No. 12-35926

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK WANDERING MEDICINE, *et al.*,

Plaintiffs-Appellants

v.

LINDA McCULLOCH, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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INTEREST OF THE UNITED STATES

The United States has a direct interest in this appeal, which concerns the proper interpretation and application of Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973. Specifically, this appeal concerns whether a plaintiff alleging a vote denial or abridgement claim under the VRA based upon unequal access to voting opportunities must establish that a state voting practice results in the affected group being unable to elect candidates of its choice. The Department of

Justice is charged with enforcing the VRA, 42 U.S.C. 1973j(d), and therefore has a strong interest in how courts construe and apply the statute.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether a claim of unequal access to voting opportunities under Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973, always requires proof of plaintiffs' inability to elect candidates of their choice.

STATEMENT OF FACTS

1. Statutory Background

Section 2 of the Voting Rights Act prohibits voting procedures that deny or abridge the right to vote on account of race. 42 U.S.C. 1973. Paragraph (a) states, in pertinent part, that

> [n]o 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.

42 U.S.C. 1973(a). Under Paragraph (b), a plaintiff may establish a violation of this provision if,

> based on the totality of the 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) of this section 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.

42 U.S.C. 1973(b). Paragraph (b) goes on to state that "[t]he 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," but specifically states that its protections do not create "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b).

Claims brought under Section 2 are generally categorized as either "vote denial" or "vote dilution" claims, although Section 2's text makes no distinction between such claims. "Vote denial" includes claims alleging unequal access to voting opportunities, and often refers to practices or procedures that interfere with or impair the ability of would-be voters to register and cast a vote or have that vote counted.[1] *Farrakhan* v. *Gregoire*, 590 F.3d 989, 998 n.13 (9th Cir.) (*Farrakhan II*), rev'd on other grounds, 623 F.3d 990 (9th Cir. 2010) (en banc) (*Farrakhan III*); see also 42 U.S.C. 1973*l*(c). Historically, these types of claims challenged practices such as literacy tests, poll taxes, white primaries, and English-only ballots. *Ibid.* More recent claims have challenged a group's unequal access to

[1] For purposes of this brief, the United States will use the term "vote denial" to refer collectively to all claims which could result from either the outright denial of the right to vote, or merely its abridgement. Under this use, the term "vote denial" includes the type of claim brought by plaintiffs in this case.

voting practices and procedures, such as exclusionary candidate qualifications, *Arakaki* v. *Hawaii*, 314 F.3d 1091, 1096 (9th Cir. 2002), unequal access to voter-registration opportunities, see *Mississippi State Chapter Operation Push, Inc.* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991), and unequal access to polling places, see *Spirit Lake Tribe* v. *Benson County*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown* v. *Dean*, 555 F. Supp. 502 (D.R.I. 1982). See also *Jacksonville Coal. for Voter Prot.* v. *Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004) (unequal access to early voting sites); *Brown* v. *Post*, 279 F. Supp. 60 (W.D. La. 1968) (unequal access to absentee voting opportunities). "Vote dilution," in contrast, often results from at-large elections and similar practices that dilute the value of votes cast by minority voters in places where they are able to cast a ballot. *Farrakhan II*, 590 F.3d at 998 n.13; see also *Burton* v. *City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999) (explaining that vote dilution "occurs when an election practice results in the dilution of minority voting strength and, thus, impairs a minority's ability to elect the representative of its choice").

Section 2(a) explicitly establishes a "results" test, such that a plaintiff need not prove that a voting practice was adopted or maintained with discriminatory intent. As originally passed, Section 2 stated:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political

> subdivision to deny or abridge the right of any citizen of the United States to vote on account of race of color.

Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965). Lower courts had interpreted that provision to mean that plaintiffs did not have to show discriminatory intent, and could instead prove a vote dilution claim by establishing that, under the totality of the circumstances, a voting practice results in discrimination. See, *e.g.*, *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1304-1307 (5th Cir. 1973) (en banc), aff'd, *sub nom. East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636 (1976). In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), however, a plurality of the Supreme Court held that Section 2 required a plaintiff bringing a vote dilution challenge to an at-large election scheme to establish intentional discrimination. Congress responded in 1982 by amending Section 2 to restore the evidentiary standard developed in earlier vote dilution cases that did not require proof of discriminatory intent, and that instead focused on the totality of the circumstances operating in the given jurisdiction. See S. Rep. No. 417, 97th Cong., 2d Sess. 27-28 (1982) (Senate Report). The Senate Judiciary Committee (Senate Committee) explained that "[a]n examination of the vote dilution cases before *Bolden* reveals that *Bolden* was in fact a marked departure from prior law" (Senate Report 19), and that amending the statute to include a "results test" was "meant to restore the pre-[*Bolden*] legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote" (Senate Report 27). Thus, by adding the

language "in a manner which results" to Paragraph (a) and by adding Paragraph (b), Congress made it a violation to have a voting standard, practice, or procedure that results in the denial, on the basis of race, of equal access to any phase of the electoral process and deprives voters of an equal opportunity to elect a candidate of their choice, on the basis of race. *Id.* at 30; see also *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991).

In its report on the amendments, the Senate Committee identified several factors that may inform a court's evaluation of the totality of circumstances to determine whether a challenged practice or procedure denies minority voters the same opportunity to participate in the political process as other citizens. These "Senate Factors" were derived from the Fifth Circuit's en banc decision in *Zimmer*, interpreting Supreme Court precedent. Senate Report 28 n.113. They include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report 28-29. The Senate Committee identified two additional factors that may have probative value to a plaintiff's Section 2 claim:

> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group

and

> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29. The Senate Committee indicated that this list was non-exhaustive, and that no particular factor, number of factors, or any particular combination of factors need be proved to sustain a Section 2 claim. *Ibid.*

2. Factual Background

State law permits Montanans to cast an in-person ballot on election day, vote by mailing an absentee ballot before election day, or cast an in-person absentee ballot within 30 days of an election. "Late registration" permits would-be voters to

register to vote (or to update their registration) by appearing in-person at the county election office or any other location designated by the county election administrator. See Mont. Code Ann. § 13-2-304 (2012). "Early voting" permits registered voters to receive, mark, and submit an absentee ballot in-person at the county election office or any other location designated by the county election administrator as soon as absentee ballots become available, until noon on the day before the election. See Mont. Code Ann. §§ 13-13-205, -211, -222 (2012). Maintaining late registration and early voting sites permits Montanans both to register to vote and cast a ballot with a single visit to a designated site or, for those persons already registered to vote, to cast an in-person absentee ballot before election day.

Montana law permits a county to create satellite election offices so that late registration and early in-person absentee voting is offered at more than one location. Rosebud, Blaine, and Big Horn counties currently offer late registration and early in-person absentee voting only in each county's courthouse, located in the county seat. These three counties are each geographically large and sparsely populated. Each of these counties also has a substantial Native-American population, most of whom live on or near Indian reservations within those counties. The reservations are located a considerable distance from the county seat. For example, Lame Deer, the largest community and tribal headquarters of

the Northern Cheyenne, is located over 100 miles, round trip, from Rosebud's county seat (Forsyth). R. 4-1, Exh. 1.[2] Fort Belknap, the main community of the Fort Belknap Indian Reservation, is located 43 miles, round trip, from Blaine's county seat (Chinook). R. 4-1, Exh. 1. Crow Agency, the tribal headquarters and main city of the Crow Indian Reservation, is located over 27 miles, round trip, from Big Horn's county seat (Hardin). R. 4-1, Exh. 1.

3. District Court Proceedings

Plaintiffs are Native-American registered voters who live in Montana's Northern Cheyenne, Fort Belknap, and Crow Indian Reservations. They filed suit against Montana's Secretary of State and the commissioners and clerks/county recorders of Rosebud, Blaine, and Big Horn counties on October 10, 2012, alleging in part that the single late registration and early in-person absentee voting locations for each of the three counties violated Section 2 of the Voting Rights Act. See generally R. 1. Using information obtained from the Secretary of State's Office, plaintiffs asserted that participation in absentee voting opportunities by Native-American voters in the three counties is far below that of the State average. R. 1 at 13. Plaintiffs sought a preliminary injunction ordering defendants to open satellite election offices for late registration and early in-person absentee voting in Lame

[2] Citations to "R.__" refer to documents filed in the district court.

