Nos. 19-1257 & 19-1258

In the
Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, 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 United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* LEGISLATORS ELIJAH HAAHR, PAUL GAZELKA, DAVID RALSTON, RON RYCKMAN, BRADY BRAMMER, MATT SIMPSON, MIKE SHIRKEY, AND LEE CHATFIELD IN SUPPORT OF NEITHER PARTY

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December 7, 2020

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legislators and legislative leaders from various states across the country who share the constitutional duty to regulate our national election system. This case has profound implications for that duty.

Elijah Haahr has served in the Missouri House of Representatives since 2012. At the time of his selection in 2018 as Speaker of the Missouri House of Representatives, he became the youngest Speaker in the nation.

Paul Gazelka is Majority Leader of the Minnesota Senate and a long-standing Minnesota legislator. From 2005 to 2007 he served in the Minnesota House of Representatives. In 2010 he was elected to the Minnesota Senate, and in 2016 became the Senate Majority Leader.

David Ralston is Speaker of the Georgia House of Representatives and a long-serving legislator. From 1992 to 1998, he served as a member of the Georgia Senate. In 2002 he was elected to the Georgia House of Representatives and became its Speaker in 2010.

Ron Ryckman is Speaker of the Kansas House of Representatives. He has served in the Kansas House since 2013 and became its Speaker in 2017.

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[1] Under Supreme Court Rule 37, *amici* state as follows: This brief is filed with the consent of all parties. No party or person other than *amici* and their counsel authored this brief in whole or in part or contributed money for the preparation or submission of this brief.

Brady Brammer is a member of the Utah House of Representatives, representing District 27. He assumed office in January 2019.

Matt Simpson is a member of the Alabama House of Representatives, representing District 96. He has been a member since 2018.

Mike Shirkey is Majority Leader of the Michigan Senate. From 2011 to 2015 he served in the Michigan House of Representatives. He has served in the Michigan Senate since 2015 and was chosen as Majority Leader in 2019.

Lee Chatfield is the Speaker of the Michigan House of Representatives. He was first elected in 2016 and became the House Speaker for his final term in 2019. He is currently the youngest Speaker in the nation.

Together, Speaker Haahr, Majority Leader Gazelka, Speaker Ralston, Speaker Ryckman, Representatives Brammer and Simpson, Majority Leader Shirkey, and Speaker Chatfield submit this brief to explain the crucial role of state legislatures in ensuring fair, honest, and orderly elections. Regardless of which party prevails, *amici* urge the Court to adopt clear, comprehensible, and predictable legal standards to govern disputes like this one. Lawmakers across the country, in fulfilling their constitutional duty to regulate the "Time, Places, and Manner" of elections, should have a fair opportunity to enact neutral voting regulations without subjecting state officials to a flood of lawsuits—lawsuits which are often filed after voting has begun and force state officials to change rules and regulations mid-election.

SUMMARY OF ARGUMENT

This case has been in active litigation for over four and a half years. During that time, the litigants—including the Democratic Party, Arizona State Officials, and the Arizona Republican Party—have fought two evidentiary hearings before the district court (one of which was a ten-day merits trial), two appeals before the Ninth Circuit, two en banc appeals before the Ninth Circuit, and an emergency proceeding before this Court (which was forced to intervene just days before the 2016 presidential election to avoid throwing Arizona's election system into a state of confusion). Dozens of lawyers have represented the scores of parties and *amici* who have participated in this case. Thousands of pages of briefing and judicial orders have been written, including six published court opinions.

At issue is the enforceability of two Arizona voting laws similar to those that have long operated in dozens of other states. Those two Arizona laws were repeatedly upheld by the district court and a panel of the Ninth Circuit—only to be enjoined, and then struck down, by the en banc Ninth Circuit.

This is no way to run an election system.

