No. 16-393

In the Supreme Court of the United States

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.
PETITIONERS,

v.

MARC VEASEY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS REPRESENTING STATES IN THE FIFTH CIRCUIT SUPPORTING PETITIONERS

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QUESTION PRESENTED

As explained in the petition, the Fifth Circuit held that statistical disparity in the preexisting possession of photo identification by members of different races was sufficient to make Texas' Voter ID law incompatible with section 2 of the Voting Rights Act. This brief addresses the first question presented, specifically:

> Does Texas' Voter ID law result in the abridgment of voting rights on account of race?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

Like other voting regulations, voter identification requirements not only help prevent voter fraud, but also foster public confidence in elections—thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy. Unfortunately, the decision of the *en banc* Fifth Circuit in this case creates a roadmap for invalidating many such regulations. It does so by basing a violation of Section 2 of the Voting Rights Act—which prohibits certain regulations that have a disparate impact on racial minorities—on little more than the common statistical correlation between race and poverty. Under that rationale, virtually *any* regulation, no matter how beneficial to democratic self-government, that incrementally and indirectly increases the "cost" of voting—in money, time or even inconvenience—is also at risk of invalidation. Accordingly, the decision below will effectively shift to federal judges the People's authority to organize and regulate their own elections.

Amici, a group of elected officials from throughout the Fifth Circuit (and listed in the Appendix), are deeply concerned about the impact of the Fifth Circuit's decision on democratic self-governance in their States, and on the balance of power between the States and the federal government. Accordingly, *amici* respectfully urge the Court to grant the petition and reverse the decision below.

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

STATEMENT

To promote greater confidence in the outcome of elections in Texas, Texans of all political persuasions have been clamoring for tighter voter identification requirements since at least 2004. In 2011, the Texas legislature passed a voter identification law, SB 14, which generally requires voters to present an approved photo identification. S.B. 14, 82d Leg., Reg. Sess., 2011 Tex. Gen. Laws 619. At least one of the acceptable documents is available for free—a Texas election identification certification, or "EIC." See Tex. Transp. Code 521A.001(a)–(b) (Department of Public Safety "may not collect a fee" for an EIC); Tex. Health & Safety Code 191.0046(e) (providing that state and local officials "shall not charge a fee" to obtain supporting documents required for an EIC).

Respondents—plaintiffs below—nevertheless alleged that SB 14 "was enacted with a racially discriminatory purpose, has a racially discriminatory effect, . . . and unconstitutionally burdens the right to vote." Pet. App. 4a (citing *Veasey* v. *Perry*, Pet. App. 255a). The district court took the extraordinary step of granting discovery into potentially privileged internal legislative correspondence. But no evidence among the thousands of pages of correspondence or hundreds of hours of deposition revealed any discriminatory purpose. A majority of the Fifth Circuit panel thus held that the district court erred in finding that SB 14 was enacted with a racially discriminatory purpose.

Despite the lack of discriminatory purpose, and without reaching the constitutional issues presented by its position, the panel nonetheless invalidated SB

14 for having a discriminatory *effect* in violation of Section 2. See 52 U.S.C. 10301(a) (proscribing 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 . . . to vote on account of race or color"). The majority's essential rationale was that, because SB 14 imposes some burden (however small) on Texans living in poverty, and because poverty is correlated with race, the law has a racially discriminatory impact. See Pet. App. 285a, 297a.

The Fifth Circuit granted rehearing *en banc* and affirmed the panel's decision, over the dissenting votes of Judges Jones, Jolly, Smith, Owen, Clement, and Elrod. Pet. App. 131a–251a. The *en banc* majority followed the panel's basic rationale—i.e., relying on the correlation between race and poverty to hold that SB 14 has a racially discriminatory impact. Pet. App. 4a, 55a. But in dissent, Judge Jones, joined by Judges Jolly, Smith, Owen, and Clement, explained that the majority's decision departed from the text of Section 2, Pet. App. 195a–204a, and this Court's emphasis in *Thornburg* v. *Gingles,* 478 U.S. 30, 35 (1986), that a violation can only be based on results flowing from the *law* at issue, rather than from pre-existing conditions. Pet. App. 200a. Judge Elrod, joined by Judge Smith, likewise noted that "there is no evidence in this record that any voter has been denied the right to vote on the basis of his or her race because of its voter ID requirements." Pet. App. 232a.

