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
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE LEADERSHIP CONFERENCE EDUCATION FUND, AND 52 OTHER PUBLIC-INTEREST ORGANIZATIONS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of over 220 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. One of the missions of The Leadership Conference is to promote effective civil rights legislation and policy. The Leadership Conference was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965 and its subsequent reauthorizations, and the Fair Housing Act of 1968.

The Leadership Conference Education Fund ("The Education Fund") is the research, education, and communications arm of The Leadership Conference. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public understanding of issues of prejudice. The Education Fund has published studies and reports on many subjects, including voting rights.

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The Leadership Conference and The Education Fund believe that a vital national interest is at stake in this case. That national interest is the right of all citizens to vote free from discrimination and to choose leaders that represent their interests and, by doing so, to promote the influence of the United States throughout the world as a viable and vibrant democracy.

Several other organizations also join as signatories to this brief. These organizations are identified and their interests set forth in the Appendix.

SUMMARY OF ARGUMENT

Petitioners and their amici ask this Court to adopt an interpretation of Section 2 of the Voting Rights Act that would render that provision hopelessly ineffective in combating the new species of vote-denial laws, i.e., laws that make it disproportionately more difficult for minority voters to participate in the political process. This Court should reject that request.

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.'" *Chisom* v. *Roemer*, 501 U.S. 380, 403 (1991). Recognizing that "the Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," *Allen* v. *State Board of Elections*, 393 U.S. 544, 565 (1969), this Court stated that the Act, including Section 2, "should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination," *Chisom*, 501 U.S. at 403. As Justice Scalia recognized, Section 2, by "proscrib[ing] practices with discriminatory effect whether or not intentional," "provides a powerful, albeit sometimes blunt, weapon with

which to attack even the most subtle forms of discrimination." *Id.* at 406 (Scalia, J., dissenting).

I. Now is not the time to weaken Section 2. In *Bartlett* v. *Strickland*—a recent case in this Court substantially interpreting Section 2—a plurality of this Court recognized that "racial discrimination and racially polarized voting are not ancient history." 556 U.S. 1, 25 (2009). "Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and [Section] 2 must be interpreted to ensure that continued progress." *Id.*

Bartlett's teaching remains true today. While some discriminatory practices have been abandoned, the last decade has witnessed many jurisdictions placing new hurdles in front of the ballot box: hampering voter registration, limiting early and absentee voting, closing poll locations, purging voters from the rolls, and imposing strict voter-identification requirements. And it is reasonable to expect that such restrictions are likely to increase in quantity and severity in the future, amidst a litany of unsubstantiated but oft-repeated claims of voter fraud.

These restrictions on voting disproportionately affect minority voters, and substantially so. Minority voters, after all, disproportionately lack the resources to satisfy increasingly demanding voting requirements, due to the vestiges of current and past discrimination (including state-sponsored discrimination).

The growing tide of voting restrictions that lessen minority voters' opportunity to participate equally in the political process reflects the "protean strategies" of vote denial that "led Congress to adopt the Voting Rights Act" in the first place. *Dougherty Cty. Bd. of*

Educ. v. *White*, 439 U.S. 32, 37 n.6 (1978); *see also Reno* v. *Bossier Par. Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part, dissenting in part) (Voting Rights Act not intended to permit jurisdictions "to pour old poison into new bottles").

II. Democracies are fragile and endure where society relies on voter participation as the core means by which political disagreements are mediated at regular intervals. This understanding underlies the respective roles that the branches of the federal government play to ensure that our democracy endures, matures, and thrives. The role of the federal courts is particularly significant because the problem of discrimination in voting has proven to be a substantial and enduring threat to political participation.

History teaches that the solution is vigilance. That is, courts must be willing and able to look past formalities and to closely examine the facts and historical context, in order to ferret out discriminatory voting laws.

This Court should interpret Section 2 accordingly. Section 2 should be capacious enough to empower courts to consider the totality of the circumstances and, based on that context-specific inquiry, determine whether a particular electoral barrier crosses the line from a mere electoral rule into one that disproportionately and unjustifiably lessens minority voters' opportunity to participate equally in the political process.

The Voting Rights Act and its core enforcement provision, Section 2, represent a hard-won federal embrace of a bedrock minority-inclusion principle in American democracy. This Court should adhere to that principle and vindicate Section 2.

ARGUMENT

I. SECTION 2 HAS A VITAL CONTINUING ROLE IN PROTECTING MINORITY VOTERS' EQUAL ACCESS TO THE BALLOT

A. Voting Rights Have Been Increasingly Under Attack in the Last Decade

1. Between 2010 and 2020, 28 states passed new laws or policies restricting access to the ballot. Specifically, 16 states enacted strict voter-identification laws, 12 states enacted laws or adopted policies that make it more difficult to register and to stay registered to vote, 12 states enacted laws or adopted policies that that make it more difficult to vote early or absentee, and 3 states created new barriers for restoring the right to vote for people with past criminal convictions. *New Voting Restrictions in America*, Brennan Center for Justice (Nov. 18, 2019), https://bit.ly/383e0U8; *Voting Laws Roundup 2020*, Brennan Center for Justice (Dec. 8, 2020), https://bit.ly/3rI1rVM.

