Nos. 19-1257 and 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.

ARIZONA REPUBLICAN PARTY, ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

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

BRIEF FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The National Association for the Advancement of Colored People ("NAACP") is a non-profit organization founded on the goal of achieving an equitable society for communities of color. Throughout its 111-year existence, one of the NAACP's core missions has been to protect minorities' right to vote.

For nearly sixty years, the Lawyers' Committee for Civil Rights Under Law has fought for the civil rights of all Americans. The Committee began at the behest of President John F. Kennedy, who sought to enlist private attorneys in the battle for civil rights. Since that time, the Committee has represented litigants in voting rights cases throughout the nation, including in cases before this Court, such as *Shelby County v. Holder*, 570 U.S. 529 (2013). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, such as *Thornburg v. Gingles*, 478 U.S. 30 (1986), a decision critical to this case.

The NAACP and the Lawyers' Committee have an interest in this case because it raises important voting rights issues central to their missions.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission. The parties have consented in writing to the filing of this brief through blanket consent letters.

INTRODUCTION

For over fifty years, Section 2 of the Voting Rights Act has stood as a bulwark against racial discrimination in voting. Since this Court's decision in *Shelby County v. Holder*, Section 2 has become even more indispensable, as the primary line of defense against both overt and subtle racial discrimination in voting. The decision below held the line and applied an oft-used test to identify and stamp out such discrimination, but Petitioners' novel approach would eviscerate the protections that Section 2 has long provided for minority voters.

The Act, and the Act's 1982 amendments, have ensured those protections would stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens' right to vote. Consistent with the text and purpose of the Act as amended, this Court and several of the Circuit Courts of Appeal have adopted a standard to ensure the effective implementation of those protections. That standard recognizes that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly. The standard also recognizes that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in pernicious discrimination.

Under this standard, Section 2 has worked for decades as a judicially manageable mechanism to stop

voting discrimination. There has been no flood of questionable Section 2 vote denial cases, and no widespread invalidation of voting regulations. Indeed, this case marks the first time since the 1982 amendments to the Act that this Court will review a pure vote-denial claim. The reason is clear: the lower courts have taken seriously this Court's guidance, and carefully assessed the effects of challenged voting policies or procedures within each specific jurisdiction, based on the totality of the circumstances.

Petitioners seek to upend this settled precedent by invoking a parade of purported constitutional horribles that they insist can be avoided only by narrowly construing the Act. But these conjured fears have no basis in the history of the Act or its application. Section 2 is a legitimate exercise of Congress's power under the Fifteenth Amendment, which allows Congress to use "any rational means" to prevent racial discrimination in voting and further allows Congress to restrict state action without violating the Tenth Amendment. Nor is equal protection offended simply because Section 2 empowers courts to evaluate whether voting laws have outsized impacts on racial minorities.

The constructions urged by Petitioners would all but extinguish the Act. Private Petitioners contend that Section 2 applies principally to voter "qualification" laws, but this would prevent the Act from covering the very types of voting laws that inspired the Act's passage and the 1982 amendments, including laws that locate voting precincts far from minority voters, or curtail registration drives for

voters in areas where minorities are largely unregistered. And State Petitioners' approach would abrogate the Act's—and this Court's—command to consider the "totality of circumstances" and thus prevent courts from evaluating how voting laws interact with the real world in which they operate.

That is not what Congress intended. There is no cause to abandon the established standard, or to bless the subtle but odious and persistent discrimination that thwarts the goals of the Framers of the Fifteenth Amendment and the Congress that passed the Act.

SUMMARY OF ARGUMENT

Racial discrimination in voting diminishes our democracy. The Voting Rights Act of 1965 (the "Act" or the "VRA"), and particularly Section 2, have been indispensable tools in the fight against such discrimination. Nevertheless, Petitioners seek to severely narrow Section 2's reach and utility, claiming that doing so is necessary to avoid constitutional issues. There are, however, no legitimate constitutional issues to be avoided. The VRA, as a vehicle for implementing the substantive guarantees of the Fifteenth Amendment, is subject to rational basis review, not "congruence and proportionality." Plus, Petitioners' arguments concerning purported federalism and equal protection concerns lack merit. Petitioners ignore that the Fifteenth Amendment specifically authorizes the federal government to restrict state action and further ignore that this Court has long held that the VRA's targeted consideration of race does not itself run afoul of equal protection

principles. This Court should adhere to its long-held position that the VRA must be interpreted broadly in order to fulfill the Act's constitutional mandate.

The fundamental standard governing establishment of a Section 2 vote-denial "results" claim has been settled for decades since this Court's decision in *Thornburg v. Gingles*. That standard has been applied in recent years by four Circuit Courts of Appeal and has worked exceedingly well. The test calls for proof of discriminatory impact and, consistent with the express wording of the statute, evaluation of the "totality of circumstances," which requires consideration of how the challenged practice interacts with pre-existing social and historical conditions of racial discrimination so as to result in a denial or abridgement of the right to vote.

