Nos. 19-1257 & 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL.,
PETITIONERS,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
RESPONDENTS.

ARIZONA REPUBLICAN PARTY, ET AL.,
PETITIONERS,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING NEITHER SIDE

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QUESTIONS PRESENTED

This Court granted certiorari to review whether (1) Arizona's "out-of-precinct policy," which doesn't count provisional ballots cast in person outside the voter's designated precinct, and (2) "ballot-collection law," which permits only certain persons (family and household members, caregivers, mail carriers, and elections officials) to handle another person's completed early ballot, comply with Section 2 of the Voting Rights Act (VRA) and the Fifteenth Amendment. But regardless whether the Court upholds or invalidates those particular Arizona laws, it must address the following questions:

1. Has the dissonance in VRA Section 2 vote-denial standards resulting from different circuit tests created a need for a bright line rule?

2. With VRA Section 5 inoperable until and unless Congress enacts a new and constitutionally sound coverage formula, should Section 5's anti-retrogression standards—effectively preventing any changes in election regulation that could be construed as "tightening the rules"—be judicially transferred into Section 2?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Although the Arizona laws here almost certainly comply with the Voting Rights Act—a majority of states require in-precinct voting and nearly half limit ballot collection (also known as "harvesting")—Cato submits this brief in support of neither side. That's because the need to set clear standards for vote-denial claims under Section 2 of the VRA is more important than whether these two laws stand or fall. The lower courts' divergent jurisprudential rubrics result in ambiguous voting rights and leave state legislatures unable to pass laws without legal uncertainty. Unclear laws and unnecessary litigation caused by nebulous standards undermine the legitimacy of our political institutions. Given the reforms we're bound to see as states adjust their procedures once the pandemic (hopefully) abates and to remedy the flaws exposed by the 2020 process, clear rules are necessary to promote judicial uniformity and the rule of law.

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[1] Rule 37 statements: All parties filed blanket consents to the filing of this brief. No party's counsel authored any part of this brief; *amicus* alone funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

After the contentious election that we've just witnessed, this case presents an opportunity to make future elections cleaner and less litigious, with results that inspire greater public confidence. Those salutary outcomes turn not on whether this Court allows the two specific electoral regulations at issue, in Arizona or elsewhere, but on whether it provides a clear framework by which lower courts are to evaluate Voting Rights Act (VRA) Section 2 claims.

On the surface, this case involves two common state laws: (1) in-person voters must cast their ballots in their assigned precinct and (2) third parties can't harvest ballots (with narrow exceptions for family members and the like). The Court presumably took the case not simply to rule on precinct-based voting or ballot harvesting, but to hand down general rules for evaluating VRA Section 2 vote-denial cases. Although such cases rarely came to the Court before *Shelby County v. Holder*, 570 U.S. 529 (2013), disabled Section 5 preclearance requirements, they have since understandably become the focal point of election litigation. That's why it's crucial that the Court provide guidance on how to evaluate them.

Without a proper guide for Section 2 vote-denial cases, lower courts have attempted to fashion coherent standards for considering alleged violations, but a split has emerged—and is growing. Questions regarding the evidentiary standard that must be met to establish a discriminatory burden remain unanswered. Lack of uniformity has led to virtually identical laws being declared a Section 2 violation in one state but not in

another, merely because the states are located in different circuits. *Compare, e.g., Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (approving Wisconsin's voter ID law) *with Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (disapproving Texas's voter ID law in a splintered opinion that also reversed the district court's finding of discriminatory intent).

Spreading beyond inter-circuit disagreement, circuits are clashing *within themselves*, unable to agree on the proper methodology for evaluating Section 2 interpretation. The Fourth Circuit illustrated this dynamic with two separate panels reaching opposite results over voter ID laws in North Carolina and Virginia, respectively, because of differing Section 2 interpretations. See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (enjoining state law); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (affirming ruling in favor of state law).

A similar situation arose below. While a three-judge panel agreed with a district court's analysis, a splintered en banc panel reversed the decision after disagreeing with the standards used to evaluate the Section 2 claims. Without a clear rule, there is every chance that any change in voting rules, from polling hours to cure periods for faulty absentee ballots, will draw a challenge, and might be upheld one year only to be struck down the next.