REASONS FOR GRANTING THE PETITION

As the petition convincingly explains, the Fifth Circuit's decision warrants this Court's review because it (along with a recent Fourth Circuit decision from North Carolina, which also merits review) created a circuit split on the appropriate test for Section 2 discriminatory-effect claims. See Pet. 10, 12-19. In addition, as explained below, the decision below warrants review because, first, its reliance on the general correlation between poverty and race represents a serious misinterpretation of Section 2. Second, such an interpretation would make Section 2 unconstitutional. And third, the decision below creates a roadmap for invalidating a host of other voting regulations that have long been considered uncontroversial.

I. In its reliance on the general correlation between poverty and race, the Fifth Circuit's decision seriously misinterprets Section 2.

Originally, Section 2's language paralleled that of the Fifteenth Amendment, meaning that it originally prohibited only purposeful discrimination. *City of Mobile* v. *Bolden*, 446 U.S. 55, 60–62 (1980) (plurality opinion). In 1982, however, Congress amended subsection (a) to prohibit states from imposing or applying voting practices "in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. 10301(a). Congress also added what is now subsection (b), which provides that

> [a] violation of subsection (a) is established if, based on the totality of the circumstances, it is

> shown that the political processes . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. 10301(b). These changes reflected the belief that requiring Section 2 plaintiffs to show purposeful discrimination leads to "'unnecessarily divisive . . . charges of racism on the part of individual officials or entire communities,' . . . and . . . 'asks the wrong question.'" *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28, at 36 (1982)).

Under these provisions, the *right* question is whether the law causes minorities to be disproportionately excluded from voting, not why it was enacted. While these statutory changes expanded Section 2 liability, the Fifth Circuit's reliance upon the general correlation between race and poverty took the it far beyond what Section 2's language can bear. Given the importance of the statute, that error is reason enough for this Court's review.

A. The Fifth Circuit has erroneously interpreted Section 2 to invalidate a voting prerequisite without evidence that it actually "results in" any disparate burden on minority voters.

To establish a violation of Section 2, a challenger must show that the challenged practice proximately caused harm to minority voters. This follows from Section 2's text, which imposes liability only if a voting practice "imposed . . . by [the] State . . . *results in* a

denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. 10301(a) (emphasis added). The phrase "results in" indicates that the alleged abridgement must be caused by the state-imposed practice alone, not from disparities in voter participation resulting from other sources. See, *e.g.*, *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014) (Section 2 does not reach disparities possibly caused by socioeconomic inequalities). Likewise, the concept of "abridgement" "necessarily entails a comparison" with an objective benchmark, because "[i]t makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). The Fifth Circuit's violation of these fundamental principles warrants this Court's review.

1. Proximate cause. First, the Fifth Circuit refused to require a showing of proximate cause as reflected, for example, in Justice Brennan's majority opinion in *Thornburg* v. *Gingles*. Section 2, the Court stated there, "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17.

Applying this rule in the vote-dilution context, *Gingles* held that plaintiffs challenging at-large, multi-member districts must show, as a "necessary precondition[]" to establishing a Section 2 violation, that it was the state-imposed voting practice that caused the disparate exclusion of minority candidates from the relevant offices. *Id.* at 50 (involving a multi-

member electoral system). Section 2 plaintiffs accordingly must show that any alleged vote dilution is *not* attributable to a general socioeconomic condition—in that case the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* If plaintiffs cannot make that showing, the arrangement at issue—in that case the state-imposed "multi-member form of the district"—"cannot be responsible for minority voters' inability to elect its [*sic*] candidates." *Id.* And if the voting procedure "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "not assure racial minorities proportional representation"—only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17. It follows that, in the vote denial context, a Section 2 plaintiff must show that the alleged deprivation flows from a state-imposed voting practice rather than some factor not within the State's control.

That is why the Fourth Circuit rejected a Section 2 challenge to Virginia's decision to select school-board members by appointment rather than election. Although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the school boards," there was "no proof that the appointive process caused the disparity." *Irby* v. *Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 2015) (internal quotations removed). Instead, the disparity was attributable only to the reality that blacks were "not seeking school board seats in numbers consistent with their percentage of the population." *Id.* Similarly, the Ninth Circuit

explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez* v. *Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation and quotation marks omitted), *aff'd sub nom. Arizona* v. *Inter Tribal Council of Arizona, Inc.*,133 S.Ct. 2247 (2013).