Amici do not wish to take sides in the partisan fight at the heart of this case and do not file this brief in support of either party. Instead, as state legislators who share the constitutional duty to enact laws governing the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, they wish to emphasize three points that should inform the legal standards

this Court adopts for vote-denial claims based on the "results" test of Section 2 of the Voting Rights Act:

I. The Constitution requires state legislators to adopt comprehensive regulations to ensure fair, orderly, and equitable elections for federal office. Because no State is the same—geographically, politically, or demographically—each State's election regulations must uniquely address different on-the-ground conditions. But common to every State is the need for "substantial regulation of elections" to ensure they are "fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

In order to carry out their constitutional duty to regulate elections, state legislators need clear and comprehensible legal rules for determining whether policy changes they wish to enact are likely to survive judicial scrutiny. Every change in a State's voting laws will impose some burden on voters, and it is often difficult to predict with precision how significant the burden will be and which specific groups of voters may be inconvenienced. But not every burden is unlawful, and judges wielding laws like Section 2 are ill-equipped to revise election policy without imposing unintended negative consequences on the voting system as a whole. Because "detailed judicial supervision of the election process" is unworkable and "especially disruptive," state legislators need "an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose [through a new voting regulation] is too severe" and thus violates Section 2.

Cf. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment).

II. The existing legal framework for vote-denial claims under the results test of Section 2 of the Voting Rights Act is far from objective and uniform. Lower courts have struggled to arrive at an administrable doctrinal structure, instead taking a highly fact-dependent—and oftentimes legally unpredictable—approach. The result is constant litigation which is disruptive to the election process and precludes legislators from reasonably ascertaining whether a change in election policy will survive Section 2 review.

The unpredictability exists at both "steps" of the two-step results test under Section 2. Under step one, which asks whether a new voting law imposes a "disparate burden," courts often allow Section 2 claims to proceed based on slight differences in voters' behavior, even if those differences are not statistically significant or are based on faulty math. At step two, meanwhile, courts engage in an open-ended analysis of whether "social and historical conditions" affect the burdens of voting in a particular State. This analysis can include factors that have little or nothing to do with the voting law under challenge. Here, for example, the majority below claimed that instances of discrimination occurring during a more than 175-year historical period condemns present-day election policy.

III. To avoid the inconsistency and unpredictability that currently characterizes the legal standards governing cases like this one—and to

allow state legislators to carry out their constitutional duty to regulate elections—this Court should make three doctrinal clarifications to ensure that the legal framework for vote-denial claims under Section 2's results test is clear, comprehensible, and predictable.

First, statistical disparities in voting behavior should not be used as the basis for a Section 2 vote-denial claim unless those disparities reflect something more than the "usual burdens of voting." *Crawford*, 553 U.S. at 198. Neutrally drawn election regulations similar in kind to other valid laws—if they in fact apply to all voters equally—do not deny or abridge the "right . . . to vote" and therefore do not implicate Section 2. 52 U.S.C. § 10301(a).

Second, a voting law should not implicate Section 2 unless a challenger can show that the law actually causes a denial or abridgement of voting rights. This causation requirement comes from Section 2 itself, which states that it applies only to voting regulations that "result[ ] in a denial or abridgement." *Id.* 10301(a). A mere statistical correlation between the challenged law and some aspect of the election process is insufficient. Instead, the law under challenge must causally contribute to loss of the opportunity to participate in the political process.

Finally, historical and societal factors should be relevant under Section 2 only if they relate to the voting law that is the subject of the legal challenge. An open-ended inquiry that spans decades or even centuries should not be used to condemn a present-day law unless it can be shown that the alleged

historical or societal conditions interact with the law in such a way as to prove a denial or abridgment of voting rights.

ARGUMENT

I. State legislatures play a crucial, constitutionally mandated role in the regulation of the nation's elections.

A. The Elections Clause vests state legislatures with primary authority to set the "Times, Places, and Manner" for holding elections for federal officeholders. U.S. Const. art. I, § 4, cl. 1. This is not a trivial provision—the Clause creates a "duty" on the part of state legislative bodies, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013), commanding that they "provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Fulfilling this duty is no simple task. By necessity, voting in this country is highly decentralized, with officials at the county level (or even the city level) responsible for implementing state and federal policy to coordinate multiple layers of elections. Moreover, each State is different in different ways:

- geographically (large, sparsely populated states present different voting challenges than do states with major metropolitan centers);
- politically (the number and type of elections at the state and local levels vary widely, and how each state organizes its political subdivisions is largely idiosyncratic); and
- demographically (Florida's electorate is dramatically different from Minnesota's).