Judicial inconsistencies create a legal environment where the result of a case may no longer be decided by precedent, but rather by what panel of judges a state happens to draw for its case. Legislatures are left unable to change electoral regulations without an

unending cloud of uncertainty as to their legality. In the end, the ultimate result of these contradictory conclusions is an increasingly partisan view of the judiciary, diminishing the perceived legitimacy of our third branch of government. *See, e.g.*, Charlie Savage, "G.O.P.-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say," N.Y. Times, Oct. 16, 2020, https://nyti.ms/2Vrrphi.

Further threatening to upend legal predictability is a push to meld Section 5's "retrogression" standard—which sought to prevent the reduction of minority electoral power—into Section 2. Section 5 stood as a powerful tool of federal oversight when states were still rife with systemic racial disenfranchisement. But Section 2 was never meant to have the same overbearing control, instead serving as a guarantor of voting rights in individual cases where claims of racial discrimination arise. Any explanation of Section 2's proper standards should clarify that, unlike under the Section 5 rubric, there can be no violation without a finding of actual racial discrimination.

Now presented with the opportunity to correct all this confusion, this Court should hand down a bright-line rule so courts, state legislatures, and citizens alike properly understand Section 2's protections. We need clarity and stability in the law, lest states continue to hesitate to standardize voting practices and make other reforms, whether related to what we've learned about voting during the pandemic or for other reasons. As it stands, with our current patchwork of often conflicting standards, any new expansion of voting times or methods—including mail-in balloting in light of COVID-19—may be deemed the new constitutional minimum in some states, even as others use "lesser"

procedures without legal concern. This past month since the presidential election has demonstrated the critical need to resolve such ambiguities not just for Arizona or for precinct-voting and ballot-harvesting rules, but for all voting-rights cases going forward.

ARGUMENT

I. The Lack of Clear Guidance on Vote-Denial Cases Has Resulted in a Patchwork of Standards

Enacted to reinforce the Fifteenth Amendment, the Voting Rights Act of 1965 (VRA) provided a means to enforce the promise of voting protection for all citizens. An immense success, minority participation in elections skyrocketed in the decades that followed. Section 2 of the VRA encompasses two distinct claims: vote dilution and vote denial. Vote-dilution cases involve districting that minimizes the voting strength of racial minorities, so they have practically no chance to elect candidates of their choice, whereas vote-denial cases involve state action that seeks to prevent minority participation in voting altogether.

After this Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 required a showing of purposeful discrimination, Congress amended Section 2 to contain a "results test":

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race of color.

52 U.S.C. § 10301(a) (emphasis added). After that 1982 amendment, the Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), which provides current guidance for Section 2 cases.

Gingles instructed that, once a court determines that a rule burdens voting, it should consider the totality of the circumstances as to whether there's a violation of Section 2, as informed by nine largely subjective factors. *See Gingles,* 478 U.S. at 43–45. The Sixth Circuit has elaborated that "in response to a step two inquiry, a disparate impact in the opportunity to vote is shown to result not only from the operation of the law, but from the interaction of the law and social and historical conditions that have produced discrimination." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 638 (6th Cir. 2016).

The problem with the *Gingles* factors is that they "are not exclusive . . . there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Veasey*, 830 F.3d at 246. With the immense discretion courts have in applying those factors, it is hard to imagine a cohesive body of law coming together if each circuit has the ability to weigh them as it sees fit.

No case presents a more apt example of judicial discretion dictating a result than the one now before this Court. After an extensive 10-day bench trial, the district court here found that past discrimination in Arizona had "lingering effects on the socioeconomic status of racial minorities," but to suggest that those past indiscretions could still provide the necessary causation element between Arizona's election regulations and any disparate burden for a Section 2

violation was "too tenuous to support." *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 878 (D. Ariz. 2018). For if the court had accepted that causation approach, "virtually any aspect of a state's election regime would be suspect as nearly all costs of voting fall heavier on socioeconomically disadvantaged voters . . . [as well as] potentially . . . sweep away any aspect of a state's election regime in which there is not perfect racial parity." *Id.* The court concluded that the high causation standard of Section 2 had not been met.

After the Ninth Circuit panel affirmed the district court, the en banc court assessed the *Gingles* factors for itself and, in the light of Arizona's full record of discrimination—going back to its territorial period—found that the district court had minimized that history's significance. *See Democratic Nat'l Comm. Hobbs*, 948 F.3d 989, 1016–26 (9th Cir. 2020) (en banc). The en banc court also noted that the district court minimized the importance of the racial disparity in state elected officials. *Id.* at 1029. After correcting the district court's errors, the en banc court held that the *Gingles* factors conclusively favored the plaintiffs.

