage in racial balancing just to avoid the risk and expense.

All of these constitutional questions can, of course, be readily avoided by adopting our clear, textual, and sensible construction of the statute—which is itself yet another reason for this Court to do so. *See NFIB v. Sebelius*, 567 U.S. 519, 563 (2012).

* * *

Respondents pervert § 2's language to let loose a runaway racial-proportionality train. They offer no viable way to stop it. And their application of § 2 to this case amounts to opening the throttle. This Court should reverse and put this engine back in the station.

C. Private Petitioners' Standing To *Appeal* Is Parallel to DNC's Standing To *Sue*.

Respondents challenge standing to defend the out-of-precinct policy. (Hobbs.Br.38.) But, in addition to Arizona's standing, we have standing to appeal for the same reason that the DNC had standing to sue in the first place: The challenged Ninth Circuit judgment harms the Arizona Republican Party by increasing Democratic turnout and vote share.

In voting cases, this Court has afforded standing to parties, candidates, and voters who suffer injury to electoral prospects. *See Crawford*, 553 U.S. at 189 n.7 ("Democrats have standing to challenge" voter-ID law); *Davis v. FEC*, 554 U.S. 724, 733-35 (2008); *Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

Here, the DNC and the other Plaintiffs claimed that the in-precinct policy "decrease[d] the likelihood" of "elect[ing] candidates of the Democratic Party." (Dist. Ct. Dkt. 233 ¶ 15.) That was their basis for standing to challenge the policy. By the same token, *invalidating* the policy reduces *Republican* electoral prospects—a concrete, particularized injury to the Arizona Republican Party, its candidates and voters.

Secretary Hobbs objects that we have not been ordered "to do or refrain from doing anything." (Hobbs.Br.38.) That is not the test. Standing requires only a concrete, particularized injury, *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013), which a party can suffer without being ordered to act or not act. *E.g.*, *Meese v. Keene*, 481 U.S. 465, 473 (1987) (reputational injury); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (aesthetic injury); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (competitive injury); *Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (economic injury). The Ninth Circuit's decision will injure our goal of electing Republican candidates, and that clearly suffices.

The Secretary relies on *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), but the candidates there could not allege or show that redrawn districts actually reduced their electoral prospects. *Id.* at 1737. Here, by contrast, the policy's partisan effects and electoral

impacts are undisputed and, indeed, are a premise of Plaintiffs' case. (JA.264-65.) If the Democratic Party had standing to bring this case and appeal its loss, the Republican Party necessarily has equal standing to appeal an unfavorable ruling.

II. RESPONDENTS CANNOT DEFEND THE NINTH CIRCUIT'S ALTERNATIVE "INTENT" HOLDING.

The district court found, after trial, that Arizona's legislature in enacting HB 2023 "was not motivated by a desire to suppress minority voters." (JA.357.) That is a "pure question of fact"; absent clear error, the trial court's finding is thus dispositive. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982). Respondents identify no error in that finding, much less a clear one.

1. As we previously explained, the Ninth Circuit tried to circumvent the district court's finding through a "cat's paw" theory, imputing to the legislature the supposedly discriminatory intent of one senator and one private citizen, who helped "spur[] a larger debate" about fraud and ultimately persuaded legislators that it needed to be preemptively addressed. (JA.678.) But it is the *intent of the legislature* that matters, not the intent of one or two individuals who helped convince the legislature to enact the law. Any other rule would trample on the presumption of legislative good faith, treat legislators as cogs in a machine rather than independent actors, and lead to intractable problems for courts trying to divine legislative motive.

Seemingly recognizing the problems with applying a "cat's paw" theory to legislatures, Respondents back away from it, even as they try to defend the Ninth Circuit's result. Secretary Hobbs goes so far as to suggest that a "cat's paw" theory simply reaffirms the

point that legislatures can have more than one motive, a proposition neither the district court nor Petitioners disputed. (Hobbs.Br.48-49.) The DNC downgrades the Ninth Circuit's theory of the case to an "analogy." (DNC.Br.59.) But this wordplay cannot hide that they would have this Court endorse a breathtaking expansion of what constitutes "discriminatory intent." In Respondents' view, a racially-tinged, but-for cause of legislation "taint[s] the whole process," even in the face of the explicit finding that the legislature did not harbor racial intent in enacting the law. (*Id.*)

Yet Respondents provide no meaningful support for their cat's-paw-by-another-name argument. Instead, they cite *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729-30 (2018), apparently for the proposition that a few actors can taint an entire legislature. But *Masterpiece* involved explicitly anti-religious statements made by multiple members of a seven-person adjudicatory body, during its official proceedings to "decid[e] a particular case." *Id.* at 1730. This Court emphasized that *Masterpiece* presented the "very different context" of adjudication, where "neutral[ity]" is paramount. *Id.* at 1729-30. *Masterpiece* thus provides no support for Respondents' theory that the supposedly racial motives of two individuals taints the work of an entire legislature as a matter of law.

2. The remainder of Respondents' arguments quibble with the relative weight the district court gave various pieces of evidence, but it is precisely this sort of "improper[] … *de novo* weighing" that clear error review precludes. *Anderson v. City of Bessemer City*, 470 U.S. 564, 576 (1985).

Anyway, Respondents' arguments are wrong. They claim the legislature's concerns about the risk of fraud in ballot-harvesting were "pretextual." (DNC.Br.61; Hobbs.Br.49-50.) But the trial court found otherwise (JA.352); Respondents' only contrary "evidence" is that no ballot-harvesting fraud had been documented in Arizona. Even assuming no prior undetected fraud, it is reasonable (and non-discriminatory) to *prevent* impairment of the integrity of the electoral system. *Supra* p. 16. *Crawford* confirms as much. To be sure, it does not preclude courts from finding pretext. But it *does* preclude finding pretext *based on* the absence of specific evidence of fraud. The *Crawford* record "contain[ed] no evidence of any such fraud actually occurring in [the state] at any time," yet still the "propriety" of a photo-ID rule was "perfectly clear." 553 U.S. at 194, 196-97.

Respondents also insist that the Ninth Circuit was right to rest on evidence of partisan motive, because using race as a proxy for partisanship is still illegal discrimination. (DNC.Br.60.) True, but there was no finding that anyone used race as a proxy. The district court found that a few legislators opposed harvesting because it was used by *Democrats* (JA.356). Secretary Hobbs adds that "invocation of partisanship" does not "inoculate" HB 2023 "when the weight of the evidence" shows that it "was racially motivated." (Hobbs.Br.50.) Weighing the evidence is the factfinder's role, however, and the factfinder disagreed.

And that is really the start and end of this issue. The Ninth Circuit "reverse[d] the finding of the trier of fact simply because it [was] convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. That "oversteps the bounds of its duty." *Id.*

CONCLUSION

The Court should reverse.

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