An even larger number of voting restrictions have been *considered* in state legislatures in the last decade. In 2011 and 2012, 180 restrictive bills were considered in 41 states. *Election 2012: Voting Laws Roundup*, Brennan Center for Justice (Oct. 11, 2012), https://bit.ly/34ZIG6D. In 2013, 92 restrictive bills were introduced in 33 states. *Voting Laws Roundup 2013*, Brennan Center for Justice (Dec. 19, 2013), https://bit.ly/3aYXh5V. And from 2014 through 2019, state legislatures considered a total of 83, 113, 77, 99, 70, and 87 restrictive bills in each respective year. *Voting Laws Roundup 2014*, Brennan Center for Justice (Dec. 18, 2014), https://bit.ly/3pDHsWt; *Voting Laws Roundup 2015*, Brennan Center for Justice (June 3,

2015), https://bit.ly/3aYby2X; *Voting Laws Roundup 2016*, Brennan Center for Justice (Apr. 18, 2016), https://bit.ly/383BVCU; *Voting Laws Roundup 2017*, Brennan Center for Justice (May 10, 2017), https://bit.ly/387P2mB; *Voting Laws Roundup 2018*, Brennan Center for Justice (Apr. 2, 2018), https://bit.ly/38QSXmH; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), https://bit.ly/3o6t9JH. A significant number of these bills—in some years, over half—were voter ID laws and other restrictions making it harder to register to vote by either requiring proof of citizenship or actively reducing voter-registration opportunities. *See, e.g.*, *Voting Laws Roundup 2014*, Brennan Center for Justice (Dec. 18, 2014), https://bit.ly/3pDHsWt; *Voting Laws Roundup 2017*, Brennan Center for Justice (May 10, 2017), https://bit.ly/387P2mB.

2. In addition to the just-mentioned *legislative* efforts to restrict access to voting, there have also been *administrative* efforts by state officials to restrict voting access.

For example, between 2014 and 2016, state officials removed 16 million voters from voter rolls nationwide. Brater et al., *Purges: A Growing Threat to the Right to Vote* 1, Brennan Center for Justice, (2018), https://bit.ly/3mY1lpy. Between 2016 and 2018, another 17 million names were removed. Berman, *Republicans Are Trying to Kick Thousands of Voters Off the Rolls During a Pandemic*, Mother Jones (Apr. 14, 2020), https://bit.ly/2LqoP9W. And while some degree of voter-list maintenance is appropriate and necessary under federal law, 52 U.S.C. § 20507(a)(4), studies have established that many purge procedures are riddled with errors and lacking in adequate safeguards, result-

ing in thousands of voters being wrongfully removed from the voter rolls. Brater, *Purges* 1-3, 6-9, *supra*; *see also* Fried, *The Problem of Voter Purging—and Where We Go from Here*, The Leadership Conference on Civil & Human Rights (Jan. 30, 2020), https://bit.ly/359Kudq.

"Another well-documented phenomenon is the steady increase in poll closures." Klain et al., *Waiting to Vote* 12, Brennan Center for Justice (June 3, 2020), https://bit.ly/3b3xjyq; *see also* The Leadership Conference Education Fund, *Democracy Diverted* 10-18, The Leadership Conference Education Fund (Sept. 2019), https://bit.ly/3nPvIz0. Thousands of polls have closed over the last decade. Klain, *Waiting to Vote*, *supra*. Notably, in many jurisdictions, "polling places are being closed faster than voters are switching to early voting." *Id.*

Most recently, in the 2020 Presidential election, several state officials made decisions imposing onerous burdens on voters seeking to cast their ballots. States like Texas, for example, actively issued orders making it more difficult for voters to deposit their mail ballots in drop-off sites. *See* Killough et al., *Texas Governor Limits Election Drop Boxes to One Per County in Sprawling State*, CNN (Oct. 5, 2020), https://cnn.it/3nATs9Y. Election officials in several other states interpreted election statutes narrowly, in ways that restricted whether voters could cast absentee ballots or vote curbside. *See, e.g.*, Carlisle & Abrams, *The Supreme Court's Alabama Ruling Could Disenfranchise Thousands of High Risk Voters*, Time (Oct. 23, 2020), https://bit.ly/3nyyIQ3; Mattise, *Tennessee Official: Fear of Virus Not Reason to Vote by Mail*, ABC News (May 12, 2020), https://abcn.ws/38LepcM; Menter, *Mail Voting Litigation in 2020, Part I: Appli-*

cation and Eligibility to Vote By Mail, LawFare (Oct. 27, 2020), https://bit.ly/3500D54; Gruber-Miller & Smith, *Iowa Counties Can't Set Up Drop Box Systems for Absentee Ballots, Secretary of State Says*, Des Moines Register (Aug. 26, 2020), https://bit.ly/3hub7P6. Many other state decision-makers chose not to take action to ease restrictions on voting methods that made it more difficult for health-compromised voters to cast their ballots safely in a pandemic. *See, e.g.*, Levine & Raymond-Sidel, *Mail Voting Litigation in 2020, Part IV: Verifying Mail Ballots*, LawFare (Oct. 29, 2020), https://bit.ly/3q93WyX.

3. Finally, and perhaps most concerning, there is every reason to expect that states will continue to enact more (and likely more severe) voting restrictions—in response to recent, baseless claims of rampant voter fraud.