Thus, no two States can run their elections in precisely the same manner.

Within this complicated setting, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And because no two States are the same, each state legislature must "devis[e]" its own "solutions to [the] difficult legal problems" inherent in the administration of the election process. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice,* 555 U.S. 160, 171 (2009)).

B. Legislators of good faith can't do their jobs—particularly in a complicated area such as election regulation—if they can't predict with some confidence whether courts will uphold the laws they enact. As this Court has observed in a different setting, it is "of paramount importance" that

policymakers "be able to legislate against a background of clear interpretive rules." *Finley v. United States*, 490 U.S. 545, 556 (1989).

Almost every voting law imposes "some burden upon individual voters." *Burdick*, 504 U.S. at 433 (1992). And it is often impossible to predict, before a voting law is enacted and implemented, precisely how much of a burden each incremental change in a State's election system might impose on any particular group of voters in any particular area of the State—or *why* some particular voters might appear to be burdened while others might not be. *E.g.*, *Frank v. Walker*, 768 F.3d 744, 748–50 (7th Cir. 2014) (analyzing evidence concerning the potential burden of a voter-ID law, and noting that many voters possessed the proper ID but simply declined to register, even though registration is "the easiest step" in the election process). The only certainty is that "[*e*]*very decision* that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others." *Lee v. Va. Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (emphasis added).

Section 2 of the Voting Rights Act is not a comprehensive election code. It is instead a *remedy* reserved for election laws that are racially discriminatory and deny or abridge the right of citizens to vote and participate in the election process. 52 U.S.C. § 10301(a). Courts should not interpret or apply it to unduly "tie the hands of States" in enacting policy to ensure elections are orderly and fair. *Burdick*, 504 U.S. 433. When it comes to regulating elections, "the striking of the

balance" among valid but competing policy objectives—for example, "between discouraging fraud and other abuses and encouraging turnout"—"is quintessentially a *legislative judgment* with which . . . judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). "One size need not"—and indeed *cannot*—"fit all." *Id.* Thus, at least some "[d]eference to state lawmaking" in this area is necessary if state legislatures—and not the federal judicial branch—are to remain primarily responsible for making election policy. *Ariz. State Legislature*, 576 U.S. at 817.

And there is no reason to think that judges wielding laws like Section 2 will always produce fairer and more orderly election rules than the give-and-take of the state legislative process. The legislative process typically results in incremental change within the context of a comprehensive set of election regulations and is informed by the views of state and local officials with decades of experience managing on-the-ground election conditions in the various geographical areas of the State. In contrast, when a Section 2 lawsuit is filed, a court is asked to examine one particular controversy concerning one particular state law (or, here, two). This can lead to myopia. As Judge Bybee pointed out in his dissent below, striking down Arizona's out-of-precinct policy will have unintended effects: it "will skew future elections in Arizona" by "*overvalu*[*ing*] national elections" and "*undervalu*[*ing*] local elections." Pet.

App. 154a (Bybee, J., dissenting).[2] And in striking down Arizona's restriction on which third parties may collect and turn in ballots on behalf of voters, the en banc majority not only overruled the state legislature's policy judgment but also disregarded the recommendation of "a bi-partisan commission," which supported just such "neutrally-drawn" election regulations. *Id.* at 169a.

Thus, "detailed judicial supervision of the election process" is not only unworkable and suboptimal as a policy matter; it also "flout[s] the Constitution's express commitment of the task to the States." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment) (citing U.S. Const., art. 1, § 4). "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Id.* "Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe." *Id.*

[2] Citations to the Petition Appendix are to the appendix filed in case number 19-1258.

II. The imprecise and subjective legal standards courts often employ in Section 2 vote-denial cases have fueled an explosion of election-related litigation that makes the fate of voting legislation nearly impossible for state legislators to predict.