Here, Plaintiffs have not shown—and the Fifth Circuit did not find—that SB 14 proximately causes the exclusion of minority voters. See also generally *N.C. State Conf. of the NAACP* v. *McCrory*, 831 F.3d 204 (4th Cir. 2016) (similarly ignoring the issue of proximate cause). At most the Fifth Circuit's analysis shows that *poverty* can sometimes limit voting opportunities. But that is not sufficient under Section 2, especially in the context of a law such as SB 14 that guarantees *free* IDs. [2] And even if there were proof that some minority voters were excluded from the political process—which there is not—plaintiffs did not establish that SB 14 caused the exclusion. Again, under Texas law, every person has an equal right to vote and an equal right to free photo IDs. If some persons freely choose not to take advantage of these opportunities, those private decisions do not implicate Section 2.

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[2] As with Texas, North Carolina offers all citizens free voter IDs to assist them in complying with the law there. *McCrory*, 831 F.3d at 235.

2. Objective benchmark. The Fifth Circuit's failure to apply an objective benchmark is likewise grounds for this Court's review. As part of the proximate causation inquiry, "the comparison must be made with . . . what the right to vote *ought to be*." *Bossier II*, 528 U.S. at 334. Moreover, the benchmark for measuring "how hard it should be" must be "objective," not one that is purportedly superior only because it enhances minority voting power or participation. *Holder* v. *Hall*, 512 U.S. 874, 880 (2008) (Kennedy, J.).

In some cases, "the benchmark for comparison . . . is obvious." *Id.* For example, the effect of a poll tax can be evaluated by comparing a system with a poll tax to a system without one. In other cases, however, there may be "no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Id.* at 881. If that is so, then "the voting practice cannot be challenged . . . under § 2." *Id.*

This reading of Section 2 is confirmed by *Holder.* There, the Court rejected a Section 2 challenge asserting that use of a single-member commission instead of a five-member commission resulted in vote dilution. *Id.* at 877–879. The five-member alternative clearly would enhance minority voting strength because the minority community was large enough to elect one out of five commissioners. *Id.* at 878. Nevertheless, the Court held there was "no principled reason why" the five-member alternative ought to be the "benchmark for comparison" as opposed to a "3-, 10-, or 15-member

body." *Id.* at 881. In other words, there was no "objective" benchmark for determining the proper number of commissioners, and hence no basis for a Section 2 violation. In the wake of *Holder,* then, Section 2 plaintiffs must show that the State has deprived minorities of voting opportunity compared to an "objective" alternative, not merely alternatives that would enhance minority participation.

In this case, the Fifth Circuit ignored this requirement. It based its finding of a Section 2 violation entirely on the general correlation between poverty and race. See Pet. App. 4a, 55a. Accordingly, it did not identify—or find it necessary to identify—any objective benchmark for the proper form of voter ID. See also *McCrory*, 831 F.3d at 218 (relying on the same correlations).

Nor could it. The fifty states have chosen a cornucopia of methods to verify voters' identities. *See* Nat'l Conf. of State Legislatures, *Voter ID Laws*, NCSL (Sept. 26, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. Thirty-three states require voters to show some form of ID at the polls. Of those, seventeen require photo ID, while sixteen will accept non-photo ID. When a voter appears without proper ID, moreover, eleven states require voters to take additional steps. The remaining twenty-two states require state officials to act, and the steps required vary state-by-state. Accordingly, "[t]he wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring in part). In assessing voter ID requirements, then, there simply is "no objective

and workable standard for choosing a reasonable benchmark." *Holder*, 512 U.S. at 881 (Kennedy, J.).

It is no answer to say that Texas's voting practices harm minorities relative to a *conceivable* alternative that would be better for them, such as non-photo ID or no ID at all. That is not how Section 2 works. It is always possible to hypothesize an alternative practice that would increase minority voting rates.

For example, one might speculate that a larger number of minority voters would vote if Texas required no ID and accepted voters' say-so about where they live. Yet Section 2 does not require those alternatives—which would obviously enhance opportunities for voter fraud—for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson* v. *De Grandy*, 512 U.S. 997, 1017 (1994).