Differences between the district court and en banc court's analysis should raise an alarm. Neither court applied a clear standard for determining the appropriate weight to assign each *Gingles* factor; neither decision is necessarily wrong under this Court's precedent. Focusing on Arizona's recent achievements toward equality rather than its darker history, the district court ruled for the state. *Reagan*, 329 F. Supp. at 873–76. Believing that Arizona's history is pivotal in revealing a long line of discrimination that continues to this day, the en banc panel ruled for the challengers. *Hobbs*, 948 F.3d at

1025–26. Both courts read the same evidentiary record and applied the same vague guideline about a "history of discrimination"—and reached opposite conclusions. The lack of legal certainty from such a subjective style of analysis should give this Court pause and reinforce the critical need for reform.

"While vote-dilution jurisprudence is well-developed, numerous courts and commentators have noted that applying Section 2's results test to vote-denial claims is challenging, and a clear standard for its application has not yet been conclusively established." *Husted*, 834 F.3d at 636; *see also Veasey*, 830 F.3d at 243–44 ("[T]here is little authority on the proper test to determine whether the right to vote has been denied or abridged on account of race."); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 709 (2006) ("A clear test for Section 2 vote denial claims ... has yet to emerge").

With lower courts determining how to fashion their own workable vote-denial test, three slightly different tests have emerged in the Fourth, Fifth, Sixth, and Seventh Circuits. Unfortunately, any variation in these tests means that there is the possibility of a law being upheld in one state as Section 2-compliant, only to be enjoined as a violation in another, without ever really knowing why. Two prevalent issues that have been especially problematic for continuity across the circuits are the interplay between causation and intent, and what role social and historical conditions play in a vote-denial analysis. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 451 (2015).

A. Lower Courts Are Unclear what the Proper Evidentiary Standard Is to Prove a Discriminatory Burden

There is a general consensus that the first step to a vote-denial claim is that "the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Veasey*, 830 F.3d at 244.

Circuits already disagree on how to implement this first step. There is tension regarding whether "a plaintiff must demonstrate that a challenged practice has measurably reduced total levels of minority turnout (either in an absolute sense or relative to white turnout)." Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 Yale L.J. F. 799, 809 (2018). The Fourth, Fifth, and Ninth Circuits have all held that turnout evidence is not necessary, while the Sixth and Seventh Circuits "appear to require something more: namely, evidence concerning the effect of the challenged practice on voter turnout." *Id.* at 810.

For example, both Wisconsin and Texas passed laws requiring voters to show a from of identification from an approved list to vote in person. *See Frank v. Walker*, 768 F.3d at 753; *Veasey*, 830 F.3d at 256. Although the plaintiffs in both cases introduced evidence that racial minorities are less likely to possess appropriate ID, the Seventh and Fifth Circuit came to different conclusions as to the laws' compliance with the VRA.

Indisputably, a burden on voting existed with both ID laws, but the Seventh Circuit determined that the plaintiffs "[did] not show a denial of anything . . . unless Wisconsin makes it needlessly hard to get photo ID. Because every citizen has an equal opportunity to get a photo ID, Wisconsin's ID requirement did not violate anyone's voting rights." *Walker*, 768 F.3d at 461 (cleaned up). Meanwhile, the Fifth Circuit found that there was a disparate impact and moved on to the second step of analysis when experts estimated that, out of the about four percent of Texas voters who lacked the appropriate ID, "Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack the proper ID." *Veasey*, 830 F.3d at 250.

The difference between the two tests is striking. The Seventh Circuit held that a law only meets the level of discriminatory burden if a state makes something needlessly hard to do, while the Fifth Circuit moved forward in its analysis toward invalidating law after finding that the law only imposed a new (and not necessarily insurmountable) burden on racial minorities within a subgroup of four percent of registered voters. And then, similar to the Seventh Circuit, the Sixth Circuit clarified its approach to the first step by cautioning that it should not be "construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2." *Husted*, 834 F.3d at 637. The first element "requires proof that the challenged standard . . . casually contributes to the alleged discriminatory impact." *Id.* at 638.

In sum, even slight adjustments to the burden required under the VRA sets the circuits on different directions. Without clear direction on how to determine what a discriminatory burden is, a lower court could, in theory, make compliance with Section 2 as easy or hard as it wishes.