Contrary to Petitioners' arguments, Section 2 cannot be construed as prohibiting only restrictions on voting "qualifications" while giving a free pass to any regulation that could be labeled a "time, place, or manner" requirement. The statute's plain language—particularly the broad statutory definition of the word "voting" and the inclusion of "practices" and "procedures" in the 1982 amendments—preclude that constrained construction. Moreover, exempting time, place, or manner requirements from Section 2's reach would defeat the VRA's purpose of capturing complex and subtle practices which, to this day, perpetuate the results of past discrimination.

State Petitioners' contention that a voting practice violates Section 2 only if it impacts enough voters to

influence an election's outcome also lacks any statutory basis. The plain language of Section 2(b) focuses on the loss of "opportunity" to participate in the political process and elect representatives of choice, not the election's outcome. Further, Section 2's legislative history and amendment show that the law was intended to prohibit vote-denial and abridgement techniques that make it harder for members of protected classes to vote, without reference to whether their participation would affect the outcome of any given election.

Petitioners are also wrong in claiming that the Senate Factors, set forth in the Senate Report that accompanied the 1982 amendments, are somehow inapplicable to Section 2 vote denial claims. *Gingles* made clear that the Senate Factors are probative to the "totality of [the] circumstances" of vote-denial cases, just as they are to vote dilution cases.

Petitioners further contend, without basis, that courts should consider *only* the impact that the challenged law itself, in isolation, has on members of protected classes—and should *not* consider how the challenged regulation interacts with social and historical conditions of racial discrimination. That argument, however, ignores Section 2's text, which demands a consideration of the "totality of circumstances" to determine whether a voting practice results in unequal opportunities; disregards the Senate Report that instructs courts to consider the extent to which members of a minority group bear the effects of discrimination; and flouts this Court's precedents, which have concluded that the "essence" of

a Section 2 claim is that a certain electoral law "interacts with social and historical conditions to cause an inequality." *Gingles*, 478 U.S. at 47.

Considering the interaction between the challenged practice and historical discrimination furthers Section 2's goals in at least two primary ways. First, it ensures a flexible application in which the challenged law is examined in the context of local conditions. Second, it guards against potential overreach because benign voting practices are, in this analysis, upheld. By contrast, adopting Petitioners' approach would insulate from meaningful review even the most egregious voting restrictions.

The Ninth Circuit's analysis of the voting practices at issue in this case is consistent with Section 2 and this Court's precedent and its judgment should be affirmed.[2]

ARGUMENT

I. SECTION 2 POSES NO CONSTITUTIONAL ISSUES.

"The Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history. Its simple and direct legal prohibition of racial discrimination in voting laws and

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[2] Because the parties agree that *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) governs claims of discriminatory intent, *Amici* do not address the Ninth Circuit's ruling on intent.

practices has dramatically improved the Nation, and brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments to the Constitution." *South Carolina v. United States*, 898 F. Supp. 2d 30, 32–33 (D.D.C. 2012) (Kavanaugh, J.). Despite this recognition that the VRA's "simple and direct prohibition" is an established, legitimate means of fulfilling the promises of the Fourteenth and Fifteenth Amendments, Petitioners contend that, in order to avoid constitutional issues, Section 2 must be construed narrowly. There are, however, no legitimate constitutional issues to be avoided. To the contrary, this Court should adhere to its long-held position that the VRA must "be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination," in order to fulfill its constitutional mandate. *Chisom v. Roemer*, 501 U.S. 380, 403–04 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

A. Section 2 Must Be Broadly Construed in Order to Combat Pernicious Discrimination.

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the "insidious and pervasive evil" of "racial discrimination in voting," which had been "perpetuated . . . through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966). Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted "contrivances by a state to thwart equality in the enjoyment of the right

to vote" and "nullifie[d] sophisticated as well as simple-minded modes of discrimination[,]" *Lane v. Wilson*, 307 U.S. 268, 275 (1939), prior to the VRA's passage, this language proved largely aspirational. *See*, *e.g.*, *Katzenbach*, 383 U.S. at 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).