Deer, Fort Belknap, and Crow Agency for the 2012 general election, and all future elections. R. 1 at 39.

The United States filed a Statement of Interest supporting plaintiffs, arguing that the plaintiffs were likely to succeed on their Section 2 claim. R. 45. The statement included an analysis from an expert demographer showing that Native Americans in the three counties have to travel much greater distances than their white counterparts to access the late registration and early in-person absentee voting sites in their respective counties. R. 45-1 at 1. For example, the average round trip distance that Native-American voters living in Rosebud county must travel to access the single late registration and early in-person absentee voting site is over 89 miles; for white voters, it is under 34 miles. R. 45-1 at 9. For Native-American voters living in Blaine county, the average round trip distance is over 62 miles; for white voters, it is under 20 miles. R. 45-1 at 9. And for Native-American voters living in Big Horn county, the average round trip distance is over 44 miles; for white voters, it is under 24 miles. R. 45-1 at 9. The difference between the average distances Native-American voters must travel and the average distances white voters must travel to access the single late registration and early in-person absentee voting location in each county is statistically significant. R. 45-1 at 9.

The analysis also showed that the poverty rate among Native Americans is much greater than for white residents in each of the three counties, and Native Americans in the three counties are less likely to have access to motor vehicles than their white neighbors. R. 45-1 at 5-8. The expert report concluded that adding a single satellite office for late registration and early in-person absentee voting on the reservations in each of the three counties would significantly reduce the average distance Native-American *and* white voters would have to travel to access late registration and early in-person absentee voting sites, and would significantly decrease the disparities between Native-American and white voters in their access to late registration and early in-person absentee voting. R. 45-1 at 6, 9-11.

The district court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs were not likely to succeed on the merits of their Section 2 claim. R. 79. Specifically, the district court explained that Section 2 requires plaintiffs "to prove both unequal access *and* an inability to elect representatives of their choice[,]" and that the electoral success of numerous Native-American and Native-American-preferred candidates proved fatal to plaintiffs' case. R. 79 at 7. The district court observed that plaintiffs "did not argue or attempt to prove that the failure to have satellite election offices rendered them unable to elect

representatives of their choice," and that "[t]he United States also ignored this element in its statement supporting" plaintiffs. R. 79 at 7 n.2.

The district court also held that plaintiffs were required to prove causation by showing that the failure to have satellite late registration and early in-person absentee voting locations has a discriminatory impact on Native Americans. R. 79 at 7. It then identified six Senate Factors it considered relevant to plaintiffs' Section 2 claim: the extent of any history of racial discrimination in the state affecting the right to vote (Senate Factor 1); the extent to which the jurisdiction has used voting practices that may enhance the opportunity for discrimination against minority groups (Senate Factor 3); the extent to which members of the minority group in the jurisdiction bear the effects of discrimination (Senate Factor 5); a lack of responsiveness on the part of elected officials to the particularized needs of the minority group (Senate Factor 8); whether the policy underlying the challenged voting practice is tenuous (Senate Factor 9); and the extent to which members of the minority group have been elected to public office in the jurisdiction (Senate Factor 7). R. 79 at 8-9. The court held that it was "well-established that there has been a history of official discrimination in Montana that has touched the right of Native Americans to participate in the democratic process" (Senate Factor 1). R. 79 at 9 (footnote omitted). The court found that all three counties previously employed voting practices that enhanced the opportunity for discrimination against

Native Americans (Senate Factor 2), but that recent litigation had remedied that problem. R. 79 at 10. The court also held that "it was well-established * * * that poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots" (Senate Factor 5). R. 79 at 10-11. "Defendants," the court observed, "did not even attempt to argue otherwise." R. 79 at 11.