The threat of voter fraud is the most common justification for restrictive election laws and procedures. *See* Litt, *Claims of 'Voter Fraud' Have a Long History in America. And They Are False*, The Guardian (Dec. 4, 2020), https://bit.ly/34YqLxb. Yet advocates for these restrictions have rarely (if ever) been able to show any evidence of widespread fraud. Rutenberg, *The Attack on Voting*, N.Y. Times Magazine (Sept. 30, 2020), https://nyti.ms/3o56Y6N. Still, these claims have led to the adoption of practices like strict voter ID laws and hasty voter purges. *Id.*

As this Court is well aware, many powerful voices have alleged widespread voter fraud in the 2020 general election. *See, e.g.*, Timm, *Trump's False Fraud Claims Are Laying Groundwork for New Voting Restrictions, Experts Warn*, NBC News (Dec. 6, 2020), https://nbcnews.to/38RI980. These allegations have

been rejected by election officials from every state, who have said they do not suspect or have any evidence of widespread illegal voting. Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. Times (Nov. 19, 2020), https://nyti.ms/3baEnJN. Similarly, every court to consider such allegations has rejected them as meritless. Rutenberg et al., *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. Times (Jan. 7, 2021), https://nyti.ms/2LmVKfM. Nevertheless, state legislators in Georgia, Pennsylvania, and Texas have already reacted to these unsupported fraud claims by pre-filing bills that propose new voter ID laws, make it more difficult to vote by mail, and propose more aggressive voter-roll purges. *See Voting Laws Roundup 2020*, Brennan Center for Justice (Dec. 8, 2020), https://bit.ly/3rI1rVM; *see also, e.g.*, Niesse, *Strict Absentee Voting Limits Proposed After Record Georgia Turnout*, Atlanta Journal Constitution (Jan. 7, 2021), https://bit.ly/3scrPrb.

In short, the assault on voting rights is likely to continue.

B. Recent Attacks On The Right To Vote Disproportionately Affect Minority Voters

Although the voting restrictions discussed in Section I.A burden all voters, they have been consistently found to significantly and disproportionately burden minority voters' opportunity to participate in the political process. This is so for obvious reasons. Each voting restriction—whether strict voter-identification requirements, poll closures, or otherwise—imposes additional costs on voting. These additional costs are disproportionately tougher to bear for minority voters, given the persistent wealth gap between White and

non-White citizens. *See* Currier & Elmi, *The Racial Wealth Gap and Today's American Dream*, PEW (Feb. 16, 2018) (in 2014, typical White household had 31 days of income in savings, whereas typical Black household had just 5 days), https://bit.ly/3oen9yA; Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Board of Governors of the Federal Reserve System (Sept. 28, 2020) (in 2019, typical White family had five times the wealth of typical Hispanic family), https://bit.ly/3oFtKCn; Center for Global Policy Solutions, *The Racial Wealth Gap: Asian Americans and Pacific Islanders* (Apr. 2014) (in 2014, median wealth of White households was over $35,000 higher than that of Asian households), https://bit.ly/2XvUOIm. Thus, with fewer resources to spend on overcoming additional obstacles to the ballot, minority voters are left with an unequal opportunity to participate in the political process.

That disproportionate burden is well-documented at every stage of voting—from registering to vote, staying registered to vote, getting to the polls, and casting a ballot.

1. Registering to vote is the initial hurdle for voters, and one that is generally an impediment for minority voters. The most recent Census survey data available from the November 2018 election reveals that only 53.7% of eligible Hispanic voters, 54.2% of eligible Asian American voters, and 63.7% of eligible Black voters are registered to vote. *See* U.S. Census Bureau, *Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States* (Nov. 2018) (Table 4b), http://bit.ly/2XLaYhm. By contrast, 68.4% of eligible White voters are registered to vote. *Id.*

Registering to vote has become even more difficult for minority voters in some states with the introduction of onerous proof-of-citizenship requirements. Kansas, for example, enacted a proof-of-citizenship requirement so strict that it resulted in 31,089 applicants being denied registration—a figure representing approximately 12% of all voter applications during the relevant time period. *Fish* v. *Schwab*, 957 F.3d 1105, 1128 (10th Cir. 2020).

And more than one federal court has documented the struggles that minority voters especially face in providing proof of citizenship. In *One Wisconsin Institute, Inc.* v. *Thomsen*, the district court found that, in Wisconsin, "[t]he lack of a valid birth record correlated strikingly, yet predictably, with minority status" and that "states with a history of de jure segregation have systemic deficiencies in their vital records systems." 198 F. Supp. 3d 896, 915 (W.D. Wis. 2016), *aff'd in part, rev'd in part sub nom. Luft* v. *Evers*, 963 F.3d 665 (7th Cir. 2020). Similarly, in *Veasey* v. *Perry*, the district court found illustrative the story of Mrs. Bates, a Black retiree living on a $321 monthly income, who testified on the difficulties of saving $42 to pay for a birth certificate because she "had to put the $42.00 where it was doing the most good" and her family "couldn't eat the birth certificate [or] . . . pay rent with the birth certificate." 71 F. Supp. 3d 627, 665 (S.D. Tex. 2014), *aff'd in part, rev'd in part sub nom. Veasey* v. *Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