Responding to the states' tenacious "ability . . . to stay one step ahead of federal law," Congress passed the VRA to provide a "new weapon[] against discrimination." Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 524–25, 550 (1973) (hereinafter "*Right to Vote*"). The Act "reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting." *Katzenbach*, 383 U.S. at 315. The essence of the VRA's protections was exemplified in Section 2, which provided: "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 or color." Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

Notwithstanding Section 2's broad language, jurisdictions sought to evade its reach by placing "heavy emphasis on facially neutral techniques." *Right to Vote*, *supra*, at 552. These "techniques" included everything from "setting elections at inconvenient times" to "causing . . . election day irregularities" to "moving polling places or establishing them in inconvenient . . . locations." *Id.* at

557–58. In one Mississippi county, voters were forced to "travel 100 miles roundtrip to register to vote." Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 Ford. L. Rev. 93, 93 (1983). In one Alabama county, "the only registration office in the county [was] closed weekends, evenings and lunch hours." *Id.* at 93–94. These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they "particularly handicap[ped] minorities." *Id.* at 96.

Against this backdrop, and responding to this Court's plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a "discriminatory purpose" element, 446 U.S. 55, 62 (1980), Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (emphasis added). Congress further specified that, under Section 2, a voting "standard," "practice," or "procedure" is invalid if it "results" in racial minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* By adopting this "results test," Congress captured the "complex and subtle" practices which "may seem part of the everyday rough-and-tumble of American politics" but are "clearly the latest

in a direct line of repeated efforts to perpetuate the results of past voting discrimination." S. Rep. No. 97-417, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 ("Senate Report").

The congressional record accompanying the 1982 amendments is replete with examples of the discriminatory practices that concerned Congress. The House Judiciary Committee noted that counties in Virginia and Texas had instituted "inconvenient location[s] and hours of registration" and other restrictive practices that acted as "continued barriers" to racial minorities. H.R. Rep. No. 97-227, at 14, 17 (1981) ("House Report"). The Senate Judiciary Committee similarly identified states' "efforts to bar minority participation" through "registration requirements and purging of voters, changing the location of polling places[,] and insistence on retaining inconvenient voting and registration hours." Senate Report at 10 n.22. For example, a Georgia county "adopted a policy that it would no longer approve community groups' requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites." *Id.* at 11.

Although this history led to the broad statutory language of Section 2, Petitioners insist that Section 2 must be construed narrowly (*i.e.*, with eyes closed to the interaction between the challenged law and relevant circumstances on the ground) to avoid various constitutional issues. Such manufactured concerns, however, "cannot justify a judicially created limitation on the coverage of the broadly worded

statute, as enacted and amended by Congress." *Chisom*, 501 U.S. at 403.

B. Section 2 Raises No "Congruence and Proportionality" Concerns; the Rational Basis Test Applies.

Petitioners contend that Section 2 must be interpreted narrowly so that it would survive a theoretical future challenge under the "congruence and proportionality" test articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Private Pet. Br. 39–40; State Pet. Br. 26–27. This test, however, applies only to legislation enacted to enforce the capacious guarantees of the Fourteenth Amendment, not laws implementing the more targeted guarantees of the Fifteenth Amendment.

For over one hundred years after the Civil War, this Court allowed Congress to use any "rational means" to enforce the substantive guarantees of both the Fourteenth and Fifteenth Amendments. This deference reflected the broad language of the Amendments' Enforcement Clauses, which authorize Congress to enforce the Amendments with "appropriate" legislation. U.S. Const. Amend. XIV, § 5; *id.* XV, § 2. When examining this language for the first time, the Court observed that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879). Then, in *South Carolina v.*

Katzenbach, the Court applied this principle to uphold the VRA as a legitimate exercise of Congress's Fifteenth Amendment enforcement power, explaining that "Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 324 (emphasis added). Three months later, the Court applied the same logic to the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966).

The Court subsequently decided that a further limitation was necessary to guide Congress's *Fourteenth Amendment* enforcement power because the Fourteenth Amendment broadly guarantees the right to "life, liberty, or property," U.S. Const. Amend. XIV, § 1, and unfettered discretion to enforce this guarantee would allow Congress to "displace[] laws and prohibit[] official actions of almost every description and regardless of subject matter." *Boerne*, 521 U.S. at 532. Accordingly, the *Boerne* Court determined that Fourteenth Amendment legislation must have a "proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

By contrast, because the *Fifteenth* Amendment focuses exclusively on racial discrimination in voting, the Court has not found it necessary to impose a similar limitation on Congress's Fifteenth Amendment enforcement power. From *South Carolina v. Katzenbach* forward, each of the Court's Fifteenth Amendment cases has used the same standard to recognize Congress's broad power in this realm. *See*, *e.g.*, *City of Rome v. United States*, 446 U.S. 156, 172,

175 (1980) (holding that "Congress' authority under § 2 of the Fifteenth Amendment" is "no less broad than its authority under the Necessary and Proper Clause" and that "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect"); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–83 (1999) (holding that Congress can enforce the Fifteenth Amendment with legislation that "deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional" (quoting *Boerne*, 521 U.S. at 518)); *Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting) (noting the "expansive" construction given the enforcement clauses with respect to measures directed against "*racial discrimination*") (emphasis in original). Indeed, even when the Court *struck down* Section 5 of the VRA, it did so because it found that Section 5 was "irrational." *Shelby Cnty.*, 570 U.S. at 556.