Nor do Texas's *prior* laws provide an appropriate benchmark, because such an approach would conflate Section 2 with Section 5. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—whether a change makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used* to have a particular practice in place does not make it the benchmark for a Section 2 challenge. *Holder*, 512 U.S. at 884 (Kennedy, J.) (emphasis added); see also

McCrory, 831 F.3d at 226 (incorrectly criticizing legislative decision to return law to its previous state) .

By ignoring the requirement of an objective benchmark, the Fifth Circuit converted Section 2 into a statute that requires states to adopt *whichever* voting regime would most increase the voting rates and voting power of minorities. This Court rejected this very argument in *Holder*, and it should grant the petition to reiterate its rejection of that corrosive idea.

B. The Fifth Circuit's decision erroneously interprets Section 2 to invalidate a voting prerequisite without any evidence of diminished minority political participation.

Review is also warranted because there was no evidence of decreased political participation by minorities. In vote-denial cases, Section 2's text and history show that only those voting practices that disproportionately exclude minority voters from the political process are prohibited. It does not require states to affirmatively enhance minority voting rates, as the Fifth Circuit's decision assumes. See*, e.g.*, Pet. App. 75a ("We find no clear error in the district court's finding that the State's lackluster educational efforts resulted in additional burdens on Texas voters.").

First, a violation of Section 2(a) is established when "the political processes . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity . . . to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). A political process is "equally open to participation" by members

of all races if everyone "has the same opportunity" to vote free from state-created *barriers* that impose differential burdens. *Frank*, 768 F.3d at 755; see also *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 428 (2006) ("[T]he ultimate right of § 2 is equality of opportunity."). It does not require "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *Bartlett* v. *Strickland*, 556 U.S. 1, 20 (2009). And an opportunity does not become unequal simply because some groups "are less likely to *use* that opportunity." *Frank*, 768 F.3d at 753. For this reason, laws that provide an equal opportunity satisfy Section 2 regardless of whether they have proportionate outcomes.

Second, Section 2(a) prohibits only voting practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race." 52 U.S.C. 10301(a) (emphasis added). This language clarifies that states may enact ordinary race-neutral regulations concerning the time, place, and manner of elections, such as what kind of ballots are used or how voters establish their eligibility. Shouldering these "usual burdens of voting" is an inherent part of democracy. *Crawford*, 553 U.S. at 198 (Stevens, J.). And because such baseline requirements are inherent in the right to vote, they cannot be said to deny or abridge that right.

The same is true of photo ID laws, which, to quote *Crawford,* do not "'represent a significant increase over the usual burdens of voting.'" *N.C. NAACP* v. *McCrory*, No. 1:13-cv-658, 2016 WL 204481, at *10

(M.D.N.C. Jan. 15, 2016) (quoting *Crawford*), *reversed in McCrory, supra*. This Court should grant review to reiterate *Crawford's* fundamental holding that asking all voters to assume "the usual burdens of voting" does not violate Section 2.

Third, Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. If Congress wanted to prohibit all disparate effects, it could have said so. As the Seventh Circuit noted, "there wouldn't have been a need for" subsection (b) to ask whether the political process is "equally open," or whether minorities have "less opportunity" to participate. *Id.* at 753 (emphasis and internal quotations removed). Instead, Congress chose terms such as "impose," "denial," "abridgement," "equally open," and "less opportunity" to show that Section 2 targets only the disparate *exclusion* of minority voters caused by the voting practice.

Fourth, the legislative history of the 1982 amendments confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring in the judgment); see, *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Thornburg* v. *Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment). The original version of the 1982 amendments proposed by the House would have prohibited "all discriminatory 'effects' of voting practices," yet "[t]his version met stiff resistance in the Senate." *Miss. Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). The Senate

feared that such a law would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Id.* Senator Dole stepped in with a compromise, which Congress eventually enacted. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). The key to the compromise was that it prohibited states from providing unequal voter opportunity, but it did not require equality of political outcomes. Senator Dole assured his colleagues that, under the compromise, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . or registering . . . ." 128 Cong. Rec. 14133 (1982). Since SB 14 provides voters a choice of IDs that includes one available for free, it would do violence to this legislative compromise to invalidate a voting practice that allows members of all races to have equal "access" to the political process simply because factors that are beyond the control of the government might lead to uneven racial results in voter turnout. Here, moreover, there is no proof that "participation in the political process is depressed among minority citizens" under SB 14—a basic requirement of a Section 2 claim. *League of United Latin Amer. Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993).