In addition to proof-of-citizenship requirements, some states have enacted other requirements making it more difficult to register new voters. Florida, for example, passed a law in 2011 that imposed a 48-hour deadline on submitting collected voter registration

forms, with penalties of $50 per form per day late. *Hearing on Protecting the Right to Vote: Best and Worst Practices Before the Subcomm. on Civil Rights & Civil Liberties of the H. Comm. on Oversight & Reform*, 116th Cong. 10 (Comm. Print 2019) (statement of Dale Ho, at 3, ACLU Director, Voting Rights Project), *available at* https://bit.ly/2LjlfhC. A federal court decision ruling that the Florida law was unconstitutional did not stop Tennessee in 2018 from passing a similar (in fact, worse) law. The Tennessee law imposed fines of up to $10,000 for submitting incomplete registration forms (while also imposing criminal liability if an entity took more than 10 days to submit registration forms). *Id.* These changes, unsurprisingly, chilled voter registration drives. In Florida, the League of Women Voters halted all registration activity, Rock the Vote excluded Florida from its national voter registration drive, and large numbers of volunteers dropped out of the NAACP's voter registration drives. *Id.*

These chilling effects are especially significant for minority voters, who are much more likely than White voters to register through private voter registration drives. In 2016, 6.9% of Black voters and 5.7% of Hispanic voters registered through private drives, compared to only 3.4% of White voters. *See* U.S. Census Bureau, *Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States* (Nov. 2016) (Table 12), http://bit.ly/2LSQrVd.

2. Even after successfully registering to vote, minority voters are at greater risk than White voters of being removed from voter rolls.

As noted above, tens of millions of voters have been purged from the voter rolls in the last decade. *See supra* p.6. And many voter-roll purges have been riddled

with errors. In Ohio, for example, in 2019 the secretary of state released a list of 235,000 voters set to be purged; voting-rights groups identified 40,000 errors in the list—i.e., an error rate of over 15%. Berman, *Kick Thousands of Voters Off Role the Rolls During a Pandemic*, *supra*. In 2017, Wisconsin claimed that 340,000 voters should be purged because they had moved, but an analysis by the League of Women Voters revealed that 7% of the voters on the list (i.e., over 20,000 voters) had not moved. *Id.*

Such errors are generally more likely to affect minority voters. For example, most states rely on voter-roll crosscheck systems that seek to purge duplicate registrations, but those systems are more likely to generate false positives with minority voters, as such voters are more likely to share a common surname. Studies have found that 50% of people of color have a common surname compared to only 30% of White people. As a result, Black voters are overrepresented by 45% on crosscheck lists, Asian voters by 31%, and Hispanic voters by 24%, whereas White voters are underrepresented by 8%. Harmon et al., *The Health of State Democracies* 25, Center for Am. Progress Action Fund (July 2015), https://bit.ly/3nhzBwh. Additionally, voters with limited English proficiency are less able to respond to erroneous purge letters because they may not comprehend such letters, and such voters are disproportionately of Latino or Asian background, *see* Ramakrishnan & Ahmad, *Language Diversity and English Proficiency* 3-4, Center for Am. Progress (May 27, 2014), https://ampr.gs/3idORJF. The United States Commission on Civil Rights thus concluded that recent voter purges have generally resulted in the disproportionate disenfranchisement of minority voters. U.S. Comm'n on Civil Rights, *An Assessment of Minority*

Voting Rights Access in the United States: 2018 Statutory Report 144-157 (Sept. 2018), https://bit.ly/3ondIge.

Some states have also tried to retroactively remove voters believed to be noncitizens; the resulting errors have disproportionately affected minority voters. In Florida, for example, a list that the state had created in 2012 of 2,700 potential non-citizens was found to include at least 500 citizens. Weiner, *Florida's Voter Purge Explained*, Wash. Post (June 18, 2012), https://wapo.st/2Xdnfea. Of the 2,700 individuals listed, 87% were minority voters and 58% were Hispanic voters. *Id.* By way of comparison, Hispanic voters were only 13% of the active voter base at the time. Mazzei, *Hispanics, Democrats Biggest Groups in Florida's List of Potential Noncitizen Voters, Analysis Shows*, Tampa Bay Times (May 12, 2012), https://bit.ly/2JKHRXT.

3. Even those who are successfully registered for an upcoming election then confront additional obstacles at the polls.

As noted above, many jurisdictions have closed polling sites and/or reduced hours for voting. *See supra* p.7. Such closures and reductions are likely to "disproportionately and negatively affect[]" Black voters, *Ohio State Conference of NAACP* v. *Husted*, 768 F.3d 524, 533 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. 2014), because many of these closures take place in predominantly minority communities, *see* The Leadership Conference Education Fund, *Democracy Diverted* (Sept. 2019), https://bit.ly/3nPvIz0. For example, in Georgia, of the 214 polling places closed since 2010, 80 have been in metro Atlanta, where most Black voters live. Derysh, *GOP Vows to Probe Georgia Election "Catastrophe" in Minority Areas, Dems Say it Was "No Accident,"* Salon (June 10,

2020), https://bit.ly/350i2dL. The same pattern repeated itself in the recent runoff Senate election in Georgia; for example, state officials decided to close 6 of 11 early-voting polling sites in Cobb County, specifically in those areas where most of the county's Black and Hispanic voters live. Derysh, *After Democrats Flip State, Georgia Moves to Shut Down Early Voting Locations Ahead of Senate Runoff*, Salon (Dec. 9, 2020), https://bit.ly/3om2nxi.