Because any challenge to Section 2 would be reviewed under a broad, deferential standard, Petitioners' purported concern for the Act's constitutional preservation is misplaced.

C. Section 2 Raises No Federalism Concerns.

Petitioners also contend Section 2 must be construed narrowly to avoid interfering with states' authority to regulate their elections. But this argument does not account for Congress's power under the Fifteenth Amendment to enact legislation "restrictive of what the State[s] might have done

before the constitutional amendment was adopted." *Ex parte Virginia*, 100 U.S. at 346.

Petitioners rely on cases regarding the "right to vote," a right implied by the First and Fourteenth Amendments. *See Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Because plaintiffs can invoke this right to challenge *all* laws that burden voting, the Court has employed the *Anderson/Burdick* test, which allows states to justify burdensome laws by showing that such laws serve important interests. By contrast, the Fifteenth Amendment—and by extension Section 2—deal only with laws that burden voting in a racially discriminatory way. As such, the range of laws that can possibly be challenged under Section 2 is much narrower and similar deference to states' prerogatives is less warranted. And because the Fifteenth Amendment's express goal was to target "contrivances by a state to thwart equality in the enjoyment of the right to vote," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), an appropriate means of enforcement is to authorize federal courts adjudicating claims of racial discrimination in federal elections to thoroughly scrutinize such "contrivances," even if they are otherwise within the states' authority to set the "Times, Places and Manner" of elections under Article 1, Section 4.

Moreover, the Court has held that the Enforcement Power allows Congress to abrogate the powers and protections granted to states by earlier-enacted Constitutional provisions. *See*, *e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448, 454–56 (1976)

(holding that Congress may abrogate the immunity granted by the Eleventh Amendment). Accordingly, even if the "Times, Places and Manner" clause could ordinarily protect racially discriminatory state election laws from close judicial scrutiny, the Fifteenth Amendment allows Congress to abrogate that protection.

D. Section 2 Raises No Equal Protection Concerns.

Petitioners also contend a narrow interpretation of the VRA is necessary to avoid violating the Equal Protection Clause. Private Pet. Br. 41–42; State Pet. Br. 26–27. But because the VRA "demands" some consideration of race, the Court has long "assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).

Plus, legislatures can consider social and political realities without allowing race to "predominat[e]" their decision-making. *See Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). For example, if a legislature believes a voter-ID law is necessary to prevent voter fraud, it can both pursue that primary goal and provide accommodations that ease the law's burden on minority voters. *See*, *e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016) (upholding voter-ID law that allowed all eligible voters to obtain free IDs without "any independent documentation").

Voting, moreover, "is a nonmarket, nonrivalrous good: one with no price and no limit to who may enjoy it." Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1571 (2019). Accordingly, state action that uses race to invalidate discriminatory voting burdens is not constitutionally problematic under an equal protection theory because it does "not visit negative consequences on any racial group"—indeed, the "right to vote can be extended to countless individuals without denying others access to that right." Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579, 611 (2013).

II. THERE IS NO REASON TO DISTURB A VOTE-DENIAL STANDARD THAT HAS BEEN ADOPTED BY FOUR CIRCUITS, ADHERES TO THIS COURT'S PRECEDENT, AND HAS BEEN SMOOTHLY FUNCTIONING FOR DECADES.

Section 2(a) of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "*results in* a denial or abridgment . . . to vote on account of race." 52 U.S.C. § 10301(a) (emphasis added). A violation is established if, "based on the totality of [the] circumstances," the political processes leading to an election are not "equally open to participation" by minority voters so that they have less opportunity than white voters "to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Thirty-five years ago, this Court recognized that Congress inserted the words "results in" to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice "interact" with pre-existing social and historical conditions to *result in* that burden? *Gingles*, 478 U.S. at 47. Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, "intensely local appraisal," *id.* at 79 (quotation marks omitted), that accounts for the "totality of [the] circumstances," 52 U.S.C. § 10301(b).

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of minority votes—and *vote denial*—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, "first generation" cases brought under Section 2. *See* Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 Colum. L. Rev. 418, 423 (1995). Only later did the Supreme Court "determine[] that the Act applies to 'vote dilution' as well." *Id.*

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate *burden* on the voting rights of

minority voters ("an inequality in the opportunities enjoyed"); and (2) that burden must be *caused* by the challenged voting practice ("a certain electoral law, practice, or structure . . . cause[s] an inequality") because the practice "interacts with social and historical conditions" of racial discrimination. *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

Throughout the years, while this test has remained in place, this Court has not deemed it necessary to review a single Section 2 vote-denial case. Meanwhile, there is no evidence that courts have been overwhelmed by vote-denial cases. And when such cases are brought, courts have had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the *Gingles* standard is working well.