B. The Seventh Circuit Uniquely Held That Discrimination Must Be Specifically Caused by the Defendant

One of the most noticeable deviations from the two-step test for evaluating vote-denial claims is that the Seventh Circuit makes a point that the "causation" portion of step two should distinguish between active discrimination by state or local election officials and discriminatory effects stemming from some other social or historical factors. *Walker*, 768 F.3d at 755. The court noted that the district judge tried to explain his finding that the ID law violated Section 2 because minorities are disproportionately likely to lack an ID due to their increased likelihood of living in poverty, which in turn is traceable to the effects of discrimination in education, employment, and housing. *Id.* at 753. The court specially noted that the district judge never directly blamed Wisconsin because "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Id.*

So far, the Seventh Circuit is an outlier in its Section 2 vote-denial analysis—and that uniqueness could translate into wildly different laws being Section 2-compliant than in other circuits. This possibility is already clear without even a majority of the circuit courts' having weighed in on these issues post-*Shelby*

County. Before more circuits create their own slightly different frameworks, this Court should craft a uniform rule of evaluation, so Section 2 can properly function as the defense against discriminatory voting laws and actions that it was designed to be.

C. Lack of a Clear Rule Led to Opposing Section 2 Analyses in Two Fourth Circuit Cases

Even more troubling than circuit splits on Section 2 interpretation, however, is disunity *within* a circuit. On their face, two cases in the Fourth Circuit saw two different types of Section 2 analysis solely because of the panels drawn for the case. *See* Maya Noronha, *New Applications of Section 2 of the Voting Rights Act to Vote Denial Cases*, 18 Fed. Soc'y Rev. 32 (2017).

In *League of Women Voters of N.C. v. North Carolina*, the Fourth Circuit chastised a district court for suggesting that a Section 2 violation may not have occurred because, even though same-day registration was no longer available, the burden to register was minimal because voters could easily register by mail instead. 769 F.3d at 243. The court "relieved the plaintiffs of the requirement of actually showing a denial of the right to vote, finding instead that 'nothing in Section 2 requires a showing that voters cannot register or vote under any circumstances.'" Noronha, *supra*, at 34 (*quoting League of Women Voters*, 769 F.3d at 243).

Conversely, in *Lee v. Va. State Bd. of Elections*, a different Fourth Circuit panel found that "a complex § 2 analysis is not necessary to resolve this issue because the plaintiffs have simply failed to provide evidence

that members of the protected class have less opportunity than others to participate in the political process." 843 F.3d at 600. The court classified obtaining an ID as a mere inconvenience to a voter, rather than a substantial burden—but explained that if Virginia had required IDs but not accommodated citizens who lacked them, there could possibly be a deprival of an opportunity to vote. *Id.* at 601.

It appears that the *League of Women Voters* and *Lee* panels based their decisions on very different views of what constitutes a discriminatory burden. Regardless which of the two views the Court finds more persuasive, the inconsistency in the law within one court has unsettling implications. At an extreme, the result of a case could no longer be determined by precedent, but by which judges a case draws.

Coincidentally—or perhaps not—these two decisions were decided by panels of all-Democrat-appointed and all-Republican-appointed judges, respectively. Judges naturally have their own judicial philosophies, which will differ from their colleagues and can lead to different case outcomes. But it is imperative, especially in election law cases, that courts have as little *appearance* of political bias as possible. By sharpening the applicable standards and limiting the amount of discretion judges have in VRA cases, the Court would help preserve the integrity of and public confidence in the judicial branch.

D. The Ninth Circuit's Interpretation of Discriminatory Burden Exemplifies the Conflicting Circuit Standards

The Ninth Circuit's own disparate rulings here are

a shining example of legal uncertainty. Compare *Democratic Nat'l Comm. v. Reagan,* 904 F.3d 686 (9th Cir. 2018) (panel) with *Hobbs,* 948 F.3d 989 (en banc). The panel and en banc courts both analyzed Arizona's OOP policy using the two-step inquiry seen in other circuits, but had few similarities otherwise. Unclear as to the appropriate way to determine a "discriminatory burden," the en banc court (which of course in the Ninth Circuit comprises only 11 of the court's 29 judges) arrived at a different conclusion than the three-judge panel.

Focused on whether a material impact on the opportunity for minorities to participate in the political process *and* elect representatives of their choice had occurred, the panel asked whether an unusual burden to voting as a whole was present. *Reagan*, 904 F.3d at 730. It opined that "a precinct voting system, by itself, does not have such a casual effect," *id.*, but that if a state "implement[ed] . . . a system in a manner that makes it more difficult for a significant number of members of a protected group to discover the correct precinct in order to cast a ballot" it could meet the burden of giving minority voters less opportunity. *Id.* at 731. With only 3,970 out of 2,661,497 total votes, or 0.15 percent, not cast in the correct precinct in the 2016 general election, the burden of in-precinct voting was deemed minimal and not abridging minority opportunity. *Id.* at 729. Like the Seventh Circuit, the panel looked beyond whether a mere burden existed, but rather how extensive the burden was on the overall ability to vote and elect a preferred representative. *See Walker*, 768 F.3d 744.