More generally, the phenomenon of long lines at the polls—which is, of course, exacerbated by poll closures and reduced voting hours—disproportionately affects minority voters. In 2017, research demonstrated that "a voter in a predominantly minority precinct experiences a line that is twice as long, on average, than a voter in a predominantly white precinct." Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 Political Sci. Quarterly 527, 527 (Nov. 2017), *available at* https://bit.ly/3bqCdFT. Indeed, several studies have found that "the more voters in a precinct who are non-white, the longer the wait times." Weil et al., *The 2018 Voting Experience: Polling Place Lines* 21, Bipartisan Policy Center, (Nov. 4, 2019), https://bit.ly/35vAUBz. And a more recent nationwide study also found that neighborhoods which became less White over the past decade had fewer electoral resources in 2018 than counties that became more White. *See* Klain et al., *Waiting to Vote* 10, *supra*.

4. Finally, if voters surmount all of the previously discussed obstacles, they may encounter yet another significant roadblock before being allowed to cast a ballot: strict voter ID requirements. As noted above, 16

states in the past decade have enacted such laws. *See supra* p.5.

And there is overwhelming evidence that strict voter ID laws disproportionately prevent minority voters from equal participation in the voting process. In large part, this is because minority voters are much less likely to have the limited types of accepted ID. *See, e.g.*, Stewart, *Voter ID: Who Has Them? Who Shows Them?*, 66 Okla. L. Rev. 21, 36-43 (2013); Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 Politics & Political Sci. 111 (2009); Hood III & Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statutes*, 36 Am. Pol. Research 555 (2008); Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. of Pol. 363 (2017). Additionally, minority voters are also more likely than White voters to be asked to present ID, further compounding the disproportionate effect of strict voter ID laws. Stewart, *2012 Survey of the Performance of American Elections* iii, MIT (Feb. 25, 2013).

* * *

As the prior discussion demonstrates, over the last decade, numerous jurisdictions have adopted voting regulations that significantly (and likely unjustifiably) burden minority voters' participation in the political process. Especially in the absence of Section 5, Section 2 plays an essential role in advancing the federal commitment to protecting minority voters and ensuring that they have an equal opportunity to participate in the political process.

II. THIS COURT SHOULD CONTINUE TO INTERPRET SECTION 2 TO EMPOWER COURTS TO PROTECT AGAINST THE PERSISTENT AND ADAPTIVE PROBLEM OF DISCRIMINATION IN VOTING

A. For Generations, This Court Has Protected Democracy By Striking Down Barriers To Participation

Many consider *Brown* v. *Board of Education* to mark the beginning of the Court's civil rights awakening. 347 U.S. 483 (1954). But the Court began long before then, deciding significant cases that dislodged entrenched voting discrimination and advanced the prodemocracy values of our Constitution that rely so heavily on full and open political participation. This history, although familiar to many, is especially worth reviewing today, when the importance of protecting full participation as a bedrock of legitimacy for our democracy has never been more evident.

1. The Court first targeted a form of blatant apartheid and exclusion, namely the persistent efforts to exclude Black voters from the Democratic Party, in the "white primary" cases. *See* Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 Law & Soc. Inquiry 273, 276 (2010).

The first case in this series was *Nixon* v. *Herndon*, 273 U.S. 536 (1927). Justice Holmes's opinion for the unanimous Court held that a Texas statute facially prohibiting Black people from participating in Democratic party elections was a "direct and obvious infringement" of the Fourteenth Amendment's equal protection clause. *Id.* at 541.

As we are seeing today, an advance for minority participation faced immediate backlash. Texas quickly

enacted a new statute declaring that each political party's executive committee would have the power to prescribe the qualifications of its own members. Nixon, the same plaintiff, sued again because the Democratic party had (unsurprisingly) excluded Black voters such as himself. *Nixon* v. *Condon*, 286 U.S. 73 (1932). Against the state's urging that a political party is always a "voluntary association" immune from Fourteenth Amendment limitations, the Court held narrowly that the Texas Democratic party's executive committee was acting pursuant to state-delegated power in determining its membership and was therefore an agent of the state for that purpose. *Id.* at 83. The Court left open the question of whether a political party, "without restraint by any law to determine its own membership," could constitutionally exclude Black people. *Id.*

In 1944, the Court squarely confronted "whether the exclusionary action of [a political] party was the action of [a] State." *Smith* v. *Allwright*, 321 U.S. 649, 661 (1944). It would have been all too easy for the Court to give the easy, formalistic answer of "no," because a political party was a private organization. But the Court looked past formalities, straight into the substantive heart of the voting problem. The Court expressly recognized that the problem of minority exclusion in voting went to the heart of American democracy: "The United States is a constitutional democracy" and "[i]ts organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race." *Id.* at 664. And that right, the Court explained, "is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." *Id.* The Court accordingly

looked at the practical realities in the way primary elections, state regulation, and voter access intertwined, concluding that the political party's exclusion was "state action within the meaning of the Fifteenth Amendment." *Id.* at 663-664.

Less than a decade later, the Court confronted yet another permutation of the exclusionary practices struck down in *Allwright*. In *Terry* v. *Adams*, 345 U.S. 461 (1953), the private organization that was excluding Black voters was not a political party (or regulated as such), but its pre-primaries had dictated the result in the actual primaries for decades. In holding that the private organization's exclusion constituted state action, Justice Black's plurality opinion rested principally on the practical reality that the pre-primary was "an integral part, indeed the only effective part, of the elective process." *Id.* at 469. Justice Clark, concurring on behalf of himself and three other justices, described the arrangement as an "old pattern in new guise." *Id.* at 480. Again, the Court looked past formalities and grounded its ruling in the facts and historical context.