The court found no evidence of political unresponsiveness by defendants to plaintiffs' requests for satellite voting locations and concluded that defendants' reasons for denying the requests were based on practical concerns (Senate Factors 8 and 9). R. 79 at 11-12. Rather, the court observed that it was a late request by the plaintiffs for additional satellite voting locations that contributed to the denial of their requests. R. 79 at 11-12. Finally, "and most importantly," according to the district court, the court found that plaintiffs failed to prove "the explicit requirement" that the challenged voting practice results in plaintiffs' "inability to elect representatives of their choice" (Senate Factor 7). R. 79 at 12. The court concluded that testimony establishing that Native Americans were able to elect representatives of their choice "mandates a conclusion" that the plaintiffs were unlikely to succeed on the merits of their Section 2 claim. R. 79 at 12.

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN EVALUATING PLAINTIFFS' SECTION 2 VOTE DENIAL CLAIM

A. Plaintiffs Alleging Vote Denial Claims Need Not Establish An Inability To Elect Candidates Of Choice

The district court erred as a matter of law when it held that all plaintiffs bringing a Section 2 claim must establish an inability to elect candidates of their choice to succeed on their claim. R. 79 at 12. Such a requirement ignores the differences between "vote denial" cases on the one hand, and "vote dilution" cases on other. This Court has never required Section 2 plaintiffs bringing a vote denial claim to prove an inability to elect candidates of their choice; rather, this Court has recognized that the specific circumstances relevant to a court's Section 2 inquiry depends on the type of Section 2 violation alleged and the type of voting practice that is challenged. Moreover, by requiring that plaintiffs bringing a vote denial claim establish an inability to elect candidates of their choice (R. 79 at 12), the district court has unnecessarily and erroneously divided 42 U.S.C. 1973(b) into two, independent requirements for establishing a vote denial claim, rather than giving the statutory text its natural and logical meaning.

1. The District Court's Reasoning Ignores The Qualitative Differences Between "Vote Dilution" And "Vote Denial" Claims

The district court's reasoning fails to appreciate the obvious differences between "vote dilution" and "vote denial" claims brought under Section 2.

Plaintiffs bringing vote dilution claims allege that a particular voting scheme, such as at-large elections, "operate[s] to minimize or cancel out the voting strength of racial [minorities in] the voting population" who are placed among a numerical majority of white voters. *Thornburg* v. *Gingles*, 478 U.S. 30, 47-48 & n.13 (1986) (citation omitted). The essence of a vote dilution claim, therefore, is that, even though members of a protected population are able to cast ballots without interference, the strength of those votes is diluted by the challenged voting practice. *Id.* at 45. Vote dilution claims focus on the aggregate strength of the votes cast by minority voters, and, thus, a critical factor for courts to consider in adjudicating such claims is whether minority-preferred candidates have been elected to office under the challenged electoral practice.

Plaintiffs bringing vote denial claims, on the other hand, do not allege that their cast ballots have less value or force than those cast by white voters. Rather, plaintiffs bringing vote denial claims allege that their equal opportunity to participate in the political process has been denied or abridged *in the first instance*. See, *e.g.*, *Farrakhan* v. *Gregoire*, 590 F.3d 989, 1006 (9th Cir.) (*Farrakhan II*) ("Whereas vote dilution claims implicate the value of aggregation, vote denial claims implicate the value of participation.") (citation and internal quotation marks omitted), rev'd on other grounds, 623 F.3d 990 (9th Cir. 2010) (en banc) (*Farrakhan III*); cf. *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971) (noting in a

Section 5 case that "[t]he accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise"). Of course, the inability to elect candidates of choice may result from an electoral practice that denies or abridges an equal opportunity to cast a ballot, but it cannot be dispositive of, nor is it necessary to (much less an "explicit requirement" of (R. 79 at 12)), a vote denial claim. The harm from an electoral practice that denies or abridges the equal opportunity to cast a ballot is the loss *of the franchise itself*, not the dilution of the votes cast in an election. Thus, even in situations where minority-preferred candidates are elected, the presence of electoral practices that deny or abridge the franchise for members of a protected class may still violate Section 2. This is because each individual would-be voter whose equal opportunity to cast a ballot is denied or abridged on the basis of race is consequently a victim of a discriminatory voting practice.