Recent events have by no means eliminated the need for this test, which provides the quintessential protection afforded minority voters under Section 2. *See*, *e.g.*, *Shelby Cnty.*, 570 U.S. at 536 ("[V]oting discrimination still exists; no one doubts that."); *Nomination of the Hon. Amy Coney Barrett to the Supreme Court: Hearing Before S. Comm. on the Judiciary* (Oct. 14, 2020) ("[R]acial discrimination still

exists in the United States and I think we've seen evidence of that this summer.") (statement of Amy Coney Barrett). There is no reason for this Court to tamper with this well-functioning framework, let alone follow Petitioners' radical urgings to abandon the standard.

A. Section 2 Applies to All Vote-Denial and Abridgement Claims, Not Just Those Going to Voter Qualifications.

Private Petitioners insist Section 2 should be construed as if it primarily prohibits restrictions on voting "qualifications," rather than "time, place, or manner" requirements. Private Pet. Br. 22 (emphasis omitted). They contend that the "word 'denial' refers to *qualifications* to vote, which quite literally exclude individuals from the franchise," whereas "a rule governing time, place, or manner of voting cannot be said to 'deny' anyone the right to vote." *Id.*

"As always, we begin with the text of the statute." *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007). The language of the statute runs counter to Private Petitioners' view.

First, the statute guards against discrimination in "voting," so that members of the protected class have the equal opportunity "to vote." The VRA defines the words "vote" and "voting" as including "all action necessary to make a vote effective . . . including, but not limited to, registration, listing pursuant to this [Act], or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted

properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 52 U.S.C. § 10310(c)(1). By definition, "voting" and the "vote" are not limited to qualifications.

Second, the protected "voting" acts are not limited to "qualification[s]" or "prerequisite[s]," but include "standard[s], practice[s] or procedure[s]. 52 U.S.C. § 10301(a). In *Allen v. State Board of Elections*, this Court addressed this issue and found that Congress included this language in order to give Section 2 the broadest possible scope:

> The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law . . . in even a minor way. For example, § 2 of the Act, as originally drafted, included a prohibition against any "qualification or procedure." During the Senate hearings on the bill, Senator Fong expressed concern that the word "procedure" was not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote. In response, the Attorney General said he had no objection to expanding the language of the section, as the word "procedure" "was intended to be all-inclusive of any kind of practice." Indicative of an intention to give the Act the broadest possible scope, Congress expanded the language in the final version of

> § 2 to include any "voting qualifications or prerequisite to voting, or standard, practice, or procedure."

Allen, 393 U.S. at 566–67, (quoting 42 U.S.C. § 1973) (footnote omitted). Section 2 thus prohibits any "procedure" that "results in a denial or abridgment," 52 U.S.C. § 10301(a), and "procedure" includes time, place, or manner requirements.

When Congress amended the VRA in 1982, it did so partly in response to discriminatory time, place, and manner restrictions. Congress cited examples of "complex and subtle" vote denial, several of which were time, place, or manner requirements. Senate Report at 11 (citing Texas's elimination of polling places near minority neighborhoods and Georgia's refusal to allow community groups to conduct voter registration drives); House Report at 14–17 (noting that Virginia and Texas instituted inconvenient times and places for voter registration that impeded the voting rights of racial minorities). Exempting time, place, or manner requirements from Section 2's reach would defeat the VRA's purpose of capturing "complex and subtle" practices that "perpetuate the results of past voting discrimination." Senate Report at 12.

B. Section 2 Vote-Denial Claims Are Not Limited to Cases Where the Discriminatory Act Affected the Election Outcome.

State Petitioners' contention that a voting practice violates Section 2 only if it impacts enough voters to

change an election's *outcome* may be summarily dispatched. State Pet. Br. 22.

In *Chisom v. Roemer*, this Court made clear that a vote-denial plaintiff need not separately prove vote dilution. 501 U.S. at 397. There, this Court reasoned that an abridgement of an equal opportunity to *participate* by definition is "inevitably" an impairment of the opportunity to *elect*. *Id.* In dissent, Justice Scalia interpreted the language of Section 2 differently, but reached the same conclusion for purposes of this case. As Justice Scalia explained, when a county makes it "more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate." *Chisom*, 501 U.S. at 408 (Scalia, *J.*, dissenting) (emphasis in original) (citation omitted).

In keeping with Section 2's amended text and legislative history, no court has ignored *Chisom* and required a Section 2 vote-denial plaintiff to prove that the discrimination changed the election's outcome. There is no reason to do so here.

C. The Senate Factors Are Applicable to Section 2 Vote-Denial Claims.

In *Gingles*, this Court explained the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting]

opportunities enjoyed by black and white voters." 478 U.S. at 47.