The Fifth Circuit's theory thus fundamentally rewrites Section 2. It replaces a ban on state-imposed barriers to minority voting with an affirmative duty of state facilitation of minority voting. It converts a prohibition on abridging minority voters' right to vote

into a mandate for boosting minority voting. It transforms a guarantee of equal opportunity into a guarantee of equal outcomes. And it revamps a law about disproportionate exclusionary effects into a law about *all* disproportionate effects. None of this is consistent with the text or the legislative compromise underlying its passage.[3] That too is ample reason to grant the petition and reverse.

[3] The Fourth Circuit decision in the North Carolina case is similarly flawed: The record in that case "contains no evidence as to how the amended voter ID requirement affected voting in North Carolina." *McCrory*, 831 F.3d at 242 (Motz, J., dissenting in part). Like the Fifth Circuit, the Fourth Circuit has ignored Section 2's requirement that a challenged law hinder actual participation.

II. Under the Fifth Circuit's interpretation, Section 2 would violate the Constitution.

The Fifth Circuit's approach would also make Section 2 unconstitutional—another powerful reason to grant review. As Justice Kennedy has repeatedly emphasized, this Court has never confronted whether Section 2's "results" test complies with the Constitution. See*, e.g.*, *Chisom* v. *Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 . . . is consistent with the requirements of the United States Constitution."); cf. *Georgia* v. *Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (it would be a "fundamental flaw" to require "consideration[] of race" in order to "compl[y] with a statutory directive" under the Voting Rights Act). Justice Kennedy's pointed reminders underscore that Section 2's results test already teeters at the edge of constitutionality. Interpreting Section 2 to prohibit Texas's (and North Carolina's) race-neutral voting laws and to require Texas and other states to adopt new laws for the racial purpose of enhancing minority voting—as the Fifth Circuit's reliance on the general correlation between poverty and race implies—pushes Section 2 over the constitutional ledge.

1. If the Fifth Circuit's interpretation of Section 2 were allowed to stand, the statute would exceed Congress's power to enforce the Fifteenth Amendment. The Fifteenth Amendment prohibits only "purposeful discrimination"; it does not prohibit laws that only "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights*

v. *Metrop. Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977)). And this is true whether that disproportionate impact is the result of poverty—as the Fifth Circuit assumed—or other factors.

Of course, Congress has power to "enforce" that prohibition "by appropriate legislation." U.S. Const. amend. XV, § 2. This allows Congress to proscribe more than purposeful discrimination, but—just as with the Fourteenth Amendment—this proscription applies only if the law is a "congruen[t] and proportiona[l]" "means" to "prevent[] or remedy[]" the unconstitutional "injury" of intentional discrimination. *City of Boerne* v. *Flores*, 521 U.S. 507, 519–520 (1997). The enforcement power does not allow Congress to "alte[r] the meaning" of the Fifteenth Amendment's protections. *Id.* at 519.

Accordingly, if Section 2—as interpreted by the courts—is not a congruent and proportional effort to weed out purposeful discrimination, but instead requires states to alter race-neutral laws to maximize minority voting participation or render their participation proportional, then Section 2 is not a legitimate effort to "enforce" the Constitution. Rather, it is a forbidden attempt to "change" the Fifteenth Amendment's ban on purposeful discrimination into a ban on disparate effects. *Id.* at 532.

For this reason, in the vote-dilution context, this Court has been careful to interpret Section 2's "results" test in a way that prohibits redistricting efforts *only* where there is a strong inference of a discriminatory purpose. For example, the first *Gingles* "pre-condition" requires plaintiffs to establish that minority

voters could naturally constitute a "geographically compact" majority in a district adhering to "traditional districting principles, such as maintaining communities of interest and traditional boundaries." *Abrams* v. *Johnson*, 521 U.S. 74, 91-92 (1997); see *LULAC*, 548 U.S. at 433. Because districts normally encompass identifiable "geographically compact" groups, the failure to draw such a district when a minority community is involved gives rise to a plausible inference of intentional discrimination. Conversely, the Court's interpretation of Section 2 does *not* require states to engage in preferential treatment by deviating from traditional districting principles in order to create majority-minority districts. *LULAC*, 548 U.S. at 434.