This Court agrees. In *Gonzalez* v. *Arizona*, 677 F.3d 382, 405-406 (9th Cir.), cert. granted, *sub nom*. *Arizona* v. *The Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 476 (2012) (No. 12-71),[3] this Court, sitting en banc, considered a

[3] The issue in the present case is unrelated to the issue under consideration by the Supreme Court: "Did the court of appeals err 1) in creating a new, heightened preemption test under Article 1, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the (continued…)

Section 2 vote dilution and vote denial challenge to a requirement that all voters present a particular form of identification before casting a ballot. In considering plaintiffs' particular claim, this Court identified the only Senate Factors that were "[r]elevant here" as the history of official discrimination against minorities with respect to voting (Senate Factor 1), the extent of racially polarized voting (Senate Factor 2),[4] and the extent to which members of the minority group bear the effects of discrimination (Senate Factor 5). *Gonzalez*, 677 F.3d at 405-406. This Court did not identify the inability of minority voters to elect candidates of choice as a relevant factor in the case, much less an explicitly required one.

In *Farrakhan II*, this Court considered a challenge to Washington's felon disenfranchisement law.[5] The district court had granted the State's motion for

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(…continued)
National Voter Registration Act preempts Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote."

[4] This particular Senate Factor would be most relevant to the *Gonzalez* plaintiffs' vote dilution claim, not its vote denial claim.

[5] This Court, sitting en banc, ultimately held that plaintiffs could not challenge voter disenfranchisement laws through Section 2 of the VRA unless they could "show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent." *Farrakhan III*, 623 F.3d at 993. This Court limited its ruling, however, "to this narrow issue," and expressed "no view as to any of the other issues" presented. *Ibid.* Thus, the panel's approach to vote denial claims in *Farrakhan II* should remain relevant and applicable to vote denial claims challenging other electoral practices.

summary judgment after concluding that the totality of circumstances did not support a finding that the felon disenfranchisement law resulted in discrimination on account of race. The district court based its conclusion on the fact that plaintiffs had not presented substantial evidence with respect to some of the Senate Factors. This Court reversed, and criticized the district court for "requiring [plaintiffs] to prove Factors that had little if any relevance to their particular vote denial claim." *Farrakhan II*, 590 F.3d at 1004. This Court explained that the district court must consider the totality of circumstances in any Section 2 case, but noted that "not all of the Senate Factors were equally relevant, or even necessary, to that analysis." *Ibid.*; see also *id.* at 1005 (explaining that the enumerated factors are "particularly [pertinent] to vote dilution claims, * * * and, it follows, not as pertinent, generally, in vote denial cases") (citation and internal quotation marks omitted); see also *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988) ("While the basic 'totality of the circumstances' test remains the same, the range of factors that [are] relevant in any given case will vary depending upon the nature of the claim and the facts of the case."), cert. denied, 489 U.S. 1080 (1989).

In particular, this Court explained that the "factors that examine the political strength of minority voters in the jurisdiction are of lesser relevance" in vote denial claims. *Farrakhan II*, 590 F.3d at 1006. Citing the obvious differences between vote denial claims on the one hand, and vote dilution claims on the other, this

Court explained that Senate Factor 7 (*i.e.*, the extent to which members of the minority group have been elected to public office in the jurisdiction)

> simply has no bearing on the question whether minorities are being denied the right to vote 'on account of race.' Even if a majority of elected officials in the jurisdiction were members of the minority group, it would still violate [Section] 2 to deny minority citizens the right to vote on discriminatory grounds. The fact that minority candidates have had success in the state does not cure the discriminatory denial of the franchise to minority voters.

Farrakhan II, 590 F.3d at 1006. This Court came to a similar conclusion with respect to Senate Factor 8 (*i.e.*, whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group). *Id.* at 1006-1007.

Here, the district court's application of Section 2's results test cannot be reconciled with this Court's decisions in *Gonzalez* and *Farrakhan II*. Rather than focus on the totality of the circumstances that are relevant to "the nature of the claim and the facts of the case," *Farrakhan II*, 590 F.3d at 1005 (citation omitted), the district court considered numerous factors that this Court has previously identified as irrelevant in similar vote denial claims. Even more problematic, the district court concluded that one of these irrelevant factors – a showing that the challenged practice results in minority voters' inability to elect candidates of choice – was, in fact, an "explicit requirement" of a successful Section 2 claim. R. 79 at 12. Doing so was directly contrary to this Court's case law.