Recognizing Section 2's command that courts consider the "totality of circumstances," 52 U.S.C. § 10301(b), the *Gingles* Court looked to the Senate Report accompanying the 1982 amendments to compile a list of relevant "circumstances." 478 U.S. at 36. These nine social and historical conditions—the "Senate Factors"—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction's education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine). *Id.* at 36–37 (citing Senate Report at 28–29).

Although *Gingles* involved vote dilution, the decision addressed Section 2 writ large, recognizing that "Section 2 prohibits *all* forms of voting discrimination, not just vote dilution." 478 U.S. at 45 n.10 (emphasis added); *see* Senate Report at 30 (confirming that Section 2 "prohibits practices, which . . . result in the denial of equal access to *any phase* of the electoral process for minority group members") (emphasis added). Further, *Gingles* recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue. *See* 478 U.S. at 45. The *Gingles* Court's statement that the Senate Factors will "often be pertinent to *certain types* of § 2 violations," such as dilution, 478 U.S. at 45 (emphasis added), cannot be reconciled with

a conclusion that the Factors "*only*" inform one specific type of Section 2 claim.

D. Proof of Impact in a Section 2 Vote-Denial Case Is Not Limited to that Caused by the Challenged Law Independent of Socio-Historical Conditions of Discrimination.

State Petitioners argue Section 2 applies only when "disproportionate impacts on minority voters have been caused by the *state law at issue*—and *not* by 'socioeconomic conditions' or a 'history of discrimination.'" State Pet. Br. 28. That argument, however, (1) ignores Section 2's text, which demands a consideration of the "totality of circumstances" to determine whether a voting practice results in unequal opportunities, 52 U.S.C. § 10301(b); (2) disregards the congressional intent manifested in the Senate Report that instructs consideration of the extent to which members of a minority group "bear the effects of discrimination," Senate Report at 206; and (3) flouts this Court's precedent, which has held that the "essence" of a Section 2 claim is that a certain electoral law or practice "interacts with social and historical conditions to cause an inequality," *Gingles*, 478 U.S. at 47; *accord Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

The express statutory mandate to establish a Section 2 violation through proof of the "totality of circumstances" precludes Petitioners' theory. By directing courts to consider the "totality of [the] circumstances," 52 U.S.C. § 10301(b), Section 2 requires an analysis that is flexible and attentive to

local conditions. *See Gingles*, 478 U.S. at 46 (Congress intended a "flexible, fact-intensive test for § 2 violations"); *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) ("An inflexible rule would rule counter to the textual command of § 2 . . . ."). This Court has warned against applying "unduly rigid" tests that would "superimpose[] an inflexible framework onto statutory text that is inherently flexible." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553–55 (2014).

This flexibility was no accident. Congress amended Section 2 to thwart more than just clumsy, blatant forms of voter suppression. If the Act could catch only laws that explicitly discriminated against minority voting (*e.g.*, "Black people cannot vote on Tuesdays"), it would be doing essentially no work at all. Congress, however, structured the Act so it would not be easily outmaneuvered by states adopting subtle forms of discrimination. *See*, *e.g.*, *Allen*, 393 U.S. at 565 ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations.").

The need for flexibility springs directly "from the demonstrated ingenuity of state and local governments in hobbling minority voting power." *De Grandy*, 512 U.S. at 1018 (citations omitted). This Court has therefore remained "chary of entertaining a simplification" that would rob Section 2 of its essential ability to adapt and counteract the shifting shapes of discrimination. *Id.* at 1019.

Recent events have confirmed the wisdom of this approach. *See*, *e.g.*, *N.C. State Conf. of NAACP v.*

McCrory, 831 F.3d 204, 221 (4th Cir. 2016) ("In a vote denial case . . . this holistic approach is particularly important, for '[d]iscrimination today is more subtle than the visible methods used in 1965.'" (quoting H.R. Rep. No. 109-478, at 6 (2006))); Samuel Issacharoff, *Voting Rights at 50*, 67 Ala. L. Rev. 387, 388 (2015) ("[T]he ability to cast a ballot free of legal shenanigans is more seriously under challenge than at any time since the civil rights revolution.").

Accordingly, federal courts have assessed vote-denial claims and found violations in cases evidencing significant impact on members of the protected class, where the impact is a direct result of the challenged law's interaction with socioeconomic and historical racial discrimination. *See*, *e.g.*, *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 405 (5th Cir. 1991) (finding dual registration system violated Section 2 where "voter registration procedures resulted in black citizens in Mississippi registering to vote at a rate 25% lower than white citizens" and jurisdiction had a "history of discriminatory voter registration procedures"); *Spirit Lake Tribe v. Benson Cnty.*, No. 10-cv-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (finding that closing voting places on reservation violated Section 2 where 46% of residents would be unable to find transportation necessary to vote); *Brown v. Dean*, 555 F. Supp. 502, 504 (D.R.I. 1982) (enjoining polling location change that would "be a substantial deterrent to voting by the members of the plaintiff class"); *Harris v. Graddick*, 593 F. Supp. 128, 132–33, 137 (M.D. Ala. 1984) (Section 2 violated by Alabama counties who appointed few or no Black

persons as poll officials where jurisdiction's failure to do so perpetuated voter intimidation).