Instead of inquiring whether a discriminatory burden to voting existed as a whole, the en banc court

determined that a burden could be established using truncated data similar to the Fifth Circuit's analysis in *Veasey*. *Hobbs*, 948 F.3d at 1014 (citing *Veasey*, 830 F.3d at 256–64). The opinion focused on the increasing percentage of in-person ballots being cast out-of-precinct as seen by "the absolute number of all in-person ballots [falling] more than the absolute number of OOP ballots," *id.* at 1015, thereby increasing the percentage of minorities burdened by the policy compared to years prior. Even if that fact was ignored, the panel concluded that the number of OOP ballots cast in 2016 was substantial enough to be cognizable under the results test, reversing the panel. *Id.* The court bolstered its argument by pointing to *League of Women Voters*, where the Fourth Circuit described a district court's ruling that 3,348 ballots was de minimis as a "grave error." 769 F.3d at 241.

Even though the panel and en banc court came to opposite conclusions by using different frameworks, their dissonance was aggravated by dueling citations to the Fourth Circuit's conflicting cases described above, *Lee* and *League of Women Voters*. The impact of varying approaches to discriminatory burden analysis has already spread beyond the internal struggles of the Fourth Circuit. Without a set framework for explaining how claims of Section 2 violations are to be evaluated, courts will continue to see conflicting results as the Ninth Circuit has. This holds especially true for circuits that have not yet had the opportunity to rule on a case involving discriminatory burden.

Instead of allowing the continued fracture of Section 2 interpretation, this Court should render clear rules for lower courts to follow. For maximum clarity, it would be wise for the rule to pointedly

distinguish between discriminatory intent and disparate impact. *Cf.* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 52 (2009) (describing the same tension regarding the use of race in employment). Although Section 2 now contains a "results test," the text still requires those results to be "on account of race or color." 52 U.S.C. § 10301(a). Despite that language, the confusion around the necessity of intent continues to pervade court interpretations that find disparate impact to be *ipso facto* proof of intent. Such a reading raises several possible interpretive and constitutional issues, as noted in the Pacific Legal Foundation's *amicus* brief in this case, which this Court could put to rest with a bright-line rule that explains the role that both intent and impact play in vote-denial analysis.

II. VRA Section 5 Standards Shouldn't Be Imported into Section 2

As racial disenfranchisement diminished, the tension between states' prerogative to conduct their own elections and the VRA's Section 5 federal preclearance regime became untenable. When *Shelby County* made the obvious point that Section 4's coverage formula was unconstitutional because it hadn't been updated in decades and thus didn't reflect current realities, Section 2 became a more prominent vehicle for litigation—as it should have, to challenge potential instances of racial disenfranchisement. The problem is that courts have been running on a largely open field, with little guidance from this Court on how to evaluate Section 2 claims.

Shelby County may have rendered Section 5 inoperative until and unless Congress passes a new

coverage formula, but that doesn't mean that Section 5's purposes and standards can or should be snuck into Section 2. Section 2 and Section 5 were written with two separate purposes and remedy different constitutional concerns. The Court should be wary of attempts to muddy the waters by combining them.

Indeed, such a distortion of Sections 2 and 5 took place in the litigation over North Carolina's 2013 omnibus election reform bill. The district court viewed the Section 2 inquiry before it as whether minorities had "an equal opportunity to easily register to vote." *N.C. State Conf. of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 350 (M.D.N.C. 2014). Even though North Carolina had eliminated its same-day registration, which minority voters may have preferred to use, there were various other methods to register to vote that on net did not reduce the opportunity to do so. *Id.* at 351. Taking special notice that the plaintiffs incorporated a retrogression standard into their argument, the court clarified that it was "not concerned with whether the elimination of [same-day registration] will worsen the position of minority voters in comparison to the preexisting voting standard, practice or procedures—a Section 5 inquiry." *Id.* at 352. The simple remark provided a clear distinction between the two sections, but on appeal, the Fourth Circuit blurred that line.