The same holds true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary race-neutral election regulations in order to enhance minority voting participation. Otherwise Section 2 would exceed the powers granted to Congress in the Fifteenth Amendment. And that is true whether the existing disparity is the result of poverty or other non-purposeful factors.

2. Interpreting Section 2 to require states to boost minority voting participation—under the guise of economic differences among races—would also violate the Fourteenth Amendment's equal-treatment guarantee. As This Court has held, subordinating "traditional districting principles" for the purpose of enhancing minority voting strength violates that aspect of the Constitution. See *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996).

Section 2 thus cannot require states to abandon neutral electoral practices, such as requiring voter ID, for the "predominant" purpose of maximizing minority voter participation. *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). Yet requiring states to adjust their race-neutral laws to enhance minority participation rates would require exactly that "sordid business" of "divvying us up by race" through deliberate race-based decision-making. *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part).

This is especially true of the Fifth Circuit's interpretation since, in its view, any failure to enhance minority voting opportunity constitutes a discriminatory "result." Yet Section 2's text flatly prohibits the pursuit of all such "results," regardless of how strong the State's justification. Cf. *Ricci* v. *DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring)

Interpreting Section 2 to require states to remedy the effects of private choices or societal disparities—including income and wealth differentials—also contravenes the Equal Protection Clause requirement that race-based government action be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added); see *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (Roberts, C.J.) ("[R]emedying past societal discrimination does not justify race-conscious government action."). Requiring states to adjust their voting laws be-

cause of private choices—including choices that resulted in disparities of income or wealth—would require just that forbidden course.

3. Because the Fifth Circuit's interpretation thus raises, at a minimum, "serious constitutional question[s]" concerning both Congress's enforcement powers and the Fourteenth Amendment's equal-treatment guarantee, it must be rejected if it is "fairly possible" to interpret Section 2 as outlined above. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). This is particularly true because the Fifth Circuit's interpretation rearranges "the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). Thus, unless Congress's intent to achieve this result has been made "unmistakably clear in the language of the statute," that interpretation must be rejected. *Id.*

The same conclusion follows from the fact that the Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. See *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. If Section 2 truly did authorize the federal judiciary to override state election laws as extensively as the Fifth Circuit claims, Congress, at a minimum, would have needed to say so clearly.

In short, the Court should grant review and reverse the Fifth Circuit's interpretation of Section 2 to ensure that the statute's operation remains within constitutional bounds.

III. By relying upon the general correlation between race and poverty, the Fifth Circuit's approach jeopardizes a wide variety of heretofore uncontroversial voting regulations.

The majority's approach—especially its reliance on the correlation between race and poverty—not only distorts Section 2 and exceeds constitutional bounds, it also threatens a wide range of voting regulations.

1. As the Seventh Circuit emphasized in *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014), conflating race with poverty under section 2 threatens to "sweep[] away almost all registration and voting rules." *Id.* at 754. As Judge Jones put it in her dissent below, "[v]irtually any voter regulation that disproportionately affects minority voters can be challenged successfully under the majority's rationale: polling locations; days allowed and reasons for early voting; mail-in ballots; time limits for voter registration; language on absentee ballots; the number of vote-counting machines a county must have; … [and] holding elections on Tuesday." Pet. App. 194a & n.54; see also Petition 26-27.

2. These concerns are not merely theoretical. As Judge Jones noted, the uncontroversial regulations she identified are *currently* being challenged in courts across the country, precisely based on the general correlation between poverty and race. Pet. App. 194a & n. 54.

Judge Jones's list is just the tip of the iceberg. For example, the Sixth Circuit recently applied the Fifth Circuit's reasoning to invalidate a Michigan law eliminating straight-party voting, which allows a voter to

indicate a strictly partisan vote for all candidates of a particular political party, rather than selecting each candidate individually. Only nine states currently provide this option, and Michigan had removed straight-party voting from its ballots in 2015. But the Sixth Circuit held that this change violated Section 2. *Michigan State A. Philip Randolph Institute* v. *Johnson*, 833 F.3d 656 (6th Cir. 2016). The court speculated that removing the straight-party option might potentially increase wait times and, because of their poverty, discourage some black voters from voting.