Because context is integral to the Section 2 analysis, Congress outlined the Senate Factors that help illuminate when, in context, a policy imposes a disparate burden caused by the interaction between the policy and race. Congress intended the Senate Factors to be available in all Section 2 cases, not just those involving dilution. Senate Report at 28 ("To establish a violation, plaintiffs could show a variety of factors, *depending upon the kind of rule, practice, or procedure called into question*. Typical factors include: [the Senate Factors].") (emphasis added).

Contrary to Petitioners' argument, applying this approach to Section 2 vote-denial cases does not leave courts to assess the "totality of circumstances" and Senate Factors unchecked. By forbidding only "denial[s] or abridgment[s]" that (1) result in minority voters having "less opportunity," 52 U.S.C. § 10301(b), and (2) occur "on account of race," *id.* § 10301(a), Section 2 protects benign voting regulations that incidentally burden the right to vote for reasons other than race.

This is a meaningful limitation. It is not enough for plaintiffs to identify a disparate burden. Nor is it enough to identify a relationship between a voting practice and that burden. Section 2 requires plaintiffs to show that the policy "results in" that burden, 52 U.S.C. § 10301(a), *because* it "interacts with social and historical conditions" of race discrimination. *Gingles*, 478 U.S. at 47.

Despite Petitioners' dire prediction that the test threatens to "'sweep[] away almost all registration and voting rules' across the nation," Private Pet. Br. 32; State Pet. Br. 21, application of the *Gingles* test has not opened the floodgates to vote-denial cases. Instead, courts have carefully assessed alleged violations to reach different decisions on different facts. *See*, *e.g.*, *Lee*, 843 F.3d at 600 (finding Virginia voter ID law did not violate Section 2); *Veasey*, 830 F.3d at 264 (finding Texas voter-ID law violated Section 2); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 640 (6th Cir. 2016) (finding Ohio shortening the early-voting and registration period did not violate Section 2); *League of Women Voters*, 769 F.3d at 246 (finding North Carolina law ending same-day registration and prohibiting counting ballots cast "out-of-precinct" violated Section 2). These divergent decisions demonstrate that the test "effectively allows examination of differing fact patterns." *Veasey*, 830 F.3d at 248.

Just because a test is fact driven and multi-factored does not make it dangerously limitless in application. Private Pet. Br. 33. Courts are well-practiced at applying such tests. In assessing Section 2 discriminatory intent claims, for example, courts apply the multi-factor, totality-of-the-circumstances analysis outlined in *Arlington Heights*. 429 U.S. at 266–68 (listing factors for assessing discriminatory intent and instructing judges to inquire into any "available" "circumstantial" or "direct evidence"); *e.g.*, *McCrory*, 831 F.3d at 220 (explaining *Arlington Heights* provides the framework for

analyzing a claim of intentional discrimination under Section 2). Vote dilution claims are also governed by a "flexible," "fact intensive" totality-of-the-circumstances test. *Gingles*, 478 U.S. at 46. Applying those parameters to different circumstances, courts have found that at-large elections cannot be used in some jurisdictions, *e.g.*, *Goosby v. Town Board of the Town of Hempstead*, 180 F.3d 476 (2d Cir. 1999), but are permissible elsewhere, *e.g.*, *NAACP v. City of Niagara Falls*, 65 F.3d 1002 (2d Cir. 1995). Contrary to Petitioners' claims, the test is not a one-way ratchet; it is a well-established, trusted gauge of voter discrimination.

On the other hand, adopting Petitioners' approach would have dire consequences. By insisting the challenged law itself must cause the disproportionate impact without any reference to, or interaction with, persistent discrimination, Petitioners would insulate even egregious voting restrictions. Such an approach would, for example, require literacy tests to cause underlying disparities in literacy rates—a wholesale departure from the text and purpose of Section 2. Under Petitioners' approach, Justice Scalia's paradigmatic Section 2 violation—a rule limiting registration to a three-hour, mid-day window that "ma[kes] it more difficult for blacks to register"—would instead be deemed lawful, merely because the rule itself did not cause the Black voters' work schedules that could not accommodate the narrower registration window. *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). The Act was written and intended to root out both overt and subtle discrimination. The

Court should reject Petitioners' novel re-reading of the statute, which would perpetuate both.