2. The District Court's Reasoning Conflicts With Section 2's Natural And Logical Meaning

The district court's reasoning unnecessarily and erroneously divides 42 U.S.C. 1973(b) into two, independent requirements for establishing a claim under the Voting Rights Act, rather than giving the statutory text its natural and logical meaning. In effect, the district court held that plaintiffs bringing a vote denial claim must prove that members of their class have less opportunity than other members of the electorate: (1) to participate in the political process, and (2) then *separately* demonstrate an inability to elect representatives of their choice. This was error.

Amended Section 2(b)'s explicit reference to electing candidates is a natural result of the context in which the statute developed. Congress amended Section 2 in response to the Supreme Court's decision in a vote *dilution* case, and was intent on restoring the evidentiary standard for dilution claims that existed before that decision. See *Farrakhan II*, 590 F.3d at 998 (noting that "the debate surrounding the [1982] amendment focused almost exclusively on vote dilution"); see also Senate Report 19 (noting that "[a]n examination of the *vote dilution cases* before [*City of Mobile* v. *Bolden*, 446 U.S. 55 (1980),] reveals that *Bolden* was in fact a marked departure from prior law") (emphasis added); see also Senate Report 19-24 (examining the evidentiary standard in numerous vote dilution cases prior to *Bolden*). Moreover, the Senate Committee explained that the amended statute was

"meant to restore the pre-[*Bolden*] legal standard which governed cases challenging election systems or practices as an illegal *dilution of the minority vote*." Senate Report 27 (emphasis added). In a dilution case, the diminished "opportunity * * * to participate in the political process" is the dilution of the value of the minority voters' ballots, which results in a diminished opportunity "to elect candidates of their choice." 42 U.S.C. 1973(b). Given Congress's focus on vote dilution cases when it amended the statute, Section 2's explicit reference to minority members' opportunity to elect candidates of their choice is a predictable, and unremarkable, reflection of that context. Nothing in the statute's legislative history, however, suggests that Congress intended to *narrow* Section 2's application to just vote dilution claims. On the contrary, the amendments were designed to "broaden the protection afforded by the Voting Rights Act." *Chisom* v. *Roemer*, 501 U.S. 380, 404 (1991). Amended Section 2 thus retained protections for vote denial claims, while restoring the pre-*Bolden* standard that applied to vote dilution claims.

Moreover, proving an inability to elect candidates of choice is not even an "explicit requirement" (R. 79 at 12) for vote *dilution* claims. While that proof may certainly be probative of a Section 2 violation in the majority of vote dilution claims, the Senate Committee recognized that a failure to provide such proof would not be fatal to a Section 2 claim. Senate Report 29 n.115. The Senate

Committee explained that "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote, in violation of the Section." *Ibid.* (internal quotation marks and citation omitted). If that were the case, the Senate Committee noted, then "the possibility exists that the majority citizens might evade" violation of the statute "by manipulating the election of a 'safe' minority candidate." *Ibid.* If courts were to interpret the statute to equate a minority group's equal access to the political process with any successful election of a minority candidate, then courts "would merely be inviting attempts to circumvent the Constitution." *Ibid.* (citation omitted). Thus, when evaluating any Section 2 claim, the Senate Committee urged courts to make "an independent consideration of the record," rather than focus on any particular factor – such as inability to elect candidates of choice. *Ibid.* (citation omitted). The Supreme Court agrees. See *Gingles*, 478 U.S. at 75 ("[T]he language of [Section] 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a [Section] 2 claim.").