2. The Court next targeted a more subtle but equally fatal obstacle to democratic inclusion: the situation where minority voters can formally cast a ballot, but in reality, that ballot does not carry the same weight as a ballot cast by White voters.

Gomillion v. *Lightfoot* concerned the constitutionality of an Alabama law that famously gerrymandered the municipality around Tuskeegee "from a square to an uncouth twenty-eight-sided figure." 364 U.S. 339, 340 (1960). The Court recognized that the gerrymander "was cloaked in the garb of the realignment of political subdivisions," *id.* at 345, but nevertheless held that the

Tuskegee gerrymander was blatant and impermissible race discrimination, *see id.* at 341.

One year after *Gomillion*, in *Baker* v. *Carr*, the Court corrected a profound systemic dysfunction in the political process—the inability of minority voters to have their voting rights recognized and remedied by a federal court. 369 U.S. 186 (1962). The plaintiffs in *Baker* urged that Tennessee's legislative apportionment statute was unconstitutional. The district court determined that the matter presented a nonjusticiable "political question" and dismissed the case. *Id.* at 209. But the Court disagreed, holding that the "right asserted [was] within the reach of judicial protection under the Fourteenth Amendment." *Id.* at 237. As commentary presciently observed at the time, *Baker* "move[d] broadly in the direction of developing and supporting procedures necessary for the effective operation of a modern democratic system." Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64 (1962). Without the Court's reluctant but indispensable intervention, dispossessed minority voters would have lacked—indeed today might still not have—a way to vindicate their voting rights in federal court. By enforcing the fundamental promise of equal representation, despite fear of entering a "political thicket," *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946), the Court in fact conveyed to the nation that it stood for democracy. As one commentator observed: "At least some of us who shook our heads over *Baker* v. *Carr* are prepared to admit that it has not been futile, that it has not impaired, indeed that it has enhanced, the prestige of the Court." Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 Harv. L. Rev. 986, 991 (1967).

3. The Court also responded to obstacles that raised pretextual grounds for excluding minority voters from the democratic franchise. In *Hunter* v. *Underwood*, this Court invalidated a provision of Alabama's Constitution, which disfranchised citizens for misdemeanors "involving moral turpitude," and had been applied to bar plaintiffs from voting for life because they had presented a bad check. 471 U.S. 222, 224 (1985). Writing for the unanimous Court, then-Justice Rehnquist explained that the "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. Yet again, the Court looked into the broader context underlying a formally neutral law and appropriately recognized the reality of racial discrimination.

History has judged the Court's cases not as unwarranted judicial interventions in the democratic process but rather as much-needed guardrails ensuring that American democracy would endure. In a multiracial society where voting is the highest act of democratic expression and citizenship—as voting is "preservative of all rights," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886)—the Court embraced a principle of minority inclusion in voting.

Congress followed, in passing the Voting Rights Act of 1965. Pub. L. No. 89-110, 79 Stat. 437. If Reconstruction was a rebirth of America around the principle of minority inclusion, the Voting Rights Act was a new and meaningful federal commitment to that principle in practice. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). And Congress—reflecting the will of the American people—has repeatedly affirmed that commitment, reauthorizing and expanding the Act (includ-

ing Section 2) in 1970, 1975, 1982, 1992, and 2006. *See* Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 402 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 102-344, 106 Stat. 921 (1992); Pub. L. No. 109-246, 120 Stat. 577 (2006).

B. Courts Can And Must Be Vigilant To Combat Discrimination In Voting

One unfortunate lesson of this Court's voting-rights jurisprudence discussed in Section II.A is that the enduring nature of voting discrimination poses a threat to American democracy. As the pre-eminent historian of voting and democracy, Professor Alexander Keyssar, explained in recent testimony, "the history of voting rights since the founding, and despite our most heroic images of our country, has not been one of continuous expansion and enlargement"; rather, it has been "up and down" with significant periods of contraction. Keyssar, *U.S. Commission on Civil Rights Meeting, Part 2*, C-SPAN (Aug. 18, 2017), https://bit.ly/3nF4laG. And "the conflicts and patterns of exclusion have always been along the lines of race, class, and for a long time gender." *Id.* In short, this country's "history of democratic rights is a history of conflict" because "not everybody wants everybody to participate." *Id.*

But the Court's jurisprudence also points to the solution: Courts must be vigilant to combat the persistent and adaptive problem of discrimination in voting. That is, courts must recognize the corrosive effects of voting discrimination and, with the benefit of longstanding jurisprudence, look past formalities and examine the practical realities and historical context, in order to ferret out discrimination in voting. Or, as Professor Keyssar put it, the "lesson" from American history is that "if you want to preserve voting rights, you

have to protect them." Keyssar, *Commission on Civil Rights Meeting*, *supra*.

And recent decisions of this Court and the courts of appeals demonstrate that federal courts can, in fact, be vigilant in carefully reviewing the totality of circumstances underlying challenged voting practices and appropriately striking down those that cross the line into discrimination.

For example, in *League of United Latin American Citizens* v. *Perry*, this Court held that Texas violated Section 2 because its redistricting "undermined the progress of a racial group that ha[d] been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." 548 U.S. 399, 439 (2006). "In essence the State took away the Latinos' opportunity because Latinos were about to exercise it," the Court stated, which raised the specter of "intentional discrimination." *Id.* at 440. *LULAC* appropriately recognized that voting progress is precarious and highlighted how swiftly a state can, with a "troubling blend of politics and race," dilute the votes of a "group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination." *Id.* at 442. The Court's careful assessment, based on the totality of the circumstances, thus gave minority voters a fair opportunity to choose their leaders.