A. Often, the legal standards that judges apply in cases like this one are not, in fact, "objective" and "uniform" and they do not allow state legislators to "determine, *ex ante*," whether a voting law they wish to enact will be upheld or struck down. *Id*. Indeed, "[l]ower courts have struggled to come up with a workable framework" for Section 2 vote-denial cases brought under the results test despite "the whirlwind of activity" in this area. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 463–64, 474 (2015) (urging an "administrable doctrinal structure" that is "not too complex or amorphous"). The struggle to define consistent legal standards for these cases can be seen in the unusual number of en banc decisions that present sharply contrasting views of the law, both across and within circuits.[3]

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[3] *See, e.g.*, Pet. App. 7a–113a (en banc majority), 114a (Watford, J., concurring), 114a–142a (O'Scannlain, J., dissenting), 143a–169a (Bybee, J., dissenting); *Veasey v. Abbott*, 830 F.3d 216, 247 (5th Cir. 2016) (en banc); *id*. at 272–80 (Higginson, J., concurring); *id*. at 280–318 (Jones, J., concurring in part and dissenting in part); *id*. at 318–19 (Smith, J., dissenting) ("The en banc court is gravely fractured and without a consensus."); *id*. at 319–36 (Dennis, J., concurring in part, dissenting in part, and concurring in the judgment); *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014) (Posner, J.) (on

Currently, the legal standards courts apply in these cases draw on "highly fact dependent" factors that attempt to make fine distinctions between "different laws, different states with varying histories of official discrimination, and different populations of minority voters." *Veasey v. Abbott*, 830 F.3d 216, 247 n.37 (5th Cir. 2016) (en banc). This prompts judges to, for example, scour a "multi-thousand page record" for any "trace" or "inference" of discrimination to determine whether a burden caused by a voting law—even if exceedingly slight—must be invalidated. *Id.* at 281 (Jones, J., concurring in part and dissenting in part). As one judge has implied, this means that a law's legality cannot be predicted: "[w]hether a practice is permissible under a given set of facts is . . . not legally determinative of whether it is permissible under a different set of facts." *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 670 (6th Cir. 2016) (Gilman, J., concurring).

The consequence of this approach to Section 2 is a flood of "constant litigation" that calls into question the validity of commonplace voting regulations. *Cf. Crawford*, 553 U.S. at 208 (Scalia, J., concurring). Because "potential allegations of severe burden are endless," even laws that have "already [been] on the books" for decades can become grist for the lawsuit mill. *Id.*; *see also Veasey*, 830 F.3d at 310 (Jones, J.,

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suggestion of rehearing en banc) ("I asked for a vote on whether to rehear these appeals en banc. The judges have voted, the vote was a 5 to 5 tie, and as a result rehearing en banc has been denied.").

concurring in part and dissenting in part) (listing the wide range of voter regulations potentially and actually subject to challenge under amorphous Section 2 legal standards: "polling locations; days allowed and reasons for early voting; mail-in ballots; time limits for voter registration; language on absentee ballots; the number of vote-counting machines a county must have; registering voters at a DMV (required by the federal Motor Voter law); holding elections on Tuesday").

The confusion hamstrings well-meaning legislators who wish to enact new voting laws while avoiding litigation under Section 2, which is often filed in the middle of an election season and requires judges to issue decisions at a breakneck pace so that voters and state officials have advance notice of what rules will apply when voting begins. *Mich. State A. Philip Randolph Inst.*, 833 F.3d at 661 (explaining that the Michigan Secretary of State repeatedly sought emergency relief from the district and circuit courts after a voting law was preliminarily enjoined). Even judges on the same court can hopelessly disagree about the validity of a particular election law. *Veasey*, 830 F.3d at 318 (Smith, J., dissenting) ("The en banc court is gravely fractured and without a consensus. There is no majority opinion, but only a plurality opinion that draws six separate dissenting opinions and a special concurrence."). Legislators themselves thus have little chance of navigating the current morass of Section 2 case law.