The more appropriate reading of the statute recognizes that the language "to participate in the political process and elect representatives of their choice" is a single phrase adopted from the vote dilution cases, but one which readily applies to vote denial claims when those claims are viewed in their proper context. When applied to vote denial claims, the single phrase is most naturally understood to

emphasize the showing of less opportunity for minority voters to participate in the political process than other members of the electorate because their opportunity to register or to cast a ballot is denied, impaired, or diminished (on account of race or color). But, by establishing that minority voters have less opportunity to participate in the political process itself, those voters also necessarily establish that they have less opportunity, as individual voters, "to elect representatives of their choice." 42 U.S.C. 1973(b). As the Supreme Court explained, "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397. The fact that other members of the protected class have access to the political process and success in electing representatives of their choice (or even that minority-preferred candidates are also preferred and elected by non-minority members of the electorate), cannot invalidate a vote denial claim brought by other members of that protected class who are denied equal access to the political process itself. *Farrakhan II*, 590 F.3d at 1006. For example, a policy of appointing only white poll workers violates Section 2 irrespective of its impact on election outcomes. *Harris* v. *Siegelman*, 695 F. Supp. 517, 528-529 (M.D. Ala. 1988).

Section 2 is intended to identify challenged electoral practices that "result[] in minorities being denied equal access to the *political process*" generally. Senate

Report 27 ("The Operation of Amended Section 2") (emphasis added); see also *id.* at 28 ("Section 2 protects the right of minority voters to be free from election practices, procedures, or methods, that deny them the same opportunity to participate in the *political process* as other citizens enjoy.") (emphasis added). This determination is to be made by considering a range of objective factors, made relevant by "the kind of rule, practice, or procedure called into question," rather than dependence upon a single factor. *Id.* at 28. Congress ultimately identified "the extent to which members of a protected class have been elected to office in the State or political subdivision" as "*one circumstance* which *may* be considered" when evaluating an alleged violation. 42 U.S.C. 1973(b) (emphasis added). The Senate Committee identified other relevant factors to consider, of course, and both the Senate Committee and the Supreme Court made clear that the list "is neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45; see also Senate Report 29. The Court, in fact, explained that although "the enumerated factors will often be pertinent to certain types of [Section] 2 violations, *particularly to vote dilution claims*, other factors may also be relevant and may be considered." *Gingles*, 478 U.S. at 45 (footnote omitted; emphasis added); see *Farrakhan II*, 590 F.3d at 1004 ("[T]he district court erred in requiring [plaintiffs] to prove Factors that had little if any relevance to their particular vote denial claim."); *Gonzalez*, 677 F.3d at 405-406. "The question whether the political processes are 'equally open,'" the

Supreme Court recognized, "depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." *Gingles*, 478 U.S. at 45 (quoting Senate Report 30 & n.120). The district court's insistence that Section 2 plaintiffs who bring a vote denial claim establish an inability to elect candidates of their choice ignores the "functional" aspects of vote denial claims, and conflicts with the natural meaning of the statute, Congress's intent, this Court's prior case law, and the Supreme Court's reasoning.

B. District Courts Evaluating Vote Denial Claims Must Consider Those Circumstances And Facts Relevant To The Type Of Claim Brought

Plaintiffs who bring a Section 2 claim must establish that a challenged practice or procedure "results" in discrimination "on account of race or color." 42 U.S.C. 1973(a). Whether a plaintiff asserts a "vote denial" or "vote dilution" claim, that determination is made by considering the totality of circumstances operating in the jurisdiction. *Smith* v. *Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997); *Gonzalez*, 677 F.3d at 405 n.32. As explained above, however, the circumstances relevant to the Section 2 analysis often depend on the type of claim brought and the evidence presented in support of that claim.

It is clear from this Court's previous decisions that a plaintiff alleging a violation of Section 2 based on vote denial must show a causal relationship between the challenged voting practice and the alleged discriminatory result. *Salt*

River, 109 F.3d at 595; *Gonzalez*, 677 F.3d at 405. In *Gonzalez*, this Court explained that a 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." 677 F.3d at 405 (internal quotation marks and citation omitted); see also *Salt River*, 109 F.3d at 595 (holding in a vote denial case that a "bare statistical showing of disproportionate impact on a racial minority does not satisfy the Section 2 results inquiry"). Relying on *Salt River*, this Court held in *Gonzalez* that a plaintiff must instead show a "causal connection between the challenged voting practice and a prohibited discriminatory result." *Gonzalez*, 677 F.3d at 405 (citation omitted). Applying this test, this Court held that, on the record before it, the plaintiffs in *Gonzalez* failed to establish that the requirement to provide identification at polling place locations caused a prohibited discriminatory result. Specifically, this Court noted that the plaintiffs alleged that Latinos were less likely to possess the necessary identification, but produced no evidence to support the allegation. *Id.* at 407. This Court also recognized evidence of general discrimination in Arizona against Latinos and the existence of racially polarized voting, but noted that plaintiffs produced "no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes * * * resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice."