More recently, in *North Carolina State Conference of NAACP* v. *McCrory*, the Fourth Circuit corrected the district court's "failure of perspective," which had led it to "ignore critical facts bearing on legislative intent, including the inextricable link between race and politics in North Carolina." 831 F.3d 204, 214 (4th Cir. 2016). In North Carolina, after "years of preclearance and expansion of voting access," Black "registration

and turnout rates had finally reached near-parity with white registration and turnout rates" by 2013. *Id.* But, on the day after the Supreme Court handed down *Shelby County* v. *Holder*, 570 U.S. 529 (2013), a leader of the party that "newly dominated the legislature" announced "an intention to enact what he characterized as an 'omnibus' election law." 831 F.3d at 214. The legislature requested "data on the use, by race, of a number of voting practices" and then passed provisions that "target[ed] African Americans with almost surgical precision." *Id.* The law was "the most restrictive voting law North Carolina ha[d] seen since the era of Jim Crow." *Id.* at 229. After careful review of the entire record and totality of circumstances, the Fourth Circuit stated that it could "only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent." *Id.* at 215.

Additionally, the Tenth Circuit in *Fish* v. *Schwab* struck down Kansas's proof-of-citizenship voting requirement as unconstitutional and contrary to the National Voter Registration Act. 957 F.3d 1105. The court recognized the challenge of "separat[ing] those regulations that properly impose order—thereby protecting the fundamental right to vote—from those that unduly burden it—thereby undermining it." *Id.* at 1122. But the Court refused to accept the state's formalistic suggestion that, "as a matter of law," the requirement to present proof of citizenship only imposed a "limited burden" on voters. *Id.* at 1130. Rather, the court examined the facts (as found by the district court) and determined that the requirement, in fact, disenfranchised 31,089 legitimate voters. *Id.* And it carefully assessed the state's proffered justifications for the proof-of-citizenship requirement, holding that they

were insufficiently supported by the record to support such a significant infringement on the right to vote. *Id.*

These court decisions reflect the parting words of civil-rights leader John Lewis. "Democracy is not a state. It is an act, and each generation must do its part . . . ." Lewis, *Together, You Can Redeem the Soul of our Nation*, N.Y. Times (July 30, 2020), https://nyti.ms/2XR1bGk.

C. The Court Should Continue To Interpret Section 2 To Empower Courts To Combat Discrimination In Voting

As the foregoing demonstrates, Section 2 represents a federal commitment to the democratic principle of minority inclusion in voting—a commitment built on this Court's own cases protecting democracy. That principle demands judicial vigilance, to conduct the careful context-specific inquiry to properly identify discrimination in voting.

This Court should interpret Section 2 accordingly, to empower courts to exercise the vigilance required to protect minority participation in democracy. Specifically, Section 2 should be capacious enough to allow courts to consider the totality of circumstances and, based on that context-specific inquiry, determine whether a particular electoral barrier crosses the line from a mere electoral rule into one that disproportionately and unjustifiably lessens minority voters' opportunity to participate equally in the political process.

This point is well-illustrated by comparing the Fifth and Seventh Circuits confronting strict voter ID laws in Texas and Wisconsin respectively. The Fifth Circuit conducted a totality-of-the-circumstances analysis and struck down Texas's strict voter ID law, based

on a significant disparate impact and a nexus with the state's own history of discrimination. The Seventh Circuit, by contrast, interpreted Section 2 as a simplistic equal-treatment rule, and upheld Wisconsin's strict voter ID law simply because it did not facially discriminate against minority voters.

1. *Texas Voter ID Law.* Within hours of *Shelby County*, Texas Attorney General Greg Abbott declared that the state's restrictive voter ID law, which had been previously blocked under Section 5's preclearance mechanism, would "take effect immediately." *Statement by Texas Attorney General Greg Abbott* (June 25, 2013), https://bit.ly/34Z3Stm; *see also* Ford, *The Entirely Preventable Battles Raging Over Voting Rights*, The Atlantic (Apr. 14, 2017), https://bit.ly/2KI6zc9. That law would have disenfranchised over 500,000 voters, with "Hispanic registered voters and Black registered voters . . . respectively 195% and 305% more likely than their Anglo peers to lack" acceptable ID. *Veasey*, 830 F.3d at 250.

In analyzing the Texas voter ID law, the en banc Fifth Circuit began by appropriately recognizing that the essence of a Section 2 claim is that "a certain electoral law, practice, or structure interacts with social and historical conditions to *cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Veasey*, 830 F.3d at 244 (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986)). The court thus adopted a two-part test, with the first part examining statistical evidence "to discern whether a law has a discriminatory impact" and the second part considering various factors identified by Congress "to determine whether such an impact is a product of current or historical conditions of discrimi-

nation such that it violates Section 2." *Id.* at 245. In so doing, the court rejected efforts to adopt simplistic bright-line rules, reasoning that "assessing whether a law has a discriminatory impact is no simple matter and does not lend itself to simple formulation." *Id.* at 249 n.41.