Putting aside the potential for bigotry inherent in the suggestion that minority voters are incapable of enduring a mild delay to vote, or that they are not capable of selecting candidates individually, such rulings threaten to force unnecessary and sweeping change on other states. Following the reasoning in the Sixth Circuit's decision, which mirrors the reasoning of the court below, the forty-one states that do not offer straight-party voting options could also be said to be discriminating against minority voters and violating Section 2.

In another recent case, *One Wisconsin Institute* v. *Thomsen*, 2016 U.S. Dist. LEXIS 100178 (W.D. Wisc. Jul. 29, 2016), the court invalidated on the basis of Section 2 a regulation that reduced early voting from twenty days to ten. But under this reasoning, the states that have never allowed early voting are also impermissibly discriminating.

3. The Fifth Circuit's logic would also put into question many States' voter registration systems. For example, only a few states currently offer same-day

registration. But under the Fifth Circuit's reasoning, the vast majority of States that do *not* offer same-day registration are in violation of Section 2—simply because the absence of such a system imposes some (very modest) cost on voters and arguably burdens poor (and hence minority) voters disproportionately.

Indeed, under the Fifth Circuit's reasoning, the requirement of registration itself would be invalid if someone could show that poor voters disproportionately find it difficult to assemble the documents that registration typically requires. Yet the practice of voter registration was ubiquitous in 1982, when Section 2 was amended, and dates to the 1800s. Nat'l Conf. of State Legislators, *The Canvass*, Voter Registration Examined (March 2012). It is unthinkable that, when Congress amended Section 2 in 1982, it meant to prohibit a voting practice such as registration—especially when such a prohibition is never mentioned anywhere in the 1982 Amendments' extensive legislative history. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress'[s] silence in this regard can be likened to the dog that did not bark.").

4. Any reading of Section 2 that would threaten such a wide swath of hitherto uncontroversial voting laws at least deserves this Court's review. Congress enacted Section 2 to end discrimination, not to upend ordinary election laws.

As Justice Harlan once observed in another context, "[a]ll that [the State] has done here is fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." *Griffin v. Illinois*, 351 U.S. 12, 34 (1956). So

too here: According to the Fifth Circuit, Texas has violated Section 2 simply by failing to remedy pre-existing economic disparities. But a Section 2 violation cannot be based solely on pre-existing statistical disparities and general socioeconomic inequalities.

Judge Jones correctly warned in her dissent below that this flawed analysis will take us "another step down the road of judicial supremacy by potentially subjecting virtually every voter regulation to litigation in federal court," even as it "disable[s] the working of the democratic process." Pet. App. 211a (Jones, J., dissenting). The Fifth Circuit's decision richly warrants this Court's review.

CONCLUSION

By relying on the general correlation between race and poverty, the Fifth Circuit's decision provides a roadmap for invalidating many voting regulations that not only prevent voter fraud but also enhance confidence in the outcome of elections—a necessary condition of democratic government. In so doing, the decision below unconstitutionally turns Section 2 on its head, undermining the fundamental right of *all* citizens to organize and regulate their elections free from unauthorized micromanagement by unelected federal judges.

The petition should be granted.

Respectfully submitted,

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October 27, 2016

Appendix

APPENDIX: List of Amici

Senator John Coryn
Texas

Senator Ted Cruz
Texas

Senator David Vitter
Louisiana

Representative Joe Barton
Texas

Representative Kevin Brady
Texas

Representative Kevin Brady
Texas

Representative Michael C. Burgess, M.D.
Texas

Representative John Carter
Texas

Representative K. Michael Conaway
Texas

Representative John Culberson
Texas

Representative Blake Farenthold
Texas

Representative John Fleming, M.D.
Louisiana

Representative Bill Flores
Texas

Representative Louie Gohmert
Texas

Representative Kay Granger
Texas

Representative Garrett Graves
Louisiana

Representative Jeb Hensarling
Texas

Representative Will Hurd
Texas

Representative Ted Poe
Texas

Representative Sam Johnson
Texas

Representative John Ratcliffe
Texas

Representative Kenny Marchant
Texas

Representative Pete Sessions
Texas

Representative Michael McCaul
Texas

Representative Lamar Smith
Texas

Representative Randy Neugebauer
Texas

Representative Mac Thornberry
Texas

Representative Pete Olson
Texas

Representative Randy Weber
Texas

Representative Steven Palazzo
Mississippi

Representative Roger Williams
Texas