B. A claim under the results test of Section 2 of the Voting Rights Act is typically adjudicated using a two-step framework. As applied by some courts, both

steps of the framework invite excessive judicial second-guessing of voting legislation under often amorphous and subjective legal standards.

1. At the first step, a court asks whether a plaintiff has shown that the challenged voting law creates a "disparate burden" on a minority group. Pet. App. 36a. Below, the Ninth Circuit majority asserted that a "bare statistical showing" is not enough to support a Section 2 claim. *Id.* at 37a (citation omitted). But in practice, courts often find a "disparate burden" when a voting law is claimed to have any perceptible effect on voter participation, no matter how minor.

For example, the Ninth Circuit majority based its step-one conclusion regarding Arizona's out-of-precinct policy on voting data showing a mere 0.5% difference in voting patterns among racial groups. Pet. App. 123a (O'Scannlain, J., dissenting). The majority did not ask whether this miniscule difference was statistically significant or whether it was likely to persist over multiple elections. Instead, the court divided one percentage by another (i.e., it divided the share of successful votes by one racial group by the share of successful votes by another) to arrive at what appeared to be massive discrepancies in voter behavior. As Judge Easterbrook has explained, this approach amounts to junk science and is a "misuse of data": "[d]ividing one percentage by another produces a number of little relevance" and "mask[s] the fact that the populations [are] effectively identical." *Frank*, 768 F.3d at 752 n.3. This is a common problem; many other courts have brushed aside the implications of actual data in a

quest to subject a challenged voting law to Section 2 scrutiny. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 639 (6th Cir. 2016) (explaining that the district court and the challengers effectively ignored statistical evidence demonstrating that, despite a reduction in Ohio's early-voting period, voters were "no less likely to vote").

To protect a State's laws from lawsuits based on this kind of statistical manipulation, a conscientious legislator would have to ensure that a proposed voting law, once implemented, will have absolutely no differential effect on groups of voters. Of course, no legislator, no matter how well meaning, could do so.

2. In the second step of the Section 2 results test, courts ask whether "there is a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them." Pet. App. 37a. To answer that question, courts often look not to Section 2 itself, but to the Senate Report accompanying the 1982 amendments to the Voting Rights Act. The Senate Report lists nine "factors" available for consideration, including a wide-ranging historical inquiry into whether "official discrimination" ever "touched the right of the members of the minority group to . . . vote" and whether minorities might be affected by discrimination "in such areas as education, employment and health." *Id.* at 38a–39a. As the majority explained below, this list is "neither comprehensive nor exclusive." *Id.* at 39a. Each factor may or may not have "probative value," and courts

may consider each of them—or not—"as appropriate." *Id.* 37a–40a.

This approach is "incredibly open-ended." *Veasey*, 830 F.3d at 309 (Jones, J., concurring in part and dissenting in part). A case in point is the majority below, which examined historical examples of discrimination over the span of nearly *175 years*, including during the territorial period before Arizona became a state. Pet. App. 48a–81a. As this Court has recognized, "current burdens . . . must be justified by current needs." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009). Basing a decision about the validity of a present-day law on discrimination that occurred dozens or even hundreds of years ago violates this basic principle and can lead to "bizarre" results—for example, it can lead to condemning current legislative policy based on the decades-old actions of an opposing political party, "whose legacy has been repudiated by current" officeholders. *Veasey*, 830 F.3d at 318 (Jones, J., concurring in part and dissenting in part). In this way, "[v]oting rights litigation is . . . decoupled from any 'results' caused by the state." *Id.*

Because current legislators like *amici* have no control over what might have happened in their State decades ago (let alone over 170 years ago), there is little if anything they can do during the legislative process to insulate potential voting legislation from legal claims based on this approach to Section 2.

III. This Court must adopt clear and comprehensible legal standards for cases like this one so that state legislatures may effectively fulfill their constitutional duty.