Applying the two-part test just described, the Fifth Circuit then held that the Texas voter ID law violated Section 2. The law imposed "excessive and disparate burdens on minority voters," *Veasey*, 830 F.3d at 250, and the law "worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result," *id.* at 264-265. That state-sponsored discrimination, the court explained, included the state's role in de jure segregation in education, employment, housing, and transportation. *Id.* at 259.

Although the court struck down Texas's strict voter ID law, the Fifth Circuit's careful analysis was tethered to that specific law and its underlying context and did not sweep more broadly to encompass voter ID laws generally. At the same time, the court's decision had a concrete and measurable impact, ensuring that hundreds of thousands of minority voters could equally participate in American democracy.

2. *Wisconsin Voter ID Law.* In 2011, Wisconsin enacted a photo ID law that only permitted eight forms of photo ID. 2011 Wis. Act 23. A federal district court enjoined the law partly on the ground that it violated Section 2 by creating a disparate impact on minority voters. *Frank* v. *Walker*, 17 F. Supp. 3d 837, 863, 879 (E.D. Wis. 2014). Specifically, the district court found that over 300,000 Wisconsin voters lack acceptable ID, that Black and Hispanic voters were significantly more likely than White voters to lack ID, and furthermore

that Black and Hispanic voters were less likely to have the documents necessary to obtain qualified ID. *Id.* at 854, 870-872.

The Seventh Circuit reversed, holding that the voter ID law did not violate Section 2. *Frank* v. *Walker*, 768 F.3d 744, 755 (7th Cir. 2014). The Seventh Circuit did not dispute the disparate effect of the voter ID law, nor that its effect was "traceable to the effects of discrimination in areas such as education, employment, and housing." *Id.* at 753. The court nevertheless upheld the law by criticizing the two-step approach discussed above and instead reading Section 2 as only "an equal-treatment requirement." *Id.* at 755. The court accordingly rejected the plaintiffs' challenge because the law did not facially "draw any line by race" and "because in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at 753, 755.

The Fifth Circuit identified the fundamental problem with the Seventh Circuit's equal-treatment interpretation. That approach would "giv[e] states a free pass to enact needlessly burdensome laws with impermissible racially discriminatory impacts" when "[t]he Voting Rights Act was enacted to prevent just such invidious, subtle forms of discrimination." *Veasey*, 830 F.3d at 247.

And the consequences of the Seventh Circuit's approach are deeply concerning. As a result of the Seventh Circuit's decision, Wisconsin's voter ID law was in place during the November 2016 election. And studies have conclusively found that the voter ID law significantly disenfranchised minority voters. A survey conducted at the University of Wisconsin found that nearly 17,000 registered voters in just two Wisconsin counties were deterred from casting ballots because of Wiscon-

sin's voter ID law. Wines, *Wisconsin Strict ID Law Discouraged Voters, Study Finds*, N.Y. Times (Sept. 25, 2017), https://nyti.ms/3hUOvHX. Only 8.3% of White registered voters were deterred, compared to 27.5% of Black registered voters. Mayer, *Press Release: Voter ID Study Shows Turnout Effects in 2016 Wisconsin Presidential Election* (Sept. 25, 2017), https://bit.ly/3oPPQ5g. These estimates did not include people who did not even register to vote because they did not have an accepted form of ID. *Id.*; Wines, *Wisconsin Strict ID*, *supra*. And while these numbers may appear small on the surface, they are significant, as the margin of victory in Wisconsin in the 2016 and 2020 Presidential contests has been less than 25,000 votes.

* * *

The point is not that all laws regulating access to voting are unlawful but that Section 2 should be capacious enough to empower courts to conduct context-specific inquiries into whether a particular law crosses the line from a mere electoral rule into one that disproportionately and unjustifiably lessens minority voters' opportunity to participate equally in the political process. This Court should interpret Section 2 to ensure that it can serve that crucial purpose.

CONCLUSION

The Court should affirm the Ninth Circuit's judgment.

Respectfully submitted.

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APPENDIX

APPENDIX: LIST OF AMICI

ACCESS

Advancement Project National Office

American Federation of Labor and Congress of Industrial Organizations

Andrew Goodman Foundation

Anti-Defamation League (ADL)

Asian & Pacific Islander American Health Forum

Asian Americans Advancing Justice

Black Alliance for Just Immigration

Central Conference of American Rabbis

Clean Elections Texas

Common Cause

Communications Workers of America

Demos

End Citizens United / Let America Vote Action Fund

Fair Count Inc

Generation Vote

Government Accountability Project

Hispanic Federation

Justice for Migrant Women

Lambda Legal

League of Women Voters United States

Matthew Shepard Foundation

Men of Reform Judaism

Mid-Ohio Valley Climate Action

NARAL Pro-Choice America

National Alliance for Partnerships in Equity (NAPE)

National Association of Social Workers (NASW)

National Black Justice Coalition

National Center for Lesbian Rights

National Council of Churches

National Council of Jewish Women

National Education Association

National Equality Action Team (NEAT)

National Women's Law Center

NETWORK Lobby for Catholic Social Justice

New American Leaders Action Fund

New American Voices

Oxfam America

People for the American Way Foundation

PIVOT – The Progressive Vietnamese American Organization

Planned Parenthood Action Fund

Progressive Turnout Project

Sikh Coalition

Southern Poverty Law Center

The DKT Liberty Project

The Workers Circle

UnidosUS

Union for Reform Judaism
Union of Concerned Scientists
Women Lawyers on Guard Inc.
Women of Reform Judaism
Youth Progressive Action Catalyst