E. The Ninth Circuit's Analysis Is Consistent with Section 2 and this Court's Precedent.

The techniques challenged here are akin to the maneuvers that gave rise to the Act in the first place. From Reconstruction through today, such tactics—shifting polling places, sending minorities to inconvenient precincts, and curtailing methods by which minority groups exercise the franchise—have denied and abridged the right to vote. In undertaking its contextual analysis here, the Ninth Circuit adhered to Section 2's language and intent, and the established standard for proving a vote-denial "results" case. It employed the test designed to "evaluate a disparate burden in its real-world context rather than in the abstract." *Hobbs*, 948 F.3d at 1012. To that end, the court identified many ways in which Arizona's policies of disregarding "out-of-precinct" votes (the "OOP policy") and barring the collection of filled-out ballots (H.B. 2023) interact with local conditions to unequally burden minority voters. *Id.* at 1014–37.

The court traced Arizona's long history—continuing through "the present day"—of using facially neutral policies to disenfranchise minority voters. *Id.* at 1017–26. As recently as 2016, an Arizona county "reduced the number of polling places by 70 percent," forcing "Hispanic and African American voters . . . to travel greater distances to reach polling places than white, non-Hispanic voters." *Id.* at 1025. That same county "repeatedly

misrepresented or mistranslated key information in Spanish-language voter materials." *Id.* Under those circumstances, Arizona's pattern of imposing greater travel and informational burdens on minority voters left minority voters especially vulnerable to policies that (a) criminalize helping voters transport their completed ballots (H.B. 2023) and (b) place polling centers in counter-intuitive locations and then toss away votes cast in the wrong center.

For example, because H.B. 2023 appears facially "neutral" and "criminaliz[es] the collection and delivery of another person's ballot" without referencing the voter's race, Petitioners would end the analysis there. *Hobbs*, 948 F.3d at 998. But the Senate Factors helped the Ninth Circuit probe the relevant circumstances, including Factor five: the "extent to which members of the minority group . . . bear the effects of discrimination." Senate Report at 29. Examining that Factor as Congress intended demonstrated that years of discriminatory treatment left Arizona's minority voters with less access to secure mail services, transportation, and jobs with flexible work schedules that allow for taking time away to vote. As a result of the interaction between the law and these circumstances, minority voters bore the disproportionate brunt of the burden at the ballot box. *Hobbs*, 948 F.3d 989 at 1006–07.

As to the OOP policy, the court emphasized that there must be a "significant disparate burden" and that the "mere existence . . . of a disparate impact on a racial minority . . . is not sufficient." *Hobbs*, 948 F.3d

at 1012, 1032; *compare* State Pet. Br. 25 (mislabeling this as an "anything-more-than-de-minimis-impact-suffices standard"). The burdens imposed here—thousands of ballots being disregarded for a reason that had no bearing on the vote whatsoever (*i.e.*, an "out of precinct" vote in a national election)—were more severe than any "usual burdens of voting." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (describing "posing for a photograph" and "gathering . . . documents" as "usual burdens" in facial challenge to voter ID law). Arizona's OOP policy combined with circumstances such as "frequent changes in polling locations," "confusing placement of polling locations," and "high rates of residential mobility" of minority voters, to leave Arizona an "extreme outlier in rejecting OOP ballots" among other states. *Hobbs*, 948 F.3d at 1000–01.

Contrary to Petitioners' claims, the Ninth Circuit's test does not mandate "equal outcomes." State Pet. Br. 20–21; Private Pet. Br. 32. Under the test, a disparate burden alone is "insufficient"—there must be "a legally significant relationship" between that burden and "social and historical conditions" depressing minority political participation. *Hobbs*, 948 F.3d at 1012. Accordingly, so long as a voting practice does not interact with underlying conditions of racial discrimination to impose a significant burden, the practice will pass the test, notwithstanding any unequal outcomes. *See*, *e.g.*, *Smith v. Salt River Project Agric. Improvement & Power Distrib.*, 109 F.3d 586, 591, 595–96 (9th Cir. 1997) (upholding district's land ownership voting qualification even though it led

to unequal outcomes because the "the observed difference in rates of home ownership" was "not substantially explained by race").

As *Salt River* demonstrates, the Ninth Circuit's test distinguishes between laws that merely result in unequal electoral outcomes and those that create unequal electoral opportunities by "perpetuat[ing] the effects of past purposeful discrimination." Senate Report at 40. The test's intensely local analysis is finely calibrated, and does not in any way "transform[] § 2's equal-*opportunity* requirement into an equal-*outcome* command," as Petitioners claim. State Pet. Br. 20-21; Private Pet. Br. 32. Instead, it simply fulfills the text and the purpose of the Act by invalidating those laws that genuinely result in discrimination at the ballot box.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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