Litigation under Section 2 should not amount to a game of "gotcha" in which a newly enacted election law can be struck down based on tiny statistical differentials and decades-old acts of discrimination unconnected to present policy decisions. State legislators acting in good faith should have a fair chance of predicting whether the election regulations they enact are likely to survive judicial review. In deciding this case, the Court should make at least the following three doctrinal clarifications to ensure that the Section 2 results test is clear, comprehensible, and predictable.

A. First, the Court should clarify that not every statistical difference in voting behavior that arises after a new voting law is implemented amounts to a "denial or abridgement of the right . . . to vote." 52 U.S.C. § 10301(a). The focus should be on whether the voting process is "equally open" to all voters and gives everyone an equal "opportunity." *Id.* § 10301(b). Unless a voting law creates an unnecessary impediment to voting, it does not meet this standard.

With these principles in mind, a neutral voting regulation that causes voters some amount of inconvenience but is similar in kind to other valid voting regulations—for example, a standardized early-voting period or a change to the universal deadline for mail-in ballots—does not amount to "denial or abridgement" if it inconveniences everyone equally. *Lee*, 843 F.3d at 600 (holding that a voter ID

law did not burden the right to vote because even voters without an ID could cast ballots and cure by later presenting a photo ID). Under this approach, "[a] complex § 2 analysis is not [always] necessary," *id.*, when it is clear that a challenged law does no more than equally impose on all potential voters "the usual burdens of voting," *Crawford*, 553 U.S. at 198; *see also* Pet. App. 126a (O'Scannlain, J., dissenting) (explaining that the en banc majority struck down Arizona's out-of-precinct policy without explaining "how or why the burden of voting in one's assigned precinct is severe or beyond that of the burdens traditionally associated with voting"); *id.* at 152a (Bybee, J., dissenting) (explaining that Arizona's out-of-precinct policy "applies statewide; it is not a unique rule, but a traditional rule, common to the majority of American states").

B. Second, the Court should impose a causation requirement: "the challenged standard or practice [must] causally contribute[ ] to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process." *Ohio Democratic Party*, 834 F.3d at 638. The language of Section 2 itself imposes this element of causation by requiring that only voting laws "which *result*[ ] *in* a denial or abridgment" are vulnerable to invalidation. 52 U.S.C. § 10301(a) (emphasis added); *see also Burrage v. United States*, 571 U.S. 204, 211 (2014) ("'Results from' imposes . . . a requirement of actual causality.")

Thus, the law must not merely be correlated with some statistical differential in the behavior of certain voters—it must also *cause* an actual denial of *voting*

rights. For example, a "motor voter" law, which allows citizens to register to vote whenever they obtain or renew a driver's license, could not be invalidated simply because certain groups of voters are less likely to take advantage of the law. The question should be whether the law *itself*—not other factors unconnected to the law—causes both a failure to register *and* a denial of voting rights. *Frank*, 768 F.3d at 754 (explaining that a motor voter law should not be invalidated simply because some groups of voters "are less likely to own cars and therefore less likely to get drivers' licenses"); *see also Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310–14 (3d Cir. 1994) (requiring this type of "causal connection" when analyzing a law allowing election officials to maintain accurate voter registration lists by removing the names of those who hadn't voted and hadn't re-registered).

C. Finally, the Court should clarify that when historical and societal factors are used in the Section 2 analysis to gauge whether a law is discriminatory, those factors must be related to the challenged voting law itself. In other words, the challenged voting law must "interact[ ] with social and historical conditions that have produced discrimination" to be vulnerable to invalidation under Section 2. *Ohio Democratic Party*, 834 F.3d at 639.

Section 2, by its terms, is a statute designed to address the current discriminatory effects of current voting laws and practices. Condemning a modern voting regulation based on generations-old instances

of discrimination or generalized societal conditions that have nothing to do with the regulation itself strays far beyond Section 2's text and any fair understanding of its purpose.

CONCLUSION

In deciding this case, the Court should adopt legal standards that are clear and comprehensible enough to allow state legislators to reasonably predict whether the election regulations they enact will be vulnerable to vote-denial or vote-abridgement claims brought under the results test of Section 2 of the Voting Rights Act.

Respectfully submitted,

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December 7, 2020