Ibid. Thus, on the record presented, this Court upheld the district court's finding that plaintiffs failed to prove causation as not clearly erroneous. *Ibid.*

Plaintiffs in a vote denial case like the one here, then, must show there is a causal connection between the challenged voting practice (*i.e.*, the limited locations for late registration and early in-person absentee voting) and a prohibited discriminatory result (*i.e.*, unequal access to late registration and early in-person absentee voting on the basis of race). *Gonzalez*, 677 F.3d at 405-406. Here, the district court recognized that a Section 2 plaintiff must establish causation, but failed to perform a causation analysis that was focused on appropriate and relevant factors. R. 79 at 7.

Plaintiffs live on three reservations. These reservations are located a considerable distance from the single late registration and early in-person absentee voting site in plaintiffs' respective counties. The discriminatory impact of the challenged voting practice was uncontested in this case. The statistical evidence showed a significant disparity between the distance Native-American voters and non-minority voters must travel to reach the late registration and early in-person absentee voting locations. See R. 79 at 2 ("It is undisputed that [] Native Americans living on the three Indian Reservations face greater hardships to in-person absentee voting than residents of the three counties who do not live on the reservations."). Moreover, the evidence here showed that Native Americans are

less likely to be able to overcome the impact of the voting practice. Many Native Americans in those counties lack the resources necessary to travel long distances, thus making it more difficult for Native-American voters to participate in late registration and early in-person absentee voting than non-minority voters. The district court credited this evidence, finding that the history of official discrimination against Native Americans in Montana was "well-established" (R. 79 at 9), as was the fact that "poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots" (R. 79 at 10-11). Indeed, the district court noted that "[d]efendants did not even attempt to argue otherwise." R. 79 at 11. The district court should have considered whether these circumstances supported plaintiffs' allegation that the challenged voting practice caused a prohibited discriminatory result, in that it resulted in Native-American voters living in the three counties having less opportunity than white voters to participate in the political process. *Gonzalez*, 677 F.3d at 405-406 (identifying Senate Factors 1 and 5 as relevant circumstances to consider in a vote denial case).

The district court's focus on non-relevant factors in its analysis was error. In particular, the district court considered defendants' responsiveness to the plaintiffs' requests for additional satellite voting locations and their policy reasons for denying the requests. R. 79 at 11-12. It did so, however, in the context of

plaintiffs' timing in making their requests for additional locations. R. 79 at 11-12. The timing of plaintiffs' requests, and its bearing on defendants' ability to comply with such requests, may relate to *some* of the factors a court must consider when deciding whether to grant a preliminary injunction (*e.g.*, balancing the equities). But it is less relevant, if at all, to whether the absence of accessible late registration and early in-person absentee voting locations for Native-American voters violates Section 2 of the Voting Rights Act. Most importantly, however, the district court erred in its Section 2 analysis by reasoning that plaintiffs' ability to elect candidates of choice – a factor which has no relevance to plaintiffs' particular vote denial claim – "mandate[d] a conclusion that Plaintiffs [were] not likely to succeed on the merits of their [Section] 2 VRA claim." R. 79 at 12.

CONCLUSION

For the reasons stated, this Court should hold that the district court applied an incorrect legal standard when evaluating plaintiffs' Section 2 vote denial claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6950 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/Angela M. Miller
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Dated: March 26, 2013

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS with the Clerk of the Court using the appellate CM/ECF system on March 26, 2013.

I certify that all participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that counsel of record identified below will receive the foregoing brief by first class U.S. mail, postage prepaid, which was posted on March 26, 2013:

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