Instead of comparing "whether minorities had less of an opportunity to vote than whites under the new election law scheme, as courts have long done in their Section 2 analyses," the Fourth Circuit turned its attention to whether the change in laws decreased minorities' opportunity to vote as compared to before the law was enacted. Noronha, *supra*, at 34 (citing

League of Women Voters, 769 F.3d at 241–42). Justifying its retogression analysis, the Fourth Circuit pointed to a section 5 case "to conclude that Section 2 analysis 'necessarily entails a comparison' and requires 'some baseline with which to compare the practice.'" *Id.* (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333–34 (2000)). Integration of Section 5 into Section 2 is no longer a theoretical concern, but is actively becoming a part of Section 2 jurisprudence.

Moreover, Section 2 is an inappropriate substitute for Section 5, which has a particular history and rationale. The former has always applied nationally to enforce the Fifteenth Amendment's guarantees, while the latter was an extraordinary provision to oversee jurisdictions where racial disenfranchisement couldn't be policed through normal enforcement practices. Most jurisdictions subject to preclearance were located in the South, as a result of Jim Crow and decades of racial disenfranchisement. The overwhelming power of the prohibition on retrogression created a protective barrier for minorities to exercise their right to vote in the face of systematic attempts to silence them. But imprecise changes in the statistical trigger caused seemingly arbitrary changes in which jurisdictions became subject to Section 5. For example, amendments to the Voting Rights Act in the 1970s caused three New York City boroughs (but not the other two) to become subject to preclearance even though black New Yorkers had been freely voting since the Fifteenth Amendment's enactment in 1870, and had held municipal offices for decades. Abigail Thernstrom, "The Messy, Murky Voting Rights Act: A Primer," Volokh Conspiracy, Aug. 17, 2009, https://bit.ly/33qpqOQ.

Of course, the authority Section 5 bestowed on the federal government was never meant to be permanent. The provision had a five-year expiration date and was intended as a temporary stopgap to address egregious practices. After several reauthorizations, Congress even conceded that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." *See* H.R. Rep. No. 109-478, 12 (2006). Regardless whether Section 5 ought to be revived, subjecting the entire country to its extraordinary standards and remedies through Section 2 is not only inappropriate, it's a constitutional malapropism.

Moreover, imputing a national anti-retrogression standard into Section 2 would create a one-way ratchet on voting regulations. "If that were to happen, once any increase in voting periods or expanded procedures is passed, states would only be allowed to 'add to but never subtract from' that baseline. Any reforms reining in expansive laws would be struck down by the court." Noronha, *supra*, at 34–35 (quoting *Husted*, 834 F.3d at 623). The very thing the VRA was created to do—secure and protect the opportunity to vote—would be stymied by such a globally applied standard.

III. Inconsistency in Judicial Outcomes Undermines the Integrity of America's Electoral System and Inhibits State Legislatures

Political stability is the hallmark of a mature democracy. One of the most important factors in that political stability is a citizenry that believes it has the opportunity to participate in free and fair elections. This perception is compromised when state

legislatures enact laws that are viewed by the public as illegitimate—especially if one state has a law adjudicated to be a VRA violation while a similar law exists in another state without legal problem.

The need for a uniform understanding of Section 2 is highlighted by decreasing confidence in the integrity of America's electoral system. With partisan polarization rapidly rising in American elections since 2000, lawyers have increasingly "thrown their hats in the ring" to challenge "virtually every aspect of election administration." Reid Wilson, "Study Ranks Best, Worst States for Electoral Integrity," The Hill, Dec. 28, 2016, https://bit.ly/3orrMoX.

Unsurprisingly, many of the states that have the lowest election integrity scores are those that most frequently in legal battles over election reforms and redistricting. Pippa Norris et al., The Electoral Integrity Project, *Electoral Integrity in the 2018 American Elections* (2019). Providing bright-line rules for legislatures to follow would be a good start to decrease the number of election lawsuits that result from an ambiguous nationwide standard.

CONCLUSION

With an increase in vote-denial claims—though without evidence of actual vote denial, at least not if judged by racial disparities in voting and overall turnout rates—this Court should set out a clear interpretive method that courts can follow nationwide. Without that basic framework, any change in voting rules can draw a legal challenge and might be upheld one year only to be struck down based on new data the next. However the Court rules on the two Arizona laws at issue here, it must lay out a clear jurisprudential framework for evaluating Section 2 claims, free of balancing tests and other subjective standards that are grist for result-oriented and public-confidence-destroying judging.

Respectfully